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THE  
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# THE Atlantic Reporter.

## VOLUME XI.

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RALEIGH v. FITZPATRICK and others.

(Court of Chancery of New Jersey. October 23, 1887.)

**1. CORPORATIONS—PURCHASE OF CORPORATE PROPERTY BY TRUSTEES AT FORECLOSURE SALE—INJUNCTION—RECEIVER.**

Certain heirs, for the purpose of realizing a profit from a large quantity of land left by their ancestor, purchased the same from the executors, giving a mortgage for the purchase price, formed a corporation, and chose defendants as trustees to carry out the object of the corporation, which was to parcel the land, and sell it in residence lots. After a certain number of lots had been sold, and about one-fourth of the mortgage paid off, the trustees ceased active efforts to sell the land, and the sales stopped, in consequence of which the interest on the mortgage fell due, and was not paid. The executors of the estate foreclosed the mortgage, and defendant trustees were purchasers at the foreclosure sale. *Held*, that the *bona fides* of the trustees was sufficiently questionable to justify the court in continuing the injunction which had been granted staying the sale of the land by the trustees, and appointing a receiver of the property.

**2. SAME—ACTION TO SET ASIDE SALE—MORTGAGEES NOT NECESSARY PARTIES.**

In the action to set aside the transfer of title to the trustees, the executors who foreclosed the mortgage were not necessary parties.

**3. SAME—REPAYMENT OF AMOUNT PAID BY TRUSTEES NOT CONDITION PRECEDENT.**

Complainant, one of the heirs, should not be required, as a condition precedent to granting him relief, to repay defendants the amount expended by them at the foreclosure sale, when it appeared that he did not possess the financial ability to do so.

**4. SAME—BOND.**

Nor should complainant be required to give bond to indemnify defendants against loss, by reason of any subsequent failure of the parties to realize the amount of money vested by defendants in the property.

**5. SAME—CONTROL OF PROPERTY BY COURT.**

The proper relief was not to declare the trust as it existed before the foreclosure sale, and thus give the trustees the power of sale and disposition of the lands. Their former management of the property afforded the court a reason for taking control of it, and the same reason called for a continuance of such control.

**6. SAME—ACTION BY ONE CORPORATOR—EXTENT OF RELIEF.**

Defendants claimed that, relief being asked by complainant alone, it should be confined to him, and not so shaped as to include the other heirs. *Held* that, as the heirs were bound by mutual agreements not to sever their interests, there could be no sale of complainant's interest separately, so long as such agreements were binding, and hence, if injunction were necessary to protect his interest, the writ must cover the whole property.

## 7. SAME—INTERFERENCE WITH TRUSTEES BY MEMBER.

The alleged fact that complainant, as a member of the corporation, was offensive to defendants, and obstructive in his manner and methods, did not afford defendants just cause for suspending the sales altogether, or to such an extent as to be unable to meet the demands upon them, by the accruing interest on the mortgage.

## 8. SAME—ACTION AT LAW AGAINST TRUSTEES NO BAR TO RELIEF IN EQUITY.

The fact that complainant had a suit pending at law against one of the defendants, on his claim as stockholder in the corporation of which defendants were trustees, did not deprive him of a standing in a court of equity to set aside the purchase by the trustees at foreclosure sale; such claim not extending to the whole case, nor disposing of all the issues involved in the bill.

## 9. SAME—OFFER OF TRUSTEES TO BUY OR SELL.

Complainant was not bound, in law or equity, to accept the offer of defendants, either to buy his interest in the property, or to sell their own to him.

## 10. SAME—FRAUD OF TRUSTEES—PLEADING—INJUNCTION.

The fact that the fraudulent acts charged against defendants were fully answered by them, and their answers were not contradicted in any way, except by the testimony of complainant, did not call for a dissolution of the injunction, as the court might feel itself bound to retain the property under its control for the purpose of effecting the design of the parties who declared the trust.

## 11. SAME—ALLOWING SALE TO BE MADE—ACCEPTING PART OF PROCEEDS AS DEVISEE—ESTOPPEL.

Complainant was not estopped from disputing the validity of the foreclosure sale by allowing it to be made without objection, and afterwards accepting from the executors a payment of a portion of this money, as income due him under the will of his father.

Bill for relief, accounting, and receiver.

*Herbert A. Drake and Theo. Runyon*, for complainants. *Leon Abbett*, for defendants.

BIRD, V. C. Shall the preliminary injunction issued in this case be dissolved on this motion? is the question presented for the consideration of the court. Nothing short of a clear and concise statement of all the facts out of which this litigation arose can satisfy the mind that the conclusion reached is the correct one, whether the motion be granted or not. It should be noted that the facts disclose a portion of a family history, and an effort made by the members thereof to preserve all of the inheritance left to them by their ancestor as nearly intact as possible, and to make a profit out of that which they found themselves obliged to dispose of for the sake of the preservation of the rest.

Maurice Raleigh, of the city of Philadelphia, being possessed of large real and personal estate in the city of Philadelphia, and of about 30,000 acres of land in the counties of Cumberland, Burlington, and Atlantic, in New Jersey, departed this life in the year 1882, having first published his last will and testament giving directions for the disposition of his estate, and appointing executors. The agreements which the heirs at law, legatees, and devisees, and the executors entered into, as hereafter recited, show the necessity for such agreements, and the earnest desire upon the part of all interested to effect the purpose therein expressed.

October 1, 1884, James Raleigh, Walter Raleigh, Mary Raleigh Fitzpatrick, Martha F. Raleigh, Kings Raleigh, and Catherine R. Raleigh, of the first part, being the children of the said testator, and James G. Fitzpatrick, the husband of the said Mary, entered into an agreement in which they recited that they were interested in the said real estate in New Jersey, and that they had determined, for the purpose of closing up and disposing of it, that it should be sold for the sum of \$150,000; and that the said devisees authorized thereby the said James G. Fitzpatrick to sell the same, or to procure it to be sold, to a company to be formed under the laws of the state of New York, the capital stock of which should be \$600,000, and that he should accept from said company 4,000 shares as payment of the sum of \$100,000 in cash; which said 4,000 shares they thereby covenanted and agreed that the said party of the

second part should deposit with the treasurer of said company as security for the payment of a mortgage executed as a lien upon said premises for the sum of \$100,000, in favor of the executors of the will of said Maurice Raleigh, deceased; and they thereby nominated the said Fitzpatrick as their true and lawful attorney, and vested in him sole and exclusive power to vote upon said stock in their name. And they agreed, also, to execute and deliver to the said Fitzpatrick, on demand, from time to time, as he might require the same, good and sufficient proxies, for the purpose of enabling him more effectually to vote upon the said 4,000 shares of stock; and they further authorized the said Fitzpatrick to deliver to one Richard S. Newcombe, a lawyer of the city of New York, for services rendered by him in connection with the said 4,000 shares, stock equal to the value of \$6,000, in cash.

On the same day in October another paper writing was made and signed, by which the said James G. Fitzpatrick and Walter Raleigh, as trustees, of the one part, and B. Lobenthall and James W. Dell, executors of Maurice Raleigh, of the other part, agreed with the executors, with the consent of the widow, devisees, and heirs of Maurice Raleigh, deceased, and upon their executing a proper release, releasing the said executors from all liability to account for the sale of the said lands, to sell to the said Fitzpatrick and Walter Raleigh, as trustees, the said lands in New Jersey, for the sum of \$150,000, and to deliver deeds therefor on or before the thirty-first day of December then next ensuing. Fifty thousand dollars of the said purchase money was to be paid in cash, and \$100,000 secured by bond and mortgage upon said property, payable in five years, and without interest until December 31, 1885, and interest thereafter at the rate of 4 per cent., payable half-yearly; but said mortgage was to contain a clause providing for the release of such portion or portions of said property as might be sold, upon the payment of two-thirds of the purchase money on account of said mortgage; restraining, however, the sale of any of the said lands for less than \$5 per acre; with the usual proviso that, upon failure of the payment of the interest within 30 days after any half-yearly payment should become due, the whole principal and all interest should become due and payable.

Upon the same day the said trustees, as such, and all of the said heirs and devisees, together with the widow of Maurice Raleigh, made and executed another writing, which witnessed that the said trustees, heirs, and devisees agreed to execute and deliver to the said company so to be formed, on or before the thirty-first day of December, 1884, a good and sufficient deed of all the real and personal property belonging to the said estate of Maurice Raleigh, subject to a mortgage of \$100,000, payable as already expressed, being the same mortgage above referred to, and that the said company, as about to be formed, agreed to pay therefor the sum of \$600,000, delivering 4,000 shares of said stock, of the par value of \$100 per share; which said 4,000 shares were to be deposited with Moritz Cohn, as treasurer of the said company then about to be formed, and held by him in trust, and as security for the payment by the said trustees of the said mortgage of \$100,000.

On the same day the said heirs and devisees stipulated in a separate writing that the said James G. Fitzpatrick should pay to the said Richard S. Newcombe \$1,000 out of each of their respective shares of said stock, in all \$6,000, as compensation for the services rendered by him in perfecting the said arrangements or negotiations.

In furtherance of the main design, and upon the same day, the said heirs and devisees entered into an agreement in writing with the said James G. Fitzpatrick, in which it was recited, that "whereas, the said parties of the first part were entitled to real estate in Pennsylvania and New Jersey, under the will of the said Maurice Raleigh, and it had been agreed between them that their respective interests rendered it desirable that none of the property except the property in the state of New Jersey should be sold, which it had been

agreed should be vested in the company to be formed for the purpose of holding said property, and disposing of it as the company might deem best," and in which they then covenanted and agreed that they, the said heirs and devisees, would not, nor would either of them, sell or in any way dispose of or incur their or any of their rights or interests in said property; and that they thereby transferred and conveyed to the said James G. Fitzpatrick all their right, title, and interest in and to the same, both in the state of Pennsylvania and in the state of New Jersey, in trust; that out of the income of the property in Pennsylvania he would pay all sums necessary for keeping the said property in repair; that he would pay all taxes and assessments levied upon the same, and all insurance premiums necessary, and the interest upon all mortgage liens; and that the balance he would pay to the said heirs and devisees. They also transferred to the said James G. Fitzpatrick all the income of the property in New Jersey, in trust, that he should apply the same towards the payment of the mortgages then existing upon the property in Pennsylvania, and any surplus which might remain to invest the same upon bond and mortgage.

This power of attorney and declaration of trust all of them but Mrs. Mary R. Fitzpatrick undertook by writing to revoke on the tenth day of August, 1885, and on the eighth day of October, 1884, the said James G. Fitzpatrick and Mary R., his wife, executed a writing in and by which they undertook to revoke the trust contained in the last aforesaid agreement, bearing date October 1, 1884. In view of these agreements, and by virtue of the power of attorney, a company was organized under the laws of the state of New York by the said James G. Fitzpatrick, Richard S. Newcombe, Moritz Cohn, Jeremiah Fitzgerald, John T. Farley, and Albert Cardoza, whose certificate bears date the \_\_\_\_\_ day of December, 1884; and it was incorporated for the purpose of carrying on the business of purchasing and improving real estate for residences, homestead, and apartment houses, to be leased and conducted by the said company, and occupied by the stockholders thereof, with a capital stock of \$600,000, just the amount contemplated in all the above-named agreements; to consist of 6,000 shares, of \$100 each; which certificate was filed and recorded according to law. About the tenth of February, 1885, the said executors conveyed all the said land in the state of New Jersey to the said Walter Raleigh and the said James G. Fitzpatrick, trustees for the devisees of Maurice Raleigh, deceased, the consideration therein named being \$150,000; and about the same time the said trustees made a mortgage on the same premises to the said executors, to secure the bond of the said trustees of the same date for the payment of \$100,000 in the manner above stipulated; and upon the same day the said trustees executed and delivered a conveyance of the said property, so mortgaged, to the said corporation, called the "Raleigh Land & Improvement Company," the consideration mentioned therein being \$600,000. At the time of this transaction there was a mortgage incumbrance of \$50,000 upon the premises. Of the consideration given to the executors \$50,000 was paid in cash, to be used in discharging the mortgage, which then and before was a lien upon the premises. This \$50,000 was paid by the following named persons: \$2,500 by Walter Raleigh, \$5,000 by William Arnott, \$24,000 by the said James G. Fitzpatrick, \$5,000 by Richard S. Newcombe, \$10,000 by Moritz Cohn, \$500 by Jeremiah Fitzgerald, and \$2,000 by John T. Farley.

The principal, if not the only, object of the formation of this company, undoubtedly was the improvement and sale of these lands in New Jersey. It is undoubtedly true that James G. Fitzpatrick had the entire confidence of all the Raleigh heirs and devisees. At the commencement of this enterprise they trusted him implicitly. He was elected president of the said company; the said Newcombe, who had \$6,000 for his services previously rendered, was made vice-president; Moritz Cohn, treasurer; and the said Fitzpatrick,

Moritz Cohn, and Newcombe were appointed a standing executive committee; the said Walter Raleigh was secretary, and he was appointed the agent of the company, to superintend and make sale of portions of the premises, and resided thereon without charge of rent, and had a salary of \$1,200 a year. According to the provisions of the agreement above recited, the title to said 30,000 acres was conveyed, and the mortgage for \$100,000 was given. After the said tenth of February, 1885, \$600,000 worth of stock was issued to the said Walter Raleigh, and the said Fitzpatrick, trustees, as aforesaid, and at the same time the said Walter Raleigh was requested to join with the said James G. Fitzpatrick in making a transfer of all the said stock back to the treasurer of the said company, Moritz Cohn, without any consideration, on the promise that two-thirds thereof would be signed back to the said Walter Raleigh and the said Fitzpatrick, as and for the said \$400,000 to be paid in stock to the heirs of the said Maurice Raleigh, deceased. Walter Raleigh refused to join in this transfer, alleging that counsel advised him so to refuse. But, notwithstanding such refusal, the company proceeded to act, and to carry on the work of land improvement and sale, according to said agreements.

What has already been intimated might with propriety be here again repeated,—that evidently this was a family arrangement, in and by which each trusted and confided in the other, and mutually bound themselves each to the other, and hoped and attempted to better their pecuniary condition by the formation of this company. Lands were sold in parcels by the said company, the executors releasing the lands so sold upon the receipt of two-thirds of the purchase money, according to the conditions of the original agreement, until the mortgage of \$100,000 was reduced to about \$74,000, when, in the month of June, 1886, sales were stopped, and, there being no receipts, the interest which came due was not paid, at which juncture the executors commenced the foreclosure of the mortgage. The foreclosure proceedings were allowed to come to a decree, execution, and sale, at which the property realized over \$79,000,—a few hundred over and above the costs and interest due. The purchaser was John B. Toner, who it is admitted, was a clerk in the office of said Cohn, one of said corporators, and who bought, not for himself, but for Fitzpatrick, Newcombe, and Cohn. Of this there is no doubt. The said James G. Fitzpatrick waited upon the master, and arranged for the delivery of the deed; and, although the property was struck off to the said Toner, it was purchased for the said Fitzpatrick, Newcombe, and Cohn.

The insistment of the bill is that this transfer of the title was inequitable, and was a scheme devised by the said Fitzpatrick, Newcombe, and Cohn for the purpose of procuring the title to the property in their own names, free from the rights and interests of the said devisees, and that, therefore, the transaction is fraudulent as to the said devisees, and should be set aside. It is insisted that, under the circumstances of this case, since they took the title, and that it still remains in them, they still hold the same in trust for the said heirs and devisees precisely as they did before, and that they are liable in the law, under the direction of the court, to account therefor. It is further insisted that, being such trustees, they were not justified in becoming purchasers of the property which was committed to them in trust, to be disposed of by them in the manner in which this was committed to them. One of the prayers of the bill is that they may be restrained from conveying or in any way incumbering the said lands. Another prayer is that a receiver may be appointed to collect the rents, and to control and manage said property. The bill has been answered very fully. Very many of the principal allegations, upon which the complainant relies for the maintenance of the injunction, have been denied, and such denial quite clearly supported by affidavits. But, in my judgment, there is still enough in the case to justify the court in considering the propriety of retaining the injunction

until final hearing. With this view I will consider the case in the order in which it has been so carefully and fully presented by counsel of the defendants.

1. It is said that this injunction should be dissolved, and the bill dismissed, because the executors of Maurice Raleigh have not been made parties. This position, I think, cannot be maintained. I cannot perceive that they have at this time any interest in this property. Their demands have all been satisfied and canceled. They have no right, in law or equity, to call upon any of the parties to this controversy for anything whatsoever. The mortgage, which in their hands was a valid lien, was not paid according to the terms thereof; according to the terms thereof they commenced the foreclosure of it, and made a sale, receiving thereby the amount due. All this was done in a lawful tribunal, in a lawful way, and upon notice to all persons interested. Every one who had an interest in the property, or any right to speak, had notice of what was being done, and had an opportunity to speak. If they had been made defendants, what charges could possibly have been presented against them which would not have been subject to exceptions, and to be overruled upon the plainest principles of equity? There is nothing anywhere which discloses any wrong-doing upon their part—anything that can be considered an impeachment of their duty as trustees, under the will of Maurice Raleigh, deceased. How could they be made parties upon principle unless they were asked to repay the money realized upon their mortgage by foreclosure, and to restore the mortgage to its former *status*? Taking into consideration what I have said, and their right to the money because of the non-payment of interest when due, the question is answered. Evidently, neither the corporation, nor any of the members thereof, nor any of the devisees or heirs, could require any such thing of the executors.

2. It is said that if the executors are not made parties, then Walter Raleigh, the complainant, must come into court with clean hands, and be ready to act equitably himself, and repay this money. I suppose a brief consideration of the facts which impelled the heirs and devisees of Maurice Raleigh, deceased, to commit their interests in their father's estate to this company, will show the utter impossibility of Walter Raleigh, or any other one of the heirs or devisees, raising the sum of \$79,000. It is, perhaps, not out of the line of true reasoning upon such considerations to conclude that no one of them possessed any such ability financially. Had they been so fortunate, it would hardly have been necessary that they should have sought the aid of knowing and trusted business men and capitalists to help them along in their enterprise. To ask Walter Raleigh to take this great burden upon himself would be like expecting a sunken Cunarder to be lifted by a tug, or Orion to carry Jupiter from his orbit. And if he is unfortunate enough to be unable to do that, which the defendants insist would be equity, then is it a case which obliges the court to deny him all relief? I feel constrained to proceed further, and to inquire whether or not, since the relationship of these parties has only been changed so far as to give the security itself, that is, the land, to the debtor,—that is, this land improvement company,—whether or not equity does not demand that it shall still account as it was originally obliged, to account, and as it would have accounted had land enough been sold to realize money sufficient to pay off and discharge the said mortgage. In other words, upon this motion to dissolve the injunction, I am not satisfied that it is my duty to hold that the complainant must raise and pay \$79,000 to these members of this corporation, or be turned out of court.

3. It is said that as the legal title to the property is vested in the three defendants, Fitzpatrick, Newcombe, and Cohn, by reason of the foreclosure sale, the proper relief would be to declare the trust for which these parties hold this title, and not to enjoin them from selling it, or otherwise disposing of it. According to this view of the counsel for the defendant, the injunction, though

too broad, should not be entirely removed. Of course he does not mean to say by this that the injunction cannot properly stand at all, but should be so modified that they may be permitted to dispose of the property. This view is put upon the ground that the complainant's interest is in all about one-sixth of the 4,000 shares; that is, about one-sixth of what may be received from the trust property after the payment of the \$79,000, and of all other liabilities to which the said property is exposed under the agreements. In my judgment, if it be conceded that there is any foundation for this bill, and for the interposition of the court by injunction, the writ, as it has been already awarded, is not too broad. If Fitzpatrick, Newcombe, and Cohn can be regarded as holding this property under the same trusts that it was held before the foreclosure, and that their management of it was such as to justify the court in taking control of the future disposition of it, it would hardly be safe for the court to permit them, who had the principal management heretofore, to proceed to the sale and disposition of these lands before final hearing. The answer and affidavits thereto disclose such feeling as to make such a course highly injudicious and imprudent.

4. It is said that none of the other heirs of Maurice Raleigh, deceased, and none of the defendants named in the bill, have asked for any such relief; that, even should relief be granted, it should be confined to him, and not so shaped as to include the others who have not asked for such relief. Plainly, this is a matter of detail, and, if the injunction stands, can be provided for upon final hearing as plainly. If the complainant is right in thus asking the court to protect his interests, and in order to effect such protection an injunction should stand, there can be no sale of his interests, separately, so long as the foregoing agreements are held binding. And it seems to me equally plain that each is bound to the other by virtue of their agreement, to such an extent that this trust cannot be accomplished without the sale of all their interests in this property, in parcels or otherwise, conveying their interests at the same time. I understand their agreement to be most explicit that neither one of them will sell or in anywise incumber any of their interests in this land. The purpose of this must have been to avoid everything like embarrassment in the sale of the property as a whole. To this method of disposition they each committed themselves, and the court cannot arbitrarily disregard it.

5. It is said that no relief of any kind should be granted the complainant without his giving ample security to indemnify the defendants against loss, by reason of any subsequent failure of the parties to realize the amount of money vested by the defendants in the property, and also to indemnify them for interest upon the money so invested. To require this, could only be upon the presumption that he is in the wrong, and that the defendants are in the right. If the court should act upon such presumption as this in a case of this character,—one of trust,—the bill should be dismissed. The theory of the bill plainly is that a wrong has been committed by these defendants, and that the complainant is the sufferer. I cannot see the propriety, in such a case, of requiring him to give indemnity.

6. It is said that the complainant is estopped from disputing the validity of the foreclosure sale because he allowed it to be made without objection, saying nothing until after the defendants were bound by their bid, and by afterwards accepting from the executors a payment of a portion of this money as income due him under the will of his father, without ever having attempted to impeach the sale in any way until after such payment. As intimated, so far as the executors were concerned that sale could not, and cannot, be attacked. Whatever was done by them was lawfully and completely done. I can see no possible method of overthrowing the decree which they obtained, or of in any way impeaching it. It is not the sale itself as conducted by the executors which it is sought to overthrow or impeach, but the complainant, Walter Raleigh, seeks by this bill to impeach the conduct of the members of

this company who were intrusted with his rights and interests in the use which they made of the opportunity given to the executors to sell to effect a transfer of the title of this property to themselves, (the members of the company,) that they might hold it for their individual benefit, and free from all obligations upon their part to Walter Raleigh. It was lawful for the executors to make such a sale, but the question remains whether or not it was lawful for this land improvement company to permit such a sale to be made. The question remains whether or not they did not have it in their power, by wise and prudent management of their trust, to pay the interest as it fell due from time to time upon the mortgage. The question remains whether or not, besides paying the said interest, they did not have it in their power to make further reductions of the principal by such means as they had theretofore reduced the principal from \$100,000 to \$74,000. The question remains whether or not, under the circumstances, they were justified in not, by some lawful means, effecting a sale of this property in parcels themselves, in order to prevent the foreclosure, and the sale of the whole of it in bulk, when the step taken by them, as well as by their *cestui que trust*, makes it most manifest that the great purpose in view in forming the said company was the improvement of these lands, and the sale of them in parcels.

7. It is said that, under the agreements above recited, all the stock of Maurice Raleigh was subject, in the first instance, to the payment to the executors of the balance due upon the mortgage; and, if the executors had purchased the property at their bid at \$78,000, they would not hold it for the benefit of the complainant, and the other legatees and devisees, under the will; and in such an event it is said the present suit could not be maintained. The argument is that, if in such an event a suit could not be maintained, this suit certainly cannot be maintained. This line of reasoning, it seems to me, is upon the same false premises. It is an assumption that the action of the executors in such case would have necessarily been, in the eye of the law, fraudulent. Such does not appear, and without such fraudulent conduct appearing, their strict legal rights certainly must be protected. Until it is shown that they availed themselves of the form of law for the purpose of acquiring an unfair profit of the defendants, either in their own behalf or in the behalf of others, the rights which they would have acquired could not be disturbed. But I have not that question to decide.

8. It is said the fraudulent and negligent acts charged against the defendants, as directors of the said company and otherwise, are fully answered by the defendants, which answers are not contradicted in any way by any testimony in addition to that of the complainant. As already intimated, if this were to be conceded, it would not follow that the injunction should be dissolved at this stage. Numerous illustrations might be given where trustees could answer such charges, either by a positive denial or by the statement of the fact, and yet render themselves liable in equity to the just claims and demands of his *cestui que trust*; which claims and demands the court might feel itself bound to enforce against specific property, by retaining the property intact and under its control, for the purpose of effecting the design of the parties who declared the trust. And thus far it will be perceived I have proceeded upon the idea that the defendants, or some of them, were intrusted with the rights and interests of the Raleigh heirs and devisees, and that as such they were under the highest obligations to such heirs and devisees. They were selected as such trustees, because they were men of ability, character, and financial standing. And it will be noted that they protected themselves to the utmost limit.

9. It is said that the defendants have heretofore offered the complainant to buy his stock, or to sell theirs to him; that before the foreclosure sale they offered to sell their interests for 90 per cent. of the cash money they had put therein, without interest; that the complainant claims that the property is

worth four times the amount of the \$150,000 purchase price, and yet that he has refused this offer; and that they have offered, since the foreclosure sale, to convey to the complainant, and any persons who were willing to act with him, their interest in the property at the same terms, in addition to the repayment of the money they have been compelled to expend in the foreclosure sale; that they have also offered, if the chancellor deem proper, that there should be a resale of the property if the complainant will give a sufficient bond, so that the interests of the executors and other parties shall be protected in case of the property being purchased by other parties than these defendants at a lower price than \$79,000. All of these propositions it is said have been refused by the complainant, and that he still insists on having the beneficial use of the \$79,000, and to escape from his covenants by the agreement of October 1, 1884, and to have the same benefit in every way as though he had done what he agreed to do. However fair this offer of purchase or sale may appear upon the part of the defendants, it seems to me unquestionably clear that Walter Raleigh was in no sense, in law or equity, bound to accept of either. They offered to sell to him for 90 per cent. of the money which they had invested. They had invested the \$50,000 which had been advanced, and which was represented by 2,000 shares of stock, to pay the executors at the time of the original transaction. They wanted 90 per cent. of this from Walter Raleigh. They had paid \$79,000, the purchase price at the foreclosure sale. They wanted 90 per cent of this from Walter Raleigh. When the condition of the Raleigh estate is looked into, as disclosed by these agreements, and it is considered that it was expedient by all parties that those agreements should be made, it will not be difficult to understand that it was impossible for Walter Raleigh to raise the amount of money required to meet the proposition of these defendants. And it seems to me that the next proposition contained in this objection is alike without sure support. If Walter Raleigh could not be expected, under the circumstances, to purchase according to the demands of the defendants, it would seem to me to be quite as difficult for him to give bonds; for who can tell, as every prudent business man would say, what the loss from litigation and delay respecting such a matter would entail. Besides this, much of the objection is answered by what has been said already. It implies an obligation upon the part of Walter Raleigh to do something to protect the interests of those whom he charges to be guilty of wrong-doing. It seems to me that if in this case he has rights which the court is bound to respect and protect, as against these defendants, they being trustees, he has the right to call them to account, and to hold them to that responsibility or accountability which the law imposes, without any assurance of indemnity or reward from him.

It is said that Walter Raleigh has a claim, as a stockholder, to the extent of \$2,500, and that, in respect to this \$2,500 he has brought a suit at law against Mr. Fitzpatrick, in the city of Philadelphia, on account of which suit he is not entitled to any standing in this court. It is said that he alleges in that suit that his stock is not valid, and has offered to return the certificate, and that such suit is now pending. If this objection were valid in part, it seems to me that it is not in the whole, because, as I understand it, it does not extend to the whole case. The whole issue raised by the bill is not thereby disposed of. If, because thereof, an equity should arise, and this case go to a final hearing, there would be no trouble whatsoever in disposing of the rights of the parties according to their equitable interests. *Gardner v. Raisbeck*, 28 N. J. Eq. 71; *Longstreet v. Phils*, 89 N. J. Law, 63; *Dawley v. Brown*, 79 N. Y. 390, 397.

The eleventh and twelfth objections, it seems to me, have virtually been already disposed of; they being but amplifications of former propositions.

Now, it seems to me that the full value or force of the objections presented by the defendants to the continuance of this injunction will be best under-

stood by considering what this company, and these, its directors and agents, undertook to do, and what obligations devolved upon them from such undertaking. These 30,000 acres of land, as a whole, it was conceived by them, were of comparatively little value. They all believed that by a proper division of them into parcels, and by prudently managing the sales of them so divided, they could realize a very much larger price than by selling them as a whole. To accomplish this the company was formed. Not only did the devisees and heirs at law of Maurice Raleigh believe that the property was of much greater value when so divided than it was estimated to be worth as a whole, but Fitzpatrick, Newcombe, and the other members of the said corporation must have so believed also. It will scarcely be pressed by them, in any event, that this scheme was undertaken with the full conviction that the \$600,000 worth of stock on paper was in no event worth over \$150,000. They do not come into court and stultify themselves by saying that at the time the company was formed it was a scheme to deceive and delude the unsuspecting. I shall therefore proceed upon the conviction that when these parties entered into this arrangement for the benefit of this family, they had an honest belief that, by the prosecution of the plan, large sums of money would be realized over and above the amount of money actually invested, to-wit, the \$150,000. It might be added, by way of confirmation of this, that there is nothing in the relation of Newcombe or Cohn with the Raleigh family to induce them to give their time and money, and to run the risk of such an undertaking, for nothing. Nor is this method of reasoning rendered futile by the allegation that these lands in reality were not and are not, worth over \$150,000; and, in truth and in fact, no equity in them at this time for the said heirs and devisees. The reasoning in behalf of the complainant proceeds, as has been said, upon the conviction that all the parties interested in these lands originally, as well as those who came in afterwards and participated, proceeded, after due deliberation, upon the theory that, by pledging themselves each to the other, and uniting in their efforts to that end, they could make disposition of these lands to a profit greatly in excess of the \$150,000, by offering them for sale in parcels. And that is what this company and these trustees undertook to do, and the measure of that undertaking is the measure of their responsibility.

Did they accomplish the purpose thus assigned them, and thus by them agreed upon? And, if they did not, why not? And, if not, then is the reason assigned sufficient to release them from all further obligation? Clear enough it is, from every statement of the bill and answer, that they did not accomplish what they undertook. They sold but a comparatively small proportion of these lands. They realized, from what they did sell, enough to reduce the mortgage held by the executors from \$100,000 to \$74,000. They had remaining one parcel with improvements thereon for which they were offered \$20,000. That this was a fair price I think is conceded. As the case stands before me, from the character of the undertaking, the progress made during most of the time was reasonably rapid. They had it in their power to sell all of this land; *that* is the trust that was consigned to them. The parties had agreed, each with the other, that they would not in anywise sell or incur their respective interests in the land; all had been pledged to a common purpose. That it was worth the amount of the mortgage as a whole has been proved by the success of the executors in realizing the amount due thereon when sold in the lump.

Now, why was this unfortunate failure of the enterprise? Why were they unable to realize more than the \$150,000 for this land? The defendants now say that the land is not worth more than it sold for at the foreclosure sale. They say, also, that Walter Raleigh became so offensive to Fitzpatrick, and by his manner and methods so obstructive, that the work of making sales could not be proceeded with. It is said that he not only was thus offensive

and obstructive to Fitzpatrick, but that he studiously circulated abroad, so that it reached the ears of those who would be purchasers, his objections to proceeding with these sales, and his threats to interfere with the action of the company, and that this he carried so far as to frighten away bidders. In looking at this phase of the question, it must be remembered that Walter Raleigh was interested in these lands, and was a member of this company, and that in both aspects he was entitled to consideration, and had a right to speak. Therefore, giving the objection full force, it does not satisfactorily appear to me that the company had any just cause for suspending sales altogether, or to such an extent as to be unable to meet the demands upon them by the accruing interest on this mortgage. As I have said, Walter Raleigh was also one of them; and it is very difficult to induce the belief that he could make intelligent persons believe that this company had no power to act, that they could not convey a good title, or that he could prevent their acting, or could prevent their conveying a good title, after he had himself, as their secretary, and as their agent, effected numerous sales of portions of this same property. It rather seems to me that they hesitated in the performance of their duty after he became offensive in his manner to Fitzpatrick, resolving to cast the consequences of their hesitation upon him, and to reap the benefits which would flow from a sale under the foreclosure themselves, and would thereby oust him from any title to the property or interest therein. And it has resulted thus. The court will be justified in staying the hands of the defendants until further inquiry is made on this point.

It seems to me that the facts presented, and the consideration given to the case, justify a reference to the case of *Carson v. Marshall*, 37 N. J. Eq. 213, confirmed on appeal, 38 N. J. Eq. 250, and not only warrant my relying on that case, but require me to be governed by it in the determination of the question presented at this time. The court of errors and appeals said: "So jealous is the law upon this point that a trustee may not put himself in a position in which to be honest must be a strain upon him. I think, upon correct principle, a trustee in no case, nor in any crisis, can become the purchaser of property when the fact of his making such purchase has a tendency to promote his own interest at the expense of his *cestui que trust*. What possible difference can it make, in reason and principle, in what manner or by whom the sale is made of that which the trustee holds, when his duty in his trust relations is to make the property bring the highest price in the protection of the interests of the *cestui que trust*? His duty remains the same. He stands concerned, for the time being, as would be the owner of the property in appreciating it. When he becomes the purchaser, and exercises the conceded privilege of a purchaser to acquire at the lowest price, a direct conflict between fiduciary and personal interests arises. This, as I understand the rule, is the test of the validity of such a purchase, and not the indifferent circumstance that the sale is under the conduct of himself or another."

This explicit declaration of the law makes it apparent that a trustee cannot himself be the purchaser of property which has been committed to him to sell, whether he sells that property himself, under the trust, or whether it is sold by somebody else under the forms of law. And it seems to me that the value of this principle of law was never more strongly illustrated and enforced than in the case now under consideration. Supposing these gentlemen to have engaged in this work with the most honest intention to prosecute it with diligence, and to effectuate the very highest interests of the *cestui que trust*, and had proceeded in the work until the differences between Walter Raleigh and Fitzpatrick gave them an excuse for becoming lukewarm or indifferent or hostile, or to determine that they would take advantage of his misconduct, and the crisis which would inevitably arise if they held their hands, to-wit, a foreclosure, a sale, and a purchase by them, and thereby acquisition of an estate in fee-simple, free from all obligations, in this whole tract of land, they

certainly could not proceed and make such purchase without being subject to the severest criticisms of the indifferent business man or judge. This fault-finding of Walter Raleigh these trustees exhibit as an excuse for the total neglect of this property, and for making no sales whatever. They exhibit it as an excuse for allowing the foreclosure proceedings to be carried to completion, and for a sale of the property thereunder in bulk. This, it seems to me, they were not, under any circumstances, justified in doing. Did Walter Raleigh misbehave? Was his manner and conduct offensive and obstructive? Did he discourage bidders, and slander the title to this property, and create such doubts that persons having the means and being interested would refuse to invest, though they otherwise desired to do so? If so, now by the very proceedings which it seems to me these trustees connived at, and by their indifference encouraged, they had an opportunity to set at defiance the conduct of Walter Raleigh, and to overcome every objection which he had made, or possibly could make, and to secure to purchasers who were interested a perfectly indisputable title in fee-simple to any and every parcel of these lands. Now, they had a chance, if not so certainly effective and advantageous to the heirs and devisees of Maurice Raleigh, deceased, yet an effectual chance, of carrying out the design which they encouraged those heirs and devisees to enter into when they agreed to accept of the proposition to form the said company, and to divide the said land in parcels, and sell it in such parcels. They now had it in their power to ask the court of chancery to direct the master to make sales of these lands in parcels. The court always invites such applications, and always responds favorably thereto, even when it may be said to be reasonably questionable whether any profit will arise therefrom or not to those who are beneficially concerned. But this opportunity, so apparent upon the face of it, and in the acceptance of which they would have been so amply justified, they neglected, and allowed the property to be sold in bulk, with, what may be said in reason, the certainty before them that but few persons would be found ready and willing to pay enough as a whole to cover the amount of the incumbrance, over \$78,000. In this situation these trustees, accepting the excuse as sufficient that Walter Raleigh had become hostile and obstructive, thus allowed this sale to proceed at the instance of the executors, when the duty was fairly imposed upon them of making sale thereof themselves. That duty was imposed by their voluntarily accepting the trust, creating the very interest on the one hand, and imposing a duty on the other, which are contemplated by the learned justice in the language which I have quoted from his opinion in *Marshall v. Carson, supra*. In the *Carson Case* the testator had directed his executors to sell his lands for the payment of his debts. Judgments were obtained against him. Afterwards, instead of selling the lands themselves to discharge these judgments and other obligations, the executors allowed the sheriff to proceed to make sales of the lands of the testator upon these judgments. The executors became the purchasers, and after such purchase they claimed the right to hold the lands in fee-simple discharged of any trust. It was resolved that this they could not do. In the case before me, this company undertook to make sale of these lands, and they expressly agreed to do so, and to discharge, out of the proceeds of said sales, this mortgage. They did not sell lands enough for that purpose. They allowed the condition by which the mortgage became due to arise, when a sale was made under the forms of law by the master, the trustees themselves becoming the purchasers. Clearly this case is so like the other that I would be derelict in duty if I did not accept that as my guide.

And what I have said which leads me to conclude that the injunction should continue also leads me to conclude that a receiver should be appointed to take charge of this property, and effect a sale according to the terms and stipulations of the foregoing agreements. I have sought to satisfy my mind that I could, according to my first desire, following *City Pottery v. Yates, 37*

N. J. Eq. 543, continue the management of these lands and this trust in the hands of the original corporators; but the answer and the affidavits disclose so great an alienation of feeling that I have been compelled to reject that view. I think, under the circumstances, every consideration requires the appointment of a stranger. Of course, all of the rights and interests of the defendants will be protected and secured as far as the rents and proceeds will extend. The costs will abide the final issue.

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**LOMERSON, Ex'r, v. VROOM and others.**

(Court of Chancery of New Jersey. October Term, 1886.)

**WILL—CONSTRUCTION—PARTIES—HEIRS AND DEVISEES.**

A bill in equity for the construction of a will, under which a question arose as to its validity as a disposition of real estate, made as parties the legatees and devisees thereunder. *Held*, the rule being that a party must be presented to the court in the precise capacity in which he is sought to be charged, that the bill was demurrable, even though it did not appear but that the legatees and devisees under the will were the only heirs at law of the testator.

On demurrer.

*W. H. Morrow*, for demurrant. *L. De Witt Taylor*, *contra*.

**BIRD, V. C.** The demurrer is for want of parties. The bill is filed for the construction of a will in and by which the testator attempts to dispose of his real and personal estate. One of the questions is whether he has succeeded in disposing of the former or not. If not, his heirs at law are interested. The legatees and devisees named in the will are made parties, but the heirs at law of the testator are not. It is said that it does not appear but what the devisees and legatees are his only heirs at law. This, I think, might be answered by saying that they are not made parties as heirs at law, but only as legatees or devisees; consequently they would not, as heirs at law, be bound. I understand the rule to be that you must present the party to the court in the precise capacity in which you wish to charge or bind him. See *Wade v. Miller*, 32 N. J. Law, 296; *Kirkpatrick v. Corning*, 38 N. J. Eq. 234.

The demurrer must be allowed, with costs.

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**WESTERN UNION TEL. CO. v. ROGERS and others.**

(Court of Chancery of New Jersey. October Term, 1886.)

**INJUNCTION—TO RESTRAIN BREACH OF CONTRACT—EXCLUSIVE TELEGRAPH PRIVILEGE.**

Where an hotel proprietor has granted one telegraph company the exclusive privilege of establishing and operating an office upon his premises, equity will interfere by injunction to prevent a breach of the contract in the form of an extension of the same facilities to another and a rival company; the remedy at law of the party having the first and unquestioned right being inadequate.

Bill for injunction.

*F. S. Joline* and *John S. Applegate*, for complainants. *Wilbur A. Hetsley*, for defendants.

**BIRD, V. C.** Upon the filing of the bill in this case an order was issued, directed to the defendants, to show cause why an injunction should not be allowed restraining the defendant Rogers from violating the agreement set out in the bill, and restraining the Baltimore & Ohio Telegraph Company from availing itself of that violation. The defendant Rogers owned or had control of a hotel at Long Branch. On May 23, 1884, he agreed in writing with the complainant to furnish it with space in said hotel for the transaction of commercial or public telegraph business, and also agreed to assure to the complainant "the exclusive right of establishing, maintaining, and operating a

telegraph office in said hotel, and of connecting telegraph wires therewith during the term of this agreement." The provisions of the agreement were to "continue in force during the summer or watering season, *i. e.*, from the first day of July until the fifteenth day of September, each year, for and during the term of one year, and shall continue thereafter during each season, from year to year, unless one of the parties hereto shall give written notice of an intention to terminate the same at least ninety days previous to the beginning of any season after the close of the term hereinbefore fixed." The complainant entered and transacted the business of telegraphing during the season of 1884. Since then neither party has given notice to the other of an intention to terminate the agreement. In May of this year, Rogers entered into an agreement with the defendant, the Baltimore & Ohio Telegraph Company, extending to them the right to transact the business of telegraphing in the same hotel. The complainant asks for an injunction against the defendants, restraining them from carrying into effect the agreement so made and entered into by them.

The principal defense by way of answers and argument is that, for this manifest and confessed breach of the agreement with the complainant, the complainant has an adequate remedy at law. In other words, it is insisted that the transaction exhibits nothing more than the ordinary violation of a contract, the damages for which are easily ascertainable, and are therefore a proper subject to be submitted to a jury. This insistence, then, amounts to this: that it is the duty of this court to allow parties to violate their agreements at will, and those who participate in such violation to enjoy the fruits thereof, and oblige the injured party to carry on a litigation at law for redress of his wrongs. I do not think this court is so helpless in such case. I think it proper for this court in such case to aid the party who has the first and unquestioned right, and to oblige the interfering party to carry the litigation at law for damages for breach of contract.

Again, it is urged that the complainant cannot be heard in this court, because the court never exercises jurisdiction unless it appears that the damages threatened are irreparable. This, it is true, is one well-settled rule; but another is equally well settled, *viz.*, that the party will not be driven to his legal remedy where it may appear that that remedy will prove inadequate. In this case there can be no doubt but that the complainant could at law recover; but recover what? Most likely not more than six cents, or some other merely nominal sum. Now, I think, no thoughtful person will insist that such result would be adequate. There is enough in the case to show that the complainant has many offices, of which this is one, and that this one is part of a system of telegraphing for commercial and other business interests; and that while this one is a part, it is but a small part,—a very small part, indeed. Yet, however small, it has rights therein; but because so small in itself, it would be impossible for any jury, the most fair-minded and enlightened, to ascertain the damages. It is not like the breach of an agreement to deliver grain or any other article of sale, the value of which is easily determined. Suppose the injunction be not allowed, how then can the complainant fix his damages at law beyond that which is merely nominal? He cannot take last year's transactions as a guide, for none can determine from those, since it is plain that the number of telegrams sent from, or received at, a given point depends not only upon the number of persons desiring to be accommodated and the activity of business generally, but also upon the extent and variety of connections. Nor can the damages be fixed by the amount of business done by the defendant the Baltimore & Ohio Telegraph Company. It could be said on the one hand that it has greater facilities for business, and on the other less. But I think these observations are enough to show the application of the rule of law as now given. Kerr, *Inj.* 200, says: "By the term 'irreparable injury,' it is not meant that there must be no physical possibility

of repairing the injury; all that is meant is that the injury would be a grievous one, or at least a material one, and not adequately reparable by damages at law; and by the term, 'the inadequacy of the remedy by damages,' is meant that the damages obtainable at law are not such a compensation as will, in effect, though not *in specie*, place the parties in the position in which they formerly stood. \* \* \* The fact that the amount of damage cannot be accurately ascertained may constitute irreparable damage. \* \* \* It is no objection to the exercise of the jurisdiction by injunction that a man may have a legal remedy. The question in all cases is whether the remedy at law is, under the circumstances of the case, full and complete." Again, 1 Joyce, Inj. 75: "When the construction of a contract is clear, and the breach clear, it is not a question of damage, but the mere circumstance of the breach of contract affords sufficient ground for the court to interfere by injunction." See, also, Id. 503, 554; see, also, 2 Joyce, Inj. 852; *Railway Co. v. Railway Co.*, 5 De Gex & S. 138; 2 Joyce, Inj. 1035.

Under these authorities, I cannot but conclude that the complainant presents a case of which this court may take notice. I will advise that an injunction do issue according to the prayer of the bill.

#### LOREY v. OVERTON and others.

(Court of Chancery of New Jersey. October Term, 1886.)

MORTGAGES—BY TENANTS IN COMMON—CO-TENANT AS SURETY—FORECLOSURE—ORDER OF SALE.

The fact that one of three tenants in common joined in the mortgage of the joint property merely to secure money which her co-tenant borrowed for his own use, and that the assignee of the mortgage knew that such was the fact when he took the assignment, is no defense to a suit by such assignee to foreclose. That fact, however, entitles her to a postponement of the sale of her interest until the interest of the principal debtor has first been exhausted.

Bill to foreclose a mortgage.

W. W. Cutler, for complainant. James H. Neighbour, for defendants.

BIRD, V. C. The defendants to this bill to foreclose are a brother and two sisters, the owners in fee, as tenants in common, of the lands mortgaged. The brother borrowed of Mrs. Wood \$1,600, and gave his bond, and he and his sisters gave the mortgage in suit on said lands as further security. Mrs. Wood assigned the bond and mortgage to the complainant, who is a daughter of Lewis, the real debtor. One of the defendants, by her answer, insists that she had no interest in the said transaction beyond securing the loan, and that this fact was well known and understood by the complainant when she accepted the assignment of the mortgage; and that, this being so, the complainant cannot enforce the claim under the mortgage, against the interest of said answering defendant in the land.

Supposing that the complainant knew all the facts, is there anything in the case to discharge her from her liability as surety? For I can see no other principle involved than that which arises between creditor and surety. The testimony satisfies me that the husband of complainant advanced and paid a full consideration for the mortgage, and caused it to be assigned to the complainant. But, independently of the question of consideration, in my judgment the defense entirely fails. The defendant voluntarily joined in the execution of the mortgage to secure the claim. There is no deception, nor any pretense of it set up or shown. It is true, something is said in the answer to the effect that the sister's interest was not after all to be bound. But she gave the mortgage, and thereby bound her interest, and this cannot be overcome by parol. The title of Mrs. Wood was perfect; she could have enforced her claim against all the tenants in common. All these rights she could assign, and

just as well or perfectly without consideration—as by gift—as for their highest cash value. The defendant could no more question the rights of the donee in such case than she could those of the donor. In my judgment, all that the court can do is to order the interest of William J. Lewis, the principal debtor, sold first, and in case that does not produce enough to satisfy the claim, that then the balance be sold. I believe there is no dispute as to the amount due.

The complainant is entitled to a decree accordingly, with costs.

### CHILDS and others v. JONES and others.

(Court of Errors and Appeals of New Jersey. November Term, 1886.)

#### 1. JUDGMENT—ASSIGNMENT—RIGHTS OF WIFE.

J. held a judgment which, through a third party, was assigned to his wife. C. claimed an agreement with J. that the judgment was to be assigned to him for certain considerations which were performed by C., and filed a bill in chancery asking that court to order an account, and Mrs. J. to pay, from the proceeds of the judgment, the amount found to be due said complainant. *Held* that, the proof not sustaining the charge that the judgment was to have been assigned to C., the right of the wife to the judgment is left untouched.

#### 2. EVIDENCE—WEIGHT—EXPERT TESTIMONY AS TO VALUE OF LAND.

J., the defendant, asked that C. be held liable for the difference between what the complainant C. received for certain lands, and what about 50 witnesses testified it should have brought. *Held*, that the real-estate agent selling the land being an expert, and the fact that no larger price could be received for the land after being in the market for a long time, were better evidence of the worth of it than the testimony of the witnesses who were not experts, and who testified in a general way.

Appeal from court of chancery.

Bill for relief, etc. On final hearing on pleadings and proof. For the opinion of RUNYON, Ch., now affirmed, see 41 N. J. Eq. 74, 3 Atl. Rep. 86.

S. H. Little, for Childs and others, appellants. Alfred Mills, for Jones and others, respondents.

PER CURIAM. This decree unanimously affirmed, for the reasons given by the chancellor.

### PICKEL and others v. ALFAUGH and others.

(Prerogative Court of New Jersey. February Term, 1887.)

#### COURTS—ORPHANS' COURT—JURISDICTION—EXCEPTIONS TO INVENTORIES—APPEAL—COSTS.

Under Revision N. J. p. 753, § 2, the orphans' court has full power and authority to hear and determine all controversies respecting the fairness of inventories. Where, therefore, on appeal from an order of such court denying a motion to dismiss exceptions filed by legatees to the inventory, there is nothing in the record to support the grounds of the motion, viz., that the exceptions were improvidently and illegally filed, the order will be affirmed, with costs.

Appeal from orphans' court, Hunterdon county.

E. P. Conkling and J. F. Dumont, for appellants. J. N. Voorhees and W. A. Cotter, for respondents.

RUNYON, Ordinary. This appeal is from an order of the orphans' court of Hunterdon county, denying a motion to dismiss exceptions filed by legatees to the inventory. The ground of the motion was that the exceptions were improvidently and illegally filed. There is nothing in the record to support the objection. The orphans' court has full power and authority to hear and determine all controversies respecting the fairness of inventories, (Revision, p. 753, § 2,) and one method of questioning the fairness of an inventory is by filing exceptions to it. *Dilts v. Stevenson*, 17 N. J. Eq. 407.

The order will be affirmed, with costs.

STATE (WILLIAMS, Receiver, etc., Prosecutor) v. BETTLE and others, State Board of Assessors.

(*Supreme Court of New Jersey. November 4, 1887.*)

1. TAXATION—RAILROAD CORPORATION.

The West Shore & Ontario Terminal Company is a railroad corporation, and liable to be taxed under the "Act for taxation of railroad and canal property," approved April 10, 1884.

2. SAME—STATE BOARD OF ASSESSORS—DEDUCTING DEBTS.

Debts cannot be deducted from the valuation of the property by the state board of assessors unless applied for under the twenty-first section of said act.

3. SAME—VALUATION—INTERFERENCE BY COURT.

In the absence of proof, the court will not interfere with the valuation of the franchise by the state board of assessors, made at the taxing date.

4. SAME—EXEMPTION, WHEN CLAIMED.

Where property has been returned to the state board as used for railroad purposes, and has escaped local taxation, it is too late to claim exemption from the valuation by such board.

5. STATE BOARD NOT GOVERNED BY VALUATION OF LOCAL ASSESSORS.

The state board of assessors, in the valuation of property, must give its true value, and not be governed by the valuation of the local assessors.

6. SAME—RAILROAD TAX LAW.

Section 12 of the railroad tax law of 1884 construed.

7. SAME—DEDUCTION MUST BE MADE FROM LOCAL TAX.

Where the prosecutors claim and establish the right of deduction under section 12, such deduction must be made from the local tax, and not from the state tax of one-half of 1 per cent. By the act of 1884, the legislature did not intend, in any event, to diminish the revenue of the state, by reducing the tax of one-half of 1 per cent.

(*Syllabus by the Court.*)

On *certiorari*.

Argued at June term, 1887, before VAN SYCKEL, MAGIE, and PARKER, JJ. Vredenburg & Garretson, for prosecutor. The Attorney General, B. Gummers, and Wm. S. Gummers, for defendants.

PARKER, J. This writ of *certiorari* brings before the court the action of the state board of assessors in assessing the property of the West Shore & Ontario Terminal Company for the year 1885. Among the reasons urged for setting aside the assessment is that said company is not a railroad corporation, and therefore not liable to be taxed under the "Act for taxation of railroad and canal property," approved April 10, 1884. The "Open Cut & General Store-House Company," the corporate name of which was subsequently changed to the "West Shore & Ontario Terminal Company," was created by the consolidation of the "National Stock-Yard Company," the "Midland Terminal & Ferry Company," and the "Open Cut & General Store-House Company." This consolidation was effected under an act, entitled "An act relating to the consolidation of corporations authorized to establish store-houses, piers, or docks, or to maintain yards and buildings, for the keeping and accommodation of live-stock," approved March 23, 1883. The first section of that act provides that "it shall be lawful for such corporations to consolidate and merge their corporate rights, franchises, powers, and privileges, into any one of said corporations," so that by virtue of said act such corporations should be consolidated and merged, and also so that all the property, rights, privileges, and franchises by law vested in such corporations should be transferred to and vested in the corporation into which such consolidation and merger should be made. The succeeding sections of said act provide for the mode of effecting such consolidation and merger. The fourth section enacts that, upon filing a certificate and copy of the agreement provided for in the preceding sections in the office of the secretary of state, the merger

should be deemed to have taken place, and the said corporations be one corporation, possessing all the rights, privileges, and franchises *therefore vested in either of them*. It follows that if either of the said corporations, which by consolidation and merger went to constitute the Open Cut & General Store-House Company, possessed, at the time of such consolidation and merger, the rights, privileges, and franchises of a railroad corporation, such rights, privileges, and franchises, by the consolidation and merger, after such agreement filed, were transferred to the new corporation.

Upon reference to the act whereby the name of the "Weehawken Transportation Company" is changed to the "Midland Terminal & Ferry Company," it is found that the last-named corporation was authorized to improve all or any part of its lands, by constructing therefrom and thereon, and over the lands of others, a railroad or railroads, to intersect with the railroad or railroads then built, belonging to the Montclair Railway Company, the New Jersey Midland Railway Company, and the Ridgfield Railroad Company, within the limits of the county of Hudson, north of the railroads of the New Jersey Railroad & Transportation Company, east of the Hackensack river, and west of Bergenhill, so as to connect with any or all the railroads above mentioned, and with any other railroad or railroads then built, or which might thereafter be built. The said the Midland Terminal & Ferry Company was also, by said last-named act, given power to survey, lay out, and construct a railroad or railroads. In short, said company was invested with all the rights, privileges, and franchises of a railroad corporation, including the power of eminent domain.

By the consolidation and merger, all the aforesaid powers were transferred to and vested in the Open Cut & General Store-House Company, and subsequently, when the name of that corporation was legally changed, passed to the West Shore & Ontario Terminal Company. It also appears by the proof that the property of the West Shore & Ontario Terminal Company valued for taxation by the state board of assessors had been, and was at the time of the valuation and assessment, used for railroad purposes. It is clear, therefore, that the West Shore & Ontario Terminal Company was at the time of the assessment a railroad corporation, and that its property assessed by the state board of assessors for the year 1885, was liable to taxation under the railroad tax law of 1884.

Another reason alleged why the assessment should be set aside is that neither the secured nor unsecured debts were deducted from the valuation of the property by the board of state assessors. The railroad tax law of 1884 provides that no deduction, either for mortgage or other indebtedness, shall be allowed, unless such deduction be applied for, in the statement required to be made by the companies in the twenty-first section of said law. It appears that no claim for deduction was made under that section, nor in any other way. It is also alleged that the valuation of the property on which the assessment was predicated was excessive. The proofs taken under this head relate to the valuation of the franchise, and of certain structures which will hereafter be mentioned. As to all the other property, there not being any testimony on the subject, the valuation made by the state board of assessors will stand.

The important question raised under the head of excessive valuation relates to the franchise. It is said that, in making the valuation of the franchise, the board did not take into account the value of certain property of the company in the state of New York. The testimony in reference to that property and its value relates to the date of January, 1887, which is two years after the time when the state board of assessors made the valuation on which the assessment in this case is based. There is no evidence showing what property (if any) the said company held in the state of New York, or the value thereof, in January, 1885, being the taxing date. The court cannot, in the

absence of proof, interfere with the valuation of the franchise by the state board of assessors. There is no proof by which the court can determine that the valuation of the franchise by the state board in January, 1885, was excessive, and therefore the valuation will not be changed.

Certain property is claimed to be exempt because (as alleged) it was within the main stem of the railroad; the main stem having also been assessed as such. No proof was given to show that such property was within the 100 feet taxed as main stem, nor was there any evidence showing that the valuation was excessive, and therefore the court will not disturb the assessment on the value of such property.

Objection is made to the valuation of a bridge. It was part of the property, the construction of which was necessary to the use of the railroad. In the case of *Railroad Co. v. Board of Assessors*, 49 N. J. Law, 1, 7 Atl. Rep. 306, bridges were considered in the valuation.

As to the other property claimed to be exempt because not used (as alleged) for railroad purposes, it is sufficient to remark, such property was returned to the state board as used for railroad purposes, thus escaping local taxation, and after such return it was too late to claim exemption. Nor does the proof show that the valuation of such property was excessive.

The evidence sustains the valuation placed on four of the ferry-boats, but the valuation of the other boat should be reduced from twenty-five thousand to fifteen thousand dollars.

Another reason urged, with much tenacity, to set aside the assessment, is the claim that the real estate, other than the main stem, is assessed at a relatively higher value than the real estate of individuals in the same taxing districts. If this be so, it is in violation of the railroad tax law of 1884, and the valuation should be reduced. This claim is based upon the assessments made by the local assessors, but the testimony shows that their valuations were less than the true value. In the case before cited, the court held that the state board of assessors, in their valuation of property, are not necessarily to be governed by the valuations made by local assessors, in the same taxing district. The state board of assessors are to take true value as the standard, and not discount from their estimation of the true value because of the custom of local assessors to value property for taxation at less than its true value. It is not shown that the state board of assessors valued and assessed the lands of this company above its true value, or above the true value of lands of individuals in the same taxing district.

The remaining objection, and the one chiefly relied upon to set aside the assessment, or lessen the amount of tax, involves the construction of section 12 of the railroad tax law of 1884. The clause of that section which is invoked reads as follows, viz.: "That if said board, upon complaint of any company, shall in any case ascertain that the addition of the state tax of one-half of one per cent. to the local rate, as limited in this act, would compel any company to pay more tax than the tax such company would pay if such company did not pay the state tax of one-half of one per cent., but did pay full local rates on all the property and franchises mentioned in section three, without any other exemption than such as would be allowed to an individual citizen on such property, that then, and in such case, the said board shall make such deduction as will make the tax equal to the amount that such company would pay, upon all the property and franchises mentioned in section three, without any state tax of one-half of one per cent.; the board, for the purpose of ascertaining the amount, (but for no other purpose,) to be authorized to apportion the value of the franchise among the local taxing districts."

The complaint of the company in this case, as set forth in writing, filed with the state board of assessors, is that the addition of the state tax of half of 1 per cent. to the local rate, as limited by the act of 1884, would compel it to pay more tax than it would pay if it paid only full local rates on all its

property and franchises mentioned in section 3 of said act, and did not pay the state tax. Therefore it requested the state board of assessors to make such deduction as would make the tax on its property equal to the amount it would pay if it paid full local rates on all its property and franchises without the state tax of one-half of 1 per cent. Do the facts sustain the complaint, in whole or in part? Has there been overtaxation of the property in question in any respect?

The property of the company was found in two taxing districts, viz., the township of Union, in the county of Hudson, and the township of Weehawken, in the same county. The valuation by the state board of assessors of all the property in the township of Union for the year 1885 was \$2,312,386. The total amount of tax to be raised in that township in the year 1885 for local purposes was \$6,671. A rate less than 90 cents on the \$100 on the above valuation of all the property in the township would produce the local tax required. The value of the property of the company in said township of Union as assessed by the board was \$1,646,186, which at the above rate would produce \$4,938.55 tax. The amount of tax assessed by said board on the property of this company, in the township of Union, in the year 1885, was \$24,697.29; being an excess of tax in said township of more than \$19,000 over what the company would pay in that township if they paid full local rates on all their property therein, including a just share of the value of the franchise. In the township of Weehawken, the valuation of all the property in the year 1885 was \$6,229,953. The amount of tax to be raised in said township for local purposes, in the year 1885, was \$46,272.55. A tax at the rate of .743 on the \$100 on all the property in the township of Weehawken would produce \$46,288.55; being a little more than all the tax required for local purposes in that township in the year 1885. The value of the property of this company in the township of Weehawken, in the year 1885, according to the valuation of the state board of assessors, was \$3,915,953; which at the above rate would produce a tax of \$29,095.53. The company was taxed on its property in the township of Weehawken, in the year 1885, by the state board of assessors, the sum of \$46,839.29; being \$17,743.76 more than it would have to pay if taxed at local rates.

The prosecution claims deduction from the tax assessed in the township of Union by the state board of assessors over the sum of \$19,000; and also the sum of \$17,743.76 from the taxes assessed by the board in the township of Weehawken. Such deductions are claimed under the section of the act of 1884 from which I have quoted the above extract. I think the West Shore & Ontario Terminal Company was, in the year 1885, taxed by the state board of assessors in excess of the amount which the law justifies.

An important question here arises: How is excessive taxation under the railroad act of 1884 to be adjusted? From what tax is the deduction to be made; whether from the local or the state tax, or from both? The act is silent on that subject, and it must be construed as best comports with the purposes for which it was passed. It is claimed by the prosecution that the deduction should be made both from the state and local taxes as assessed by the state board.

Considering the history of railroad taxation in New Jersey, from the very creation of that species of property, in connection with the act of 1884, it is evident that the legislature in passing that law did not intend to exempt railroad corporations from paying a state tax of one-half of 1 per cent. under any circumstances. That rate was imposed from the beginning, and has continued to be the rate, secured in the various special charters, and also by incorporation in the general law. The act of 1884 was designed to increase the revenue from this source. It was not intended to diminish the revenue of the state. Had it been the intention of the legislature to change the long-established policy of the state by diminishing the rate of the state tax on railroad

corporations, in any event, such intention would have been manifested by clearly expressed words. The imposition of a tax, not exceeding 1 per cent., upon a part of the property of railroad corporations, for local purposes, was a new feature of railroad taxation in this state. Under the law of 1884 the rate of taxation for local purposes may vary, while the rate of what is called the "state tax" is fixed. It is from the varying amount that the deduction by reason of overtaxation is to be made, and not from the tax raised under the fixed rate for revenue essential to the support of the state government.

The result is that there should be a deduction from the amount assessed in this case by the state board of assessors. In the township of Union, the whole local tax as assessed by the state board is rendered nugatory, and will be canceled by the deduction. But the company must pay the whole of the state tax assessed in that township by the board. In the township of Weehawken, the amount of tax for local purposes assessed by the state board of assessors on the property of the company, should be reduced by deducting therefrom the sum of \$29,090.53; leaving as the tax for local purposes in that township the sum of \$17,763.76, which amount the company should pay, and also the whole state tax as assessed by the board. The figures given herein may not be strictly accurate, but the state board of assessors will correct the assessments, on the principle above stated, by accurate calculation. The error in valuation of a ferry-boat before mentioned will also be corrected.

The question of constitutionality of the act of 1884, raised by one of the reasons, has not been discussed, because it has been settled by the court of last resort.

The assessment of the state board of assessors should be corrected in conformity with this opinion.

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**MOPHERSON and others v. WALTON and others.**

*(Court of Chancery of New Jersey. October Term, 1886.)*

**1. CONTRACTS—BUILDING CONTRACT—MECHANICS' LIENS—SPECIFIC PERFORMANCE.**

A building contract provided that upon final settlement the contractor was to take in payment two houses at a fixed value; and the contractor, before completing the contract, and with the knowledge of the owner, but without his assent to the price, agreed to convey one of the houses to a third person; and, by reason of the contractor's failure to complete the contract, the balance due was not equivalent to the value put upon the houses in the contract. In an action by the owner against mechanics' lien claimants, to settle to whom the balance should be paid, *held*, that a conveyance of the house will be decreed in accordance with the agreement, conditioned that such third person pay the difference between the amount paid by him to the contractor under the agreement to purchase, and the value of the house as fixed by the building contract.

**2. MECHANICS' LIENS—ACCEPTANCE OF ORDER.**

In an action by the owner of a building against the creditors and mechanics' lien claimants of the contractor, to settle to whom the balance due under the contract was to be paid, defendant claimed under an order given on the owner by the contractor, which was general in its terms. Upon presentment the owner made no formal acceptance, but said there was now no money due the contractor, but he would pay the order out of the first money due him, and retained the order. *Held*, a sufficient acceptance, and defendant is entitled to be paid out of the balance on hand.

**3. SAME—MATERIAL-MAN'S NOTICE—EXCESSIVE CLAIM—FATAL DEFECT.**

Section 3 of the New Jersey mechanics' lien law, provides that upon refusal of the contractor to pay a material-man on demand, the material-man shall give notice to the owner of the amount due, and the owner shall retain that amount. *Held*, that a notice claiming more than is due at the time of giving the notice, is defective, and the material-man has no right to proceed under the statute against the owner for the amount due him by the contractor.

**4. SAME—REMEDY AGAINST OWNER LOST BY ACCEPTING NOTES NOT MATURED.**

*Held further*, that the right of the material-man to proceed against the owner was also lost, by accepting notes which had not matured at the time of giving the notice.

## 5. SAME—UNAUTHORIZED ITEMS IN CLAIM.

*Held, also*, that the right was lost by including in the claim items for flagging the sidewalk in front of the houses.

*W. D. Holt*, for complainants. *James S. Attkin, E. T. Green, G. D. W. Vroom, Howell & Bro., James Buchanan, F. C. Lowthrop, and D. Cooper Allinson*, for defendants.

BIRD, V. C. In this case I find that the consideration which the complainants agreed to pay for the houses to be built by the defendant Walton, independent of extras, was	-	\$20,840 00
I find that Walton did extra work to the value of	-	1,073 48
		<hr/>
		\$21,913 48
I find that the complainants paid Walton, cash,	\$12,870 60	
And his due-bill,	2,040 00	
To which is to be added the cost of completing the buildings after his failure,	3,458 01	
		<hr/>
		18,368 61

Showing a balance of - - - - - \$3,544 87

This would be the cash due to Walton on the contract, had not the contract made provision that \$6,000 of the consideration money should be paid in houses. The contract provides that on final settlement Walton shall take two of the houses on Wall street, at \$6,000, in payment. The title to these houses is still in the complainants, and the amount due Walton is not equivalent to the value put upon the houses in the agreement by \$2,455.13.

Because of Walton's failure to complete his contract, a number of material-men, having claims which Walton refused to pay, presented their claims to the complainants, and demanded payment. The claims greatly exceed the balance due, (\$3,544.87.) But this balance is in the two houses and lots to be conveyed to Walton by the contract. And the case is complicated by the fact that Walton agreed with one J. W. McKelvy to convey one of the Walton houses to Mrs. Conner for \$2,500. I find that the complainants had knowledge of this agreement, and in the law assented to the transfer; I do not mean to say they assented to the price. Mrs. Conner was put into possession. Walton had a right to make sale of his interest in these two houses. I know of no principle embodied in the mechanics' lien law, nor in any other, that offers a bar to such a transaction. Nor was he obliged to wait until the contract between him and complainants was complete, and a final settlement concluded. The complainants could not interfere, nor could creditors of Walton. The rights that may spring up between laborers and material-men on the one hand, and the complainants on the other, under such a contract, filed, as this was, under the statute, is perhaps a more difficult question. It is not so clear to my mind that the complainants were not bound to retain the \$6,000 until the final settlement, or at least until a reasonable time after the contract was completed. However, it may be claimed that it could make no difference in the result, which is perhaps the truth.

On November 1, 1879, the defendant Walton gave an order on the complainants for \$1,000 to McPherson & Maharg, material-men. McPherson & Maharg now claim that they are entitled to be first paid the amount of this order out of the funds still due on this contract to Walton. It is claimed by counsel that this was an assignment of \$1,000 of these moneys to McPherson & Maharg. This view is resisted. It is said that the order was general, having no application to any certain funds, and that at the time of its acceptance, if it was accepted, there was no such amount due on this particular contract. As to the first point, Mr. McPherson, the defendant, says "that it was distinctly understood at that time that this order was not in payment for any

lumber that went on Wall street; he still owed us that amount and \$1,164 on our books over that amount; that he gave me the order for, and he owed me, \$1,250 on notes that had been furnished within four months from the date that I made this thing, making \$3,400; the order was not for lumber furnished for the Wall-street or Clinton-street houses; it was a general order." With such a clear and emphatic statement as this from Mr. McPherson, it is quite apparent that the other material-men are justified in resisting the payment of this \$1,000 order out of the funds in hand.

As to the next point, the acceptance. He took the order at once to one of the complainants, Mr. Joseph McPherson, who said "there was no money coming to Mr. Walton at that time," and "out of the first money due Mr. Walton he would pay this order." There was no formal acceptance, but the complainant, Mr. Joseph McPherson, took possession of the order, and held it until the day of hearing, over three years. When asked whether or not Joseph paid him the cost, he answered: "No, sir; there was no money coming to Mr. Walton; he gave me, after some days, a note 'for \$1,000.' He gave me this note for \$1,000, which I supposed was for the order; went to the office and credited Benjamin F. Walton with \$1,000 on our books, but my brother's understanding of the matter was, as I afterwards learned, that he loaned me that \$1,000 to assist me, as I needed money." I find from these facts that the complainants accepted that order, and that the defendants, McPherson & Maharg, were entitled to the payment thereof out of the first money due to Walton on that contract. That order has not been paid; I shall advise a decree directing its payment out of the funds in the hands of the complainants due to Walton on the contract named.

Besides the amount of this order, other large sums of money were due McPherson & Maharg. On November 3, 1879, three days after they obtained the order, they gave notice to the complainants that they should look to them for the payment of \$1,000, for materials furnished to Walton in the construction of the houses above referred to. This notice was given under the third section of the act respecting mechanics' liens. The other material-men resist this claim also. They insist that every such demand is founded on a request of the debtor to pay, and of a refusal by him, of a sum of money actually due, and that in this case there was not \$1,000 due, if anything. The views expressed by the chief justice in *Reese v. Elmendorf*, 38 N. J. Law, 125, 133, very emphatically sustain this view of the statute. His language is: "A privilege to make exorbitant and ill-founded claims, and on a refusal of payment to intercept such sums, and hold them in the hands of the owner an indefinite time, would be simply an instrument of vexation and oppression. The statute says the workman or material-man shall give notice of the contractor's refusal to make payment, and of the amount due to him or them, and so demanded; and it proceeds to authorize the owner thereupon to retain the amount so due and claimed. Obviously, then, the amount demanded must be the amount due. As the amount claimed is to be retained by the owner, it would be a sheer injustice to allow more to be claimed than is justly due. If the workman or material-man claims therefrom more than has in fact been earned by him, such exaggeration is, I think, fatal to his right to use the statutory procedure against the owner." These plain, sensible, and business-like rules settle this branch of the case against McPherson & Maharg. They had taken the order November 1st for \$1,000, and although the defendant McPherson says it was on the general account, yet the order itself expressly says it was to be charged against Walton's account respecting these houses, and it nowhere appears that the complainants had any other account with Walton. I say they had procured that order November 1st, when the defendant McPherson admits there was nothing due to Walton from complainants, and on the third of November he makes this demand of \$1,000, when the order had not yet been paid nor formally accepted. Besides this, the

statement of account, showing all the materials furnished to their particular houses, offered in evidence, presents, in the aggregate, only \$1,144.22, without crediting the order, leaving over and above the order only \$144.22, including therein two items furnished November 5th, and also including several items which may not belong in that list at all. Plainly, then, since the order is accounted a valid claim, it is my duty to advise the rejection of this one.

We next come to the claim of Hughes, Hutchinson & Co., for \$1,500, which was made of the complainants January 2, 1880, at 12 o'clock and 40 minutes. This claim is resisted by other material-men, not because Walton did not justly owe them for materials furnished on this contract to that amount, but because that amount was not due at the time of the demand and notice. It is said that he truly owed them, but that the time for payment had been extended by Hughes, Hutchinson & Co., by accepting notes which had not yet matured. And *Dey v. Anderson*, 39 N. J. Law, 199, is relied on. The value of the goods furnished was \$1,630.52, from May 29, 1879, to January 2, 1880. Including this, they had an account against Walton, at this time, amounting to \$5,811, for \$3,762 of which they had taken and held Walton's notes. These notes were given from time to time on the general account, and, it is admitted, included large portions of the items of material furnished for these houses. It is also admitted that these notes all matured after the demand and refusal. Under the decisions in our own courts, then, these facts would seem to exclude all necessity for further inquiry, and to oblige me to advise against the claim of Messrs. Hughes, Hutchinson & Co.

J. P. McGalliard & Co. filed their claim with complainants January 2, 1880, and notified them to retain the amount out of any moneys due Walton. The claim was for \$1,300. This amount was not only not due to him from Walton on account of these houses, but the whole claim was embraced in a note or notes which had not yet matured. Hence, further consideration of this demand would prove unavailing.

I shall advise a decree in favor of the payment to Samuel Heath of the sum of \$123.73, with interest from January 2, 1880, and of \$326.82, with interest from January 13, 1880, next after the payment of the order for \$1,000 given to McPherson & Maharg.

The defendant Samuel B. Packer gave three separate notices to the complainants, and directed them to retain the amounts named in each; one of them was for \$104.15; one for \$450; and one for \$368.65. The first two were served January 3, 1880, and the last January 6th. It is unfortunate for the first one that it contains items amounting to \$69.74, for materials for flagging the sidewalks in front of the houses named, which, I think, are not proper for such a claim. This obliges me to reject the first claim, under *Reeve v. Elmendorf*, *supra*.

The same principle of construction condemns the third claim. The noxious items are small, indeed; one being "2 flaggers  $\frac{1}{2}$  day at \$2.50=\$1.80," and one "1 laborer  $\frac{1}{2}$  day at \$1.50=.75." But the statute is not to be construed by numbers or quantities, but upon principle. Upon this intelligent view, Walton is as well justified in refusing a bill that has an excess of \$2.55, as of \$255. And in such a case, on no conceivable grounds could the complainants justify a payment of any part of the claim under the statute.

The claim for \$450 stands without any such weakness. I shall advise its payment.

Fletcher Coleman presented a claim for \$105.20, and having been refused payment by Walton, he gave the complainants notice to retain that amount. I will advise the payment of that claim. His claim matured, or was made complete, under the statute, February 24, 1880.

Josiah T. Baily had an account, amounting to \$856.43, against Walton, for materials furnished him to go into these houses. He demanded payment of Walton April 7, 1880, and he refused to pay; of this refusal he at once gave

notice to complainants, and requested them to retain that sum. I think this claim is free from objection, and advise its payment, with interest.

I will advise a decree directing the sale of the two Wall-street houses by a master of this court, unless Mrs. Conner pay into court \$500 for the lot purchased by her of Walton, within 30 days from a service of a copy of the decree which shall be made in this case upon her, and unless Benjamin F. Walton pay into this court the sum of \$3,000, within 30 days from the service of a copy of the said decree. Both Mrs. Conner and Walton will be required to pay interest on the said sum, respectively, from the first day of April, 1880. Upon the payment of these moneys, the complainants will be required to execute a deed or deeds in accordance with the terms of their contract. If Walton or his assigns fail to comply with this provision, then, upon a sale, this court will direct the execution of proper conveyances.

I will advise that the claims be paid in the order in which I have considered them. Those claimants who have prevailed are entitled to costs out of the fund; those who have not, must pay their own costs.

### TROTTER v. LEHIGH ZINC & IRON Co., Limited.

(Court of Errors and Appeals of New Jersey. November Term, 1886.)

#### ATTACHMENT—OF MONEY PAID INTO COURT—PROCEDURE.

Money paid into the clerk's office by order of court, in a suit pending between H. and others, and claimed by H., is subject to attachment at the suit of a creditor of H.; and, on petition of such creditor, the chancellor will order the money to be retained in court, to be applied to the satisfaction of any judgment which may go against H. in the attachment proceedings, subject, however, to the rights and equities of the parties to the original suit.

#### Appeal from chancery court.

On petition. For the opinion of BIRD, V. C., now affirmed, see 3 Atl. Rep. 95.

C. & R. Wayne Parker, for appellant. C. D. Thompson and H. C. Pitney, for respondents.

PER CURIAM. This order unanimously affirmed, for the reasons given by the vice-chancellor in the foregoing conclusions.

### WINANS v. GRAVES.

(Court of Errors and Appeals of New Jersey. November 2, 1887.)

#### 1. CREDITORS' BILL—BY FRAUDULENT ASSIGNEE OF JUDGMENT.

A party to whom a judgment has been assigned, in pursuance of an understanding with the judgment debtor that the assignee shall hold the same for the purpose of protecting the defendant's property from the claims of his creditors, will receive no aid from a court of equity, in reaching and applying to the payment of the assigned judgment property which the judgment debtor has placed in the name of a third party, in fraud of his creditors.

#### 2. SAME—PARTIES—GRANTOR OF INNOCENT PURCHASER.

In a suit brought by a creditor of a fraudulent vendor to charge a judgment upon land formerly owned and fraudulently conveyed by such vendor, and which, after several intermediate conveyances through parties who each took title with notice of the fraud, finally reached an innocent vendee, who paid a part of the purchase money, the immediate grantor to such vendee should be made a party to the suit. If no objection is made to the absence of such party till final hearing, the court may still, in its discretion, refuse to make a decree in the cause.

(Syllabus by the Court.)

Appeal from court of chancery from opinion of Advisory Master WILLIAMS. See 4 Atl. Rep. 645.

C. H. Beasley and S. B. Ransom, for appellant. F. D. Smith and Horace Graves, for appellee.

REED, J. The bill in this cause was filed by Robert Graves, assignee of a judgment against William H. Lilliston, to reach certain real estate now owned by Sarah E. Winans, but which, as the bill charges, was bought by Lilliston, the title put in his wife's name for the purpose of evading his creditors, and was conveyed by her to her daughter, Catharine Dewing, and by the last-named person to Mrs. Winans, a sister of Mrs. Lilliston. Graves, the appellee, got the judgment from one Middleton, who was the assignee of the judgment creditor, Wild. Wild was an attorney in the city of Brooklyn, and recovered the judgment in the Brooklyn city court, on April 19, 1875. This judgment is said to have been founded on a debt for fees and professional services which Lilliston owed Wild. Wild received from Lilliston full satisfaction for this judgment. The payment was brought about in the following way: Lilliston had, as guardian of some infants, exchanged some of the property of his wards for other property, which, he says, subsequently depreciated in value. He was pursued, on behalf of the infants, for the cash value of the exchanged property. The court ordered him to execute a mortgage to a Mrs. Voss, one of the wards who had arrived at her majority, in the sum of \$2,800, to secure to the infants that sum. He arranged to get the title to certain lots, known in this cause as the Halsey-street lots, in such shape that he was enabled to give the required mortgage of \$2,800 to Mrs. Voss for the Wardell infants. It appears, however, that his difficulties in respect to the estate of these infants continued, or were revived, for subsequently he was threatened with imprisonment on a proceeding to attach him for contempt for failing to do something in regard to his trusteeship, which does not very clearly appear. The proceedings against Lilliston for an attachment for contempt were being pushed by a Mr. Burnett, a lawyer in Brooklyn, but Burnett's movements seem to have been controlled by Mr. Wild, who really represented the movement against Lilliston in the professed interests of the infants. Mr. Wild, at this juncture of affairs, concluded that the time to make his judgment had arrived. He represented to Lilliston that he had it in his power to stop the prosecution of the contempt proceedings, and that he would stop them if Lilliston would consent to do what Wild wished. He wished to get, for his judgment, the three Halsey-street lots, free of incumbrance. There was upon these lots the \$2,800 mortgage, for the security of the infants, already mentioned. Wild proposed to rid the property of this incumbrance by advising Mrs. Voss that it was for the interest of the infants that she should release this property from the mortgage. He told her that it was inadequate security, and that the infants would do better by suing the securities on Lilliston's bond. Acting under this advice, Mrs. Voss released the property from this incumbrance by canceling the mortgage. Logan, who held the title to the equity of redemption in these lots, then conveyed them to the person indicated by Wild, and the property passed under the control of Wild. So that Wild had received pay for his judgment, by advising Mrs. Voss to cancel her mortgage upon the property which he got, and by stopping the proceedings for contempt taken in the interest of the infants whom he really represented. Lilliston had consented that those who had become sureties for his conduct should be mulcted for his default, while this property should be passed over to his ward's attorney. By this arrangement the evidence is conclusive that Wild received this property of Lilliston's in full satisfaction of his debt. Instead of entering satisfaction of his judgment it appears to have been assigned to one Middleton. The advisory master, who heard the cause below, concluded that the judgment was satisfied in Wild's hands, but that Middleton got a title to such judgment by the assignment just mentioned, because Middleton had surrendered an interest which he then had in these lots. This interest is alleged to have arisen as follows: At the time when Lilliston was ordered by the court to give the mortgage to Mrs. Voss upon these Halsey-street lots, they were subject to a mortgage of \$750. Middleton claims to have advanced the money

to pay off this mortgage, so that Lilliston could give to Mrs. Voss a first mortgage. He claims that he took a deed for the property, which he never recorded, and that after the Voss mortgage was canceled he destroyed his deed so that the title could be made to Wild's appointee to pay the Wild judgment. That he was to be repaid for his destruction of this deed by an assignment of the judgment.

There is great difficulty in arriving at the truth of this claim. It seems that the title to these Halsey-street lots had been put in the name of one Bilyew, a nephew of Mrs. Lilliston. Bilyew made the deed to Lilliston on December 28, 1874, and Lilliston made the mortgage to Mrs. Voss December 30, 1874. Middleton intimates in his testimony that Bilyew made him a deed at the time of the loan of the \$750, and it was before the Voss mortgage was given. It is difficult to conceive why a deed should have been made to him at that time, or indeed at any time, to secure the loan. Middleton knew the purpose of the loan, which was to clear the property so as to permit the making of the Voss mortgage by Lilliston. He knew that the property was worth less than the amount of the Voss mortgage. A deed taken by him either before or after the making of the Voss mortgage would be of no value as security. If taken before, his title would be subjected to the lien of the mortgage, of which he was cognizant, while of his title the mortgagee was not apprised. If taken after, he got no title, because it was already in Lilliston, who conveyed to Logan. And the fact that Lilliston, after giving the Voss mortgage, conveyed the property to Logan, who recorded his deed, and held the title until called upon to reconvey to Wild's appointee, is a curious feature in this transaction, if it be assumed that Middleton had already a title to the same property. In any aspect of the case, when it is so clear that the mortgage would not have been satisfied unless upon the understanding that Wild should obtain the property, and it also appears that Middleton's interest in it while mortgaged was worthless, I do not see how it can be said that he surrendered any valuable interest in the property at the time of the assignment of the judgment. If we assume, however, that Middleton was a creditor of Lilliston, and that as between him and the parties to the judgment an assignment of the judgment might be valid as against Lilliston, and subsequent incumbrancers of his property, yet I am convinced that the facts disclosed in the testimony in this case would exclude him from any assistance from a court of equity in enforcing this judgment.

The circumstances show convincingly that the primary object of this assignment was to keep the judgment alive as a shield against the claims of other creditors of Lilliston. It seems obvious that Middleton did not wish the assignment as a security for any indebtedness of Lilliston, nor did he intend to use it for the collection of any such debt. The relations between him and Lilliston, both before and after the assignment, were entirely confidential. Lilliston says that he used Middleton among others as the repository of the titles of the properties which he owned, because he had so many suits and judgments against him that he could not hold any property in his own name. He was in as strong a position to secure his debt without as with this judgment. And his conduct after the assignment fortifies this view. He knew, for he says that Lilliston told him, that he, Lilliston, had lands in his wife's, his step-daughter's, and his sister's names. About the time of the assignment, although the exact date does not appear, Middleton had in his name the title of the Thompkins-avenue property, and although he says he was then a creditor of Lilliston, he permitted Lilliston to collect the rent. From the time of the assignment in the spring of 1876, down to 1882, he took no steps to collect the judgment. At the end of that time, he filed a bill in the city court of Brooklyn, to reach some property which he charged had been put in the name of a third person by Lilliston, in fraud of his creditors. But it is obvious that Lilliston was himself behind the complainant in that suit. The cause

of the litigation grew out of Lilliston's troubles with his wife. She had ceased to live with him early in 1881. She filed a bill in July, 1882, and in August, 1884, got a decree of divorce from him on the ground of adultery. This condition of affairs between himself and wife led to this suit. When their relations became such that he lost control over the property, which, under the use of her name, he had been concealing from his creditors, he cast about for some means of reaching it. He resorted to the use of this judgment as a method of accomplishing by indirection what he could not do directly. From all the testimony I am satisfied that the statement of Logan, who had been an attorney for Lilliston, relative to the assignment of the judgment, is substantially accurate. His statement is this, namely: That when the judgment was satisfied it was deemed best not to satisfy it on the record, and Lilliston gave me the name of Middleton, and said that Middleton was sheriff, or deputy-sheriff, and that Middleton being in the sheriff's office could be of service to him, and that instead of being satisfied of record it should be assigned to Middleton. Mr. Logan then proceeds to state how the judgment in Middleton's hands could be of service to Lilliston. It would be a first lien on all his property, held by a friend, and besides, by the custom of the sheriff's, as Middleton who was a deputy-sheriff would hold the first execution, all other executions against Lilliston would go into the hands of the same deputy. So I am forced to the conclusion that the assignment was one of the devices, resorted to by Lilliston, to baffle his creditors, and that Middleton stood as assignee of this judgment as he had stood as grantee of many conveyances,—in the posture of an abettor of Lilliston's design. He would have no standing in a court of equity as a suitor asking its assistance in collecting this judgment.

Besides, I am satisfied that these suits were brought in the interest of Lilliston to enable him to reach property which he had fraudulently concealed. In this the court will not lend its aid. *Ruckman v. Conover*, 37 N. J. Eq. 583. It is true that the present case is brought by Mr. Graves, an assignee of Middleton, instead of Middleton himself. The assignment is said to have been made in payment for professional services rendered to Middleton by Graves, who is a lawyer. But I think it clear he occupies no better position than his assignor. Nor is it necessary to put this conclusion upon the ground that an assignee takes a judgment, subject to all the defenses against it while in the hands of the assignor, and that the fraud which tainted this judgment was of that kind which an assignment in good faith for value does not purge. I think it not necessary to decide how far his rights would permit him to press this claim if he occupied a different position, because of the fact that Mr. Graves has been concerned more or less in the transactions out of which the assignment of this judgment sprang from the beginning. He was Middleton's attorney for a number of years. In 1876, he was Lilliston's attorney in respect to the proceedings against Lilliston to collect the amount he owed the Wardell infants. Out of this proceeding came the order to give the Voss mortgage, and subsequently, the payment of and assignment of the Wild judgment. He knew of Lilliston's habit of concealing his property, for he speaks of such a practice existing as early as 1874. He brought the suit in Middleton's name in the Brooklyn city court in 1882, and it was during the progress of that suit that Middleton became tired of the litigation, he says, and assigned the matter to Mr. Graves. While Mr. Graves is not chargeable with any active participation in the original assignment, or its purpose, yet his close connection with all these, and the subsequent proceedings relative to it, must have apprised him of the character of the transaction long before the date of the assignment to him. He is chargeable with notice of the design for which the judgment was kept alive, and took it burdened with Middleton's inability to invoke the aid of a court of equity to enforce it.

I am further of the opinion that Sarah E. Winans is a *bona fide* purchaser

for value. I think it is probable that her grantors, immediate and remote from Mrs. Lilliston, knew at the time when each acquired her title, of the design of concealment; so each took the title with notice of that purpose. But the conclusion that Mrs. Winans occupies the position of a *bona fide* purchaser for value defeats the claim of the complainant under the bill filed in this cause. It is filed for the cancellation of the conveyance to her which cannot be decreed except upon the assumption that she took the title with notice, or without paying any consideration. Under a bill drawn for that purpose, it would be proper to charge upon the property the amount found by the advisory master to be due upon the judgment, as the difference between the amount paid by Mrs. Winans and the value of the property is equal to the sum so found due. Mrs. Winans would be protected only up to the amount of the consideration paid by her. *Muttrheid v. Smith*, 35 N. J. Eq. 303.

I am speaking of the aspect of the case aside from the fraudulent character of the assignment of the judgment already discussed. I remark again that upon a proper issue the charge upon Mrs. Winans' property might have been made. And this court will sometimes direct the amendments to be here made. But there is another obstacle in the way of reaching this result. It lies in a defect of parties to the suit. Mrs. Dewing, who sold to Mrs. Winans, is not made a defendant. She would not be bound by a decree based upon her fraudulent act in selling the land to Mrs. Winans. She would, therefore, notwithstanding the land had been charged with Graves' claim, have her action against Mrs. Winans for the unpaid part of the purchase money. The question of Mrs. Dewing's fraud would then have to be tried *de novo*, with possibly a different result. In such an action Mrs. Dewing, while not estopped by the decree in this cause, would be prejudiced by its existence. The effect of an absence of necessary parties, when the objection is raised for the first time at the final hearing, rests very much in the discretion of the court, to be exercised in view of the effect of the decree upon the rights of the omitted parties, and of the value of the decree to the complainant. *Wood v. Stover*, 28 N. J. Eq. 248.

The court will also consider the character and importance of the suit as well as the time consumed in its prosecution. In this case, if there existed doubts as to the character of the assignment upon which the complainant stands, I should yet regard the absence of Mrs. Dewing as a party defendant, as a serious objection to the decree in this cause.

The decree should be reversed. Unanimously reversed.

#### LEATHWHITE and others v. BENNET and others.

(Court of Chancery of New Jersey. October 9, 1887.)

#### 1. VENDOR AND VENDEE — PURCHASER AFTER LEVY OF ATTACHMENT NOT A BONA FIDE PURCHASER.

The purchaser of lands took a conveyance in his wife's name, and a writ of attachment was subsequently issued against him, and his interest in the land levied on at the suit of one of the complainants. After the levy, the lands were conveyed by the purchaser and his wife to one of the defendants, in consideration of a debt due him. On a bill filed to set aside this conveyance as fraudulent, *held*, that the relief must be granted, as said defendant took it with knowledge of the attachment, and was not a *bona fide* purchaser.

#### 2. ATTACHMENT—DEBTORS CANNOT CONVEY TITLE AFTER LEVY.

An attachment having been issued against a debtor, the sheriff levied on his interest in lands conveyed to his wife, but for which he had supplied the purchase money. The debtor and his wife subsequently conveyed the lands to one of the defendants, who had full knowledge of the attachment. On a bill filed to set aside the conveyance as fraudulent, *held*, that the debtor's interest in the lands was held by the law under the attachment, and that no title passed to said defendant by virtue of the conveyance to him.

### 3. HUSBAND AND WIFE—CONVEYANCE TO WIFE IN PAYMENT OF STALE DEBT—RIGHTS OF CREDITORS.

The interest of a purchaser of property who had taken the conveyance in his wife's name was levied on under a writ of attachment against him. The wife claimed to be entitled to the land on the ground that she had advanced money to her husband a long time previous, which money he had invested and disposed of in his business. *Held*, that such advances would not support a conveyance of the purchaser's lands to his wife, to the exclusion of his creditors.<sup>1</sup>

On bill to set aside fraudulent conveyance.

*H. M. Snyder, Jr.*, and *D. J. Pancoast*, for complainants. *H. M. Cooper*, for defendants.

*BIRD, V. C.* Gilbert H. Hyers was indebted to G. L. in the sum of \$500. October 6, 1886. November 5, 1886, W. C. Finger and wife conveyed to J. Hyers, wife of G. H. H., a tract of land in Camden, and on November 16th, one E. S. and wife conveyed to said J. H. a tract of land on Johnson street, adjoining the first tract above named, so that she had title to two adjoining tracts of land. January 10, 1887, a writ of attachment was issued out of the Camden circuit court against the said G. H. H., at the suit of G. L., one of the complainants in this suit; after which the other parties, complainants in this suit, were admitted as parties to said attachment. By virtue of said writ of attachment, the sheriff levied upon the right, title, and interest of the said G. H. H. in said premises so conveyed to J. H., the wife of G. H. H. February 10, 1887, the said Volney G. Bennet, one of these defendants, was admitted as an applying creditor. March 8, 1887, the said G. H. H. and J. H., his wife, conveyed the said premises to V. G. B., one of these defendants, who was also an applying creditor in the said attachment suit. The complainants in this suit insist that the said lands so conveyed were the properties of the said G. H. H., and that they are subject to the said attachment, and that the said V. G. B. can take nothing as against the complainants by virtue of his pretended title. The weight of testimony shows that G. H. H. paid the consideration therefor. There is nothing to satisfy me that his wife advanced any money for that purpose. It seems to have been the intention of G. H. H. to make purchase of this property some time before he succeeded in doing so. He borrowed money for that purpose.

Whatever may have been the course pursued by V. G. B., and whatever consideration may have moved him to act in the premises, what he did was after the attachments were issued, and was with a full knowledge of the situation. He, therefore, cannot be said to be a *bona fide* purchaser, for the consideration which he paid was the securing of the debt which was then due. This view of the case alone would seem to dispose of it in favor of the complainants.

And, besides, if I am correct in the view that G. H. H. had an interest in the premises because he paid the consideration, then, although he joined in the deed, title would not pass, since it was held by the law under the lien of the attachment. The twentieth section of the attachment act (Revision, 45) is in these comprehensive words: "That the word 'lands' in this act shall be construed to include tenements, hereditaments, and real estate, and *any interest therein*." Any interest must of necessity include an equitable interest; such an interest as a court of equity can pursue and appropriate to the discharge of debts.

And Mrs. H. must have well understood that this property, so attached, was, in truth, her husband's; for, after he had absconded, she said to Mr. L.,

<sup>1</sup>As to the right of a wife to enforce a debt against her husband, and to receive a transfer of his property in payment thereof, or as security therefor, see *Lyon v. Zimmer*, 30 Fed. Rep. 401, and note; *Hanson v. Manley*, (Iowa,) 33 N. W. Rep. 357; *Jackson v. Beach*, (N. J.) 9 Atl. Rep. 380, and note; *Witz v. Osburn*, (Va.) 2 S. E. Rep. 33, and note; *Webb v. Ingham*, (W. Va.) 1 S. E. Rep. 816, and note; *Chapman v. Summerfield*, (Kan.) 14 Pac. Rep. 235; *Bank v. Weber*, (Iowa,) 33 N. W. Rep. 606.

who had a right to inquire, that there was no necessity for Mr. L. leaving, as there was plenty of property to satisfy his creditors, which, I think, could not have been done without taking into the account the property now in question. She made similar observations to others. These observations, and their relation to the case, will be more fully appreciated when it is remembered that H. was in the practice of taking title to lands in his wife's name; not to injure any one, but, as he supposed, to facilitate his enterprises in building.

I can find nothing in the case to justify the wife in insisting that she is entitled to hold this land because she advanced \$600 to her husband many years ago, which he then invested in a house and lot; or because she has earned money since, in various ways, which went into his business. The courts allow the claims of wives against their husbands, when properly established, just the same consideration, force, and integrity as that of strangers; but all courts feel bound to look at the circumstances with great care, lest they allow to be so established demands which have long been forgiven, if not forgotten; demands whose creation has been lost in the oblivion of the past, and whose existence was never noted by any note, memorandum, or account. Courts may say that the statute of limitations shall not be invoked to the prejudice of the wife, when she is pursuing her claims against her bond, but surely this liberality does not imply that the mercy of the court should be so sovereign as to embrace, and hide from sight, all short-comings. It is not sufficient to say that the wife once had money, and that she let her husband have it, and that he devoted it to his business, and when he became embarrassed he discharged the demand by making conveyance to her of the title of his real estate, to the exclusion of his creditors, who had every reason, from these visible and tangible tokens of ability, to rely upon his financial integrity.

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HAYDEN, Trustee, etc., v. ALLYN and others.

(*Supreme Court of Errors of Connecticut.* February 25, 1887.)

1. **INSOLVENCY—PREFERENCES—RETURNING GOODS UNPAID FOR.**

A merchant, finding that he was in failing circumstances, proposed to his largest and most pressing creditor that he should take back the goods he had sold him, and apply them at cost price to the payment of his account. He made this proposition, not with the intention of going into insolvency, but with the view and hope, which he communicated to the creditor, of reducing his stock, and cutting down his expenses, and thus of continuing in business. The creditor, finding that the merchant could not sell the goods as a whole to any one else, and that he was unable to borrow money to meet the bill, took the goods back. A few days later the merchant's store was closed by attachment, and he was forced into insolvency. *Held*, that these facts did not warrant the conclusion that the return of the goods was made "with a view to insolvency," and that the transfer was therefore not invalidated by Gen. St. Conn. p. 378, § 1, providing that preferences made "with a view to insolvency" shall be void.<sup>1</sup>

2. **APPEAL—REVIEW OF FINDINGS BY TRIAL COURT—CONCLUSIONS OF LAW.**

In an action in Connecticut by a trustee in insolvency to recover the value of goods alleged to have been transferred by the insolvent to one of his creditors, in violation of the insolvent act, the court found the facts in detail, and, "upon the facts set forth," held the transaction void under that act. *Held*, that the finding of invalidity was not a conclusion of fact, but an inference of law from the facts specifically found, and as such, it was reviewable by the supreme court.

Appeal from common pleas, Hartford county.

Action by Hayden, appellant, as trustee in insolvency of one Wheeler, to recover the value of goods alleged to have been transferred by Wheeler to the de-

<sup>1</sup>In the absence of statutory prohibition, a debtor, though known to be in failing circumstances, and contemplating an assignment, may pay or secure one or more of his creditors, though the effect of such action is to render him unable to pay or secure other claims equally meritorious. *Gilbert v. McCorkle*, (Ind.) 11 N. E. Rep. 296.

defendants in violation of the insolvent law. The case was tried to the court, (BENNETT, J.,) who found the following facts:

"The defendants are partners under the name of the Allyn & Blanchard Company, dealing in groceries in the city of Hartford. The partnership consists of N. B. Allyn, O. H. Blanchard, C. G. Lincoln, and R. N. Seyms. Between November 20, 1885, and February 10, 1886, they had sold and delivered goods to the value of \$382.31 to Frederick A. Wheeler, of Hartford, a retail dealer in groceries and meat, and on March 11, 1886, he was owing them \$232.04. Wheeler's place of business consisted of two stores adjoining and connected by an arch through the partition wall. In one he conducted the grocery business, in the other, the meat business. He had one clerk. Charles A. Fowler was employed by the defendants as their city agent in soliciting orders for goods, and collecting accounts due the firm. The first bill of goods sold Wheeler November 20, 1885, amounted to \$223.89, a part of which was sold on 30 days' time and a part on 60 days'. On that day Wheeler was put on Fowler's list of customers, and thereafter Fowler continued to visit him regularly twice a week, in common with all other customers on his list. After the account became due Fowler began to dun Wheeler, and continued to do so upon his regular visits as often as once or twice a week, until March 1, 1886. During that time Wheeler made two payments,—January 1, \$100, and March 1, \$50. From November 20, 1885, to February 10, 1886, Fowler continued to sell goods to Wheeler to any amount he chose to order, and upon the regular credit given by the defendants to their customers.

"On February 1st, Wheeler took an inventory of his business, which showed \$750 of assets and \$500 debts. About the middle of February, Wheeler made a statement of his assets and liabilities to Fowler, as shown by the inventory, and at the same time represented to him that a friend in Springfield either owed him, or was about to lend him, sufficient money to pay all his debts. Fowler reported these statements to the defendants the same day. In the latter part of February, Wheeler had a further talk with Fowler about his business affairs, and then said that his meat business was profitable, but that his grocery business was not; that he contemplated a change in his business arrangements, and wanted either to obtain a partner or sell out his grocery department; that he would buy no more goods of the Allyn & Blanchard Company until he had paid their bill in full, and asked Fowler if his firm would take back the goods on hand which he had bought of them. Fowler told Wheeler that he had no authority to take the goods back, but advised him to consult the defendants.

"On March 1st, Wheeler went to the defendants' store, and paid them \$50 on account, and at the same time had a talk of an hour or more about his business affairs with Allyn, one of the defendants. He stated that he did not have the money to pay his debts then due, and could not turn his goods fast enough to meet his obligations; that all his creditors were asking for payment, but the defendants were pressing him the most; that the defendants were his largest creditor, and the only one that he owed more than \$100. Wheeler asked the defendants to take back his stock of groceries on hand which he had bought of them, and credit the amount on his account; stating that if they would do so he could close out his grocery business, thereby reducing his expenses by surrendering the lease of one store and discharging his clerk. He thought in that way he could go on with his meat business. Allyn suggested that, instead of returning the goods, he should try and borrow \$400, or get a partner, or sell out his grocery business; but that, if he did not succeed in any of those efforts, they then would take back the goods. Wheeler went away to make an effort to carry out Allyn's suggestion. March 11th, Wheeler telephoned to the Allyn & Blanchard Company that he wished them to take back the goods that day. Allyn received the message, and asked him to come to the store. Allyn was about leaving for New York, and spoke to Blanchard

about the matter; stating that Wheeler would come to the store for the purpose of returning the goods and fixing up his account. About 2 o'clock Wheeler came, and saw Blanchard, and stated that he wished to fix up his account by returning the goods. Blanchard did not wish to take back the goods, and suggested that he sell them to some one, and pay them the proceeds. Wheeler stated that he had tried to sell them, but could not find a customer, and, as he had no money, he did not know how they could get payment unless they took back the goods. He thought if he could fix up their account he could go on in business, as his other creditors were not pressing him. Seyms was also present at this time, and suggested to Wheeler that he thought Woodward & Co. would buy the goods. Seyms and Wheeler then went to the store of Woodward & Co. to find Woodward. Woodward & Co. were successors to Seyms & Co., retail grocers, and also were customers of the Allyn & Blanchard Company to the extent of about \$500 per month. Seyms stated to Woodward that he wanted him to buy the stock of groceries belonging to Wheeler. When Woodward wished to know why he wanted him to buy, Seyms said, 'You go down and buy them; it is all right,'—meaning by that that if Woodward bought the goods, and lost anything by reason of so doing, he would make his loss good. Woodward agreed to buy the goods at the price at which they had been billed to Wheeler by the Allyn & Blanchard Company. He bought them simply on the suggestion of Seyms, but expected to use them in his business. Seyms, Wheeler, and Woodward went at once to Wheeler's store, and the goods were then delivered to Woodward. The whole amount of goods delivered was \$184.26. It was agreed between Seyms and Wheeler that the proceeds should be turned over to the Allyn & Blanchard Company and credited on their account with Wheeler. There were two loads of the goods. The first load was taken to the store of Woodward & Co. After the second load was on the wagon, Woodward told Seyms that he could not take the goods, because he thought if it should become known to his customers that he had bought a second-hand stock, and put in with his own stock, it would injure his trade. Woodward decided not to take them, and then Seyms ordered the second load then on the wagon to be taken to the store of the Allyn & Blanchard Company, and it was so delivered. On the next day the other load was also delivered at the store of the company, and all the goods became a part of their stock. In the evening of March 11th, Seyms and Wheeler met at Woodward's store to close up the transaction. Woodward gave Woodward & Co.'s check for \$184.26 to Wheeler, payable to his order, which Wheeler indorsed and delivered to Seyms. Seyms gave Seyms & Co.'s check for \$184.26 to Woodward, payable to Woodward & Co.'s order. The next day Seyms turned over Woodward & Co.'s check indorsed by Wheeler to the Allyn & Blanchard Company, and the amount of \$184.26 was credited on their account with Wheeler. Then the Allyn & Blanchard Company gave their check for \$184.26 to Seyms, payable to his order, and in a day or two afterwards the Allyn & Blanchard Company cashed their check for Seyms, who put the amount to the credit of Seyms & Co., and that completed the transaction.

"Wheeler continued his business for a few days afterwards, when his store was attached by a creditor, and closed up. March 18th a creditors' petition was filed in the probate court, praying that Wheeler be adjudged an insolvent, and on March 25th he was so adjudged. The plaintiff, George A. Hayden, was appointed his trustee in insolvency, and has duly qualified. The whole estate of Wheeler, as inventoried and returned by the trustee, is \$138.40. The plaintiff made demand before the bringing of this action upon the Allyn & Blanchard Company for the goods taken from Wheeler's store, which was refused. The value of these goods is found to be \$184.26.

"March 11, 1886, Wheeler was in failing circumstances. He was owing debts upwards of \$500, and was unable to pay them in the ordinary course of business. His creditors, some of them, were pressing for payment. His busi-

ness affairs were in so critical a condition that an attachment put on his store closed it up, and was followed at once by proceedings in insolvency. At the time the transfer of goods was made the Allyn & Blanchard Company knew of Wheeler's inability to pay his debts in the ordinary course of business, and that such transfer of goods was the only way he could meet his debt to them. They also knew that Wheeler's hope of being able to go on in his business after such adjustment of their claim rested on the fact that his other creditors were not pressing him for payment. At the time of the transfer of the goods Wheeler did not intend to go into insolvency.

"Upon the facts set forth it is found that the transfer of goods was not made in good faith, in the regular course of business, and was made in view of insolvency, and with intent to prefer a creditor, the Allyn & Blanchard Company, and with the knowledge of such creditor that it was so made, within the meaning of the insolvency act of 1885."

There was judgment for the plaintiff for the value of the goods, and the defendants appealed.

*L. Sperry*, for appellants. *J. S. Barbour*, for appellee.

LOOMIS, J. This case turns upon the question whether the transfer of goods by Wheeler, the insolvent debtor, to the defendants was made in such circumstances that it was void as against Wheeler's creditors. The court below has found the facts in detail with regard to the whole transaction, and upon the facts so found held the transfer to be void under the insolvent law. The conclusion of the court upon the subject is thus stated in the finding: "Upon the facts set forth it is found that said transfer was not made in good faith, in the regular course of business, and was made in view of insolvency, and with intent to prefer a creditor, the defendant company." Upon this conclusion the court held the transfer void, and rendered judgment for the plaintiff, the trustee in insolvency, to recover the value of the property.

If this had been a conclusion of fact from the evidence before the court, it could not be reviewed; but it is very clearly an inference of law from the facts specifically found. The evidence had exhausted itself in producing the facts thus found. Nothing remained but for the court, in the exercise of its legal judgment, to draw its inference from the facts. This the judge himself distinctly states in saying that this conclusion is "upon the facts set forth." In such a case the conclusion of the court can always be reviewed by the appellate court. An erroneous conclusion is an error of law, and not an error in an inference of fact.

The question, therefore, is whether the facts presented show clearly that the transfer was in violation of the provisions of the insolvent law, and therefore void as against creditors. Clearly the burden of proof on this point rests upon the plaintiff. Aside from the ordinary rule that a plaintiff must make out his case, there is a presumption that a transaction is legal unless brought clearly within some prohibitory or invalidating statute or rule of law. At common law such a transfer would be valid, and it is rendered invalid, if at all, only by the provisions of our insolvent law. Gen. St. p. 378, § 1.

The provisions of that section are clearly and authoritatively summarized in *Utley v. Smith*, 24 Conn. 290, where the court says: "Three things are necessary to make the deed of an insolvent debtor fraudulent and void under the statute of 1853—*First*, the grantor must be in failing circumstances; *second*, the deed must be made with a view to insolvency; and, *third*, the deed must be made with an intent to prefer one creditor over another."

In this case the facts show that the debtor was in fact in failing circumstances, and, if what he did was in view of insolvency, the transfer of this property must be regarded as having been made to give the defendants a preference over his other creditors. The whole question, therefore, is whether the transfer was made "with a view to insolvency." Upon this point it is not enough

that a debtor was actually insolvent, and that he knew that he was so. This is consistent with the intention and hope on his part to work out of his embarrassment and continue his business. In this case it is expressly found that the debtor, "at the time of the transfer of the goods, did not intend to go into insolvency." It is also found that, at the time of the negotiation resulting in the transfer of the goods, "Wheeler asked the defendants to take back the stock of groceries which he had bought of them, stating that if they would do so he could close out his grocery business, thereby reducing his expenses by surrendering the lease of one store and discharging his clerk; and that he thought that in that way he could go on with his meat business." And on the day when the transfer was made it is found that Wheeler stated to the defendants "that he thought, if he could fix up their account, he could go on in business, as his other creditors were not pressing him." It is also to be noticed that this was not a payment to a particular creditor out of money representing goods which he had sold, which goods had been purchased of his various creditors, but was simply a return to the defendants of goods which he had bought of them, and which he had found himself unable to retain and pay for. This last fact is not of itself decisive, and perhaps not very important, but it tends to show that the debtor's object was not to rob his other creditors for the sake of paying the defendants.

We think the mere fact that the debtor "did not intend to go into insolvency" is not of itself decisive of the matter. He might have seen that insolvency was inevitable, but have intended to wait for his creditors to move against him. It is enough if he knew that he could not escape insolvency, and was acting in its presence and in expectation of it. But we think that it appears from the finding that he entertained a hope of so arranging his business after the return of the groceries to the defendants as to go on with his meat market, and that his object in making the transfer was rather to escape insolvency than to go into or be overtaken by it. When we consider that it must affirmatively appear that the defendant acted "with a view to insolvency," it is clear that the finding does not warrant the conclusion that the transfer was void under the statute. The term "insolvency," as used in the statute, of course means insolvency in its technical sense; that is, proceedings in insolvency. It is very clear that a debtor may be in actual insolvency; that is, his assets may not be sufficient to pay his debts, and yet he may be very far from legal insolvency, or serious danger of it. The facts found in the case with regard to the exchange of checks between Seyms & Co., Woodward & Co., and the defendants, are in themselves suspicious, and seem to indicate an impression on the part of all parties that the transaction might not bear the light; but we cannot, looking at the matter as a question of law, consider this sufficient to neutralize the other facts found to which we have alluded, while it would not be sufficient for them merely to neutralize those facts. They must predominate, and determine the character of the transaction.

The view of the matter which we have taken is sustained by repeated decisions of this court giving construction to the section of the insolvent law in question. *Utley v. Smith*, 24 Conn. 290; *Quinebaug Bank v. Brewster*, 30 Conn. 559; *Bloodgood v. Beecher*, 35 Conn. 469; *Hall v. Gaylor*, 37 Conn. 550.

There is error in the judgment appealed from, and a new trial is granted. (The other judges concurred, except CARPENTER, J., who dissented.)

*In re SIMONS' WILL.*

(Supreme Court of Errors of Connecticut. July 2, 1887.)

## 1. WILL—DEVISE—CONSTRUCTION—"FAMILY."

The testator left a wife, a daughter 14 years old, and a son of 30, who was capable of supporting himself. The widow was given the entire income for life, or until marriage, and the entire property was placed in her possession, with power to sell or exchange it "for the family, and for the education and support of" the daughter, and in trust for the son. Upon the death or marriage of the widow, the estate was to be equally divided between the daughter and the son's trustee, the successor of the mother. *Held*, that the word "family" included the wife and daughter, but excluded the son, who took nothing until the death or marriage of his mother.

## 2. SAME—PROVISION FOR SUPPORT AND EDUCATION OF CHILD.

Where the will provides that the testator's minor daughter is to receive her education and support, but fixes no limit as to the extent of either, the estate is liable for her support until she becomes of age, and for such an education as her circumstances and condition in life would reasonably afford.

## 3. SAME—USE OF PRINCIPAL OF ESTATE FOR SUPPORT AND EDUCATION.

The use and income of the entire estate was left to the widow for life, or until marriage, and the "said property"—not the income merely—"was placed in her possession for the family, and for the education and support," of the testator's minor daughter. Power was given the widow to "exchange or dispose of the real estate, if it is found for her comfort and convenience." The estate was small. *Held*, that the widow was not limited to the income of the estate for the support and education of the daughter and the support of herself, but might encroach upon the principal for that purpose, upon giving bond and rendering annual accounts to the court of probate.

## 4. EXECUTORS AND ADMINISTRATORS—ALLOWANCE FOR COUNSEL FEES.

Expenses for counsel fees reasonably incurred in litigation against the administrator, which resulted in the recovery of a portion of the estate, are a proper charge against the estate; but expenses incurred in respect to personal demands of beneficiaries under the will are not, although they were recovered in the same litigation.

## 5. SAME—COUNSEL FEES IN AMICABLE SUIT FOR CONSTRUCTION OF WILL.

A reasonable sum may be allowed from the estate for counsel fees in an amicable suit for the construction of the will.

Reserved case from superior court, Hartford county.

Amicable suit for the construction of the will of Earl Simons, deceased.

*J. P. Andrews*, for the widow. *W. B. Stoddard*, for the daughter. *L. Sperry* and *J. A. Stoughton*, for the son.

CARPENTER, J. This will is loosely drawn, and fails to express clearly the testator's intention; nevertheless, we can gather that intention, not alone from the language used, but partly from the circumstances and condition of his family and estate. He left a widow, one son about 30 years old, and a daughter about 14 years old. His estate, consisting of real and personal property, inventoried at about \$15,000; now, after the settlement of the estate, it is less than \$12,000. Counsel for the daughter states in his brief that the son, when the will was made, was away from home, and in business for himself. The case itself does not show this, but we may assume that he was then capable of supporting and caring for himself, as the will evidently proceeds upon that assumption, there being no present provision for him.

The will, in substance, is as follows: (1) The testator gives the use and income of all his property to his wife during life, "subject only to the following conditions, limitations, and restrictions." (2) He directs that his wife during widowhood, or during life, "retain the direction and possession" of all his property. (3) "Said property is placed in her possession for the family, and for the education and support of my daughter, Clara H. Simons, and in trust for my son, Albert D. Simons." (4) The wife has "power and authority to exchange or dispose of the real estate, if it is found for her comfort and convenience. The court of probate will authorize any sale of the same, and

the investment in other security." (5) The widow is constituted a trustee for the son during life or widowhood, with a provision that after her death or marriage the trusteeship may be continued by the court of probate, "except that on written request of Albert and the trustee, and if approved by the court, then and in that event Albert is to receive his share in fee." (6) After the death or marriage of his wife the property is given to his son Albert (or to his trustee) and to his daughter Clara in equal shares.

The property is left with Mrs. Simons for the family, for the education and support of Clara, and in trust for Albert. To what extent and for what purpose she is trustee for Albert is not very clear. He is excluded from any enjoyment of the property during the widowhood or life of the mother. The testator considered it necessary that Albert's interest should be held by a trustee for a time; and the draughtsman seems to have thought that there should be a trustee before he came into the enjoyment of the property; and so, in stating the purposes for which the widow is to have the possession, the trusteeship for Albert is mentioned. We are inclined to think that this is the meaning of this part of the will.

The daughter is expressly named as a beneficiary; she is to receive her education and support. To what extent she was to be educated, and what would be the probable cost of her education, do not appear. She was therefore entitled to such an education as her circumstances and condition in life would reasonably afford. The word "family" is a collective noun, necessarily including two or more persons. As used here, we think the testator intended by it present beneficiaries. That includes the wife and daughter, but excludes the son. The provision for the daughter's support is express; that for the support of the wife is clearly implied. Of the three members of his family they are left dependent upon his provision for them; the other is not. We are satisfied, therefore, that the testator intended that his wife and daughter should be supported by his estate, and that his daughter should be educated. How long the support of the daughter shall continue is an open question, which may depend upon circumstances. After she becomes of age, having received her education, it may be reasonable to require her to support herself.

A more difficult question remains to be considered. Is the widow bound to support herself, and support and educate her daughter, from the income of the estate, or may she, if necessary, use some part of the principal for that purpose?

In behalf of the son, it is contended that the widow simply takes a life-estate, and that her possession is only such as is incidental to any life-estate, and consequently that she can expend only the income in discharging the duties imposed upon her by the will. If that had been the intention, it would have been an easy matter to say so in plain terms. If with so small means she was expected to accomplish so much, the will should have been explicit, and not have left so important a matter to be inferred. Besides, that construction gives no force to the provision that she should retain the direction and possession of the property. An ordinary gift of a life-estate would have carried with it the possession. In addition to a gift of the income without the intervention of a trustee, the possession is expressly given, and reiterated in connection with a statement of the purpose for which it was given; and we can see that the purpose specified will in all probability require more than the income. The testator must have been aware of this, and consequently must have intended that more might be used, and have given her the possession that she might have the means of using more. Said "property"—not the income merely—"is placed in her possession for the family, and for the education and support" of the daughter. From this it may be fairly inferred that he expected and intended that some portion of the principal might be used, if need be, for that purpose. Putting the property in her hands for a given purpose carries with

it an implication that all may be used which is necessary to accomplish that purpose.

Nor can we agree with the counsel for the daughter that the widow is entitled to all the income for herself, and may support the family and educate the daughter from the principal. The income is given to her "subject only to the following conditions; limitations, and restrictions;" and these are found in the obligations subsequently imposed. We think the testator intended no such division of rights and obligations, but that the mother and daughter would be supported as one family, and that the income would be used for that purpose. But her power over the principal is not unrestricted. She is a trustee, not only for the son, but for herself and daughter. As such she must render an annual account to the court of probate, and is subject to its supervision. That court will restrain any extravagance or unnecessary expense, and see that the annual expenditures are reasonable and proper.

From this view of the case it follows that the widow, as trustee, may be required to give bonds for a faithful discharge of her duties, and that any portion of the principal of the estate unexpended at her marriage or decease, shall be forthcoming for distribution between the son and daughter.

The case shows that the administrator neglected to render a satisfactory account to the court of probate; that he had in his hands money belonging to Mrs. Simons, and also to Clara, which he failed to account for; that legal proceedings were instituted for the purpose of compelling a proper accounting in respect to all these matters; that in those proceedings all of the parties to this suit employed counsel; and that the proceedings resulted in the payment of the money due to Mrs. Simons and Clara, and also of some \$2,000 due to the estate. It is now claimed that the fees of counsel so employed should be allowed as a proper charge against the estate. Whatever expense was reasonably incurred in recovering a portion of the estate should be allowed; expense incurred in respect to the personal demands of Mrs. Simons and Clara should not be allowed. A reasonable sum may also be allowed for the expenses of this suit.

The superior court is advised that the widow takes all the estate during life, or so long as she remains a widow, in trust to apply the income, and, so far as may be necessary, a portion of the principal, to the support of the family, including herself, and to the education of the daughter, and that as such trustee she may be required to give bonds; also that the reasonable expenses incurred in recovering a portion of the estate, and in the prosecution of this suit, be allowed to be paid from the estate.

(The other judges concurred, except BEARDSLEY, J., who, while concurring in the other views expressed, was of opinion that the widow had no right under the provisions of the will to expend any part of the principal of the estate.)

#### TOWN OF CLINTON v. BUELL.

(*Supreme Court of Errors of Connecticut.* September 9, 1887.)

#### 1. FISHERIES—OYSTER BED—THROWING OPEN TO PUBLIC—PROCEEDINGS NOT APPLICABLE TO CLAM BED.

The proceedings provided by the Connecticut act of 1870 (Gen. St. p. 215, § 11) for throwing open to the public ground claimed to be a natural oyster bed, when designated to an individual, and inclosed by him for planting oysters, are not applicable where the ground so designated and inclosed is a natural clam bed; the act of 1878, prohibiting such setting off and staking of a natural clam bed, providing no specific penalty or mode of redress, and the recognition of the fact that clams and oysters are distinct species of shell fish being apparent from the discrimination made by the legislature between the statutory provisions for the protection of oysters, and those for the protection of clams.

## 2 SAME—VIOLATION OF FISHERY LAW—STATE PROPER PARTY TO SUE.

Acts Conn. 1878, c. 24, entitled "An act relating to oyster grounds and fisheries," was enacted solely for the protection of the public right of fishery, and, in the absence of any legislative permission to the town to sue, the state is the only party to enforce the remedy, if any exists, for its violation.

Reserved case from superior court, Middlesex county.

*W. F. Willcox* and *W. C. Robinson*, for plaintiff. *L. Harrison* and *J. W. Alling*, for defendant.

BEARDSLEY, J. This is a proceeding under a statute passed in 1870, to throw open to the public ground claimed to be a natural oyster bed, which has been designated to the defendant, and inclosed for planting oysters. The material part of the statute is as follows: "When any natural oyster bed, or any part thereof, is designated, inclosed, or staked out, contrary to the provisions of this chapter, the superior court as a court of equity, in the county in which said oyster bed is situated, upon the petition of any individual aggrieved, or of the town in which said oyster bed is situated, against the person claiming the same, and the chairman of the oyster committee appointed by the town where such petition is brought by an individual, shall appoint a committee, who, having been sworn, and having given notice to the parties, shall hear said petition, and report the facts thereon to such court, and if it shall appear that such oyster bed has been improperly staked out, the court may order said committee to remove the stakes inclosing the same; costs to be paid at the discretion of the court." Gen. St. p. 215, § 11.

The case was referred to Robert G. Pike, Esq., as a committee, who reported the facts to the court. The defendant remonstrated against the acceptance of the report, claiming that the committee had erred in admitting certain evidence, and that Mr. Pike was disqualified to act as committee, by reason of interest and bias, and that he had improperly conversed regarding the case while it was pending. The view which we have taken of the case renders it unnecessary to decide these questions. It is proper, however, to say that upon the finding of the court no reason appears to question the fitness of the appointment of Mr. Pike as committee, or the regularity and propriety of his conduct while so acting.

The committee have not found in terms that the ground in question, when it was designated and staked out to the defendant, was not a natural oyster bed, but such is the necessary conclusion from the facts found. It is found that it was formerly a natural oyster bed, but that owing to a change of the current in Clinton harbor, produced by a new channel which has been formed by the action of the water, deposits of mud and other materials were made upon it, so that for the last 25 years there have not been more than five or six years, at irregular intervals, when oysters have been taken from it in paying quantities. It does not appear from the finding that for many years there has been any accumulation of oysters upon it. The finding that, since the ground was staked out to the defendant, the new channel has been closed by a break-water, which has had the effect of removing the muddy deposit from the old channel, is obviously immaterial. The committee also finds that the ground in question, when it was set out to the defendant, was a natural clam bed.

In 1878 the legislature enacted that "no committee or selectmen of any town shall designate, and no person shall mark, stake out, or inclose, for the cultivation of oysters, clams, or mussels, any natural clam bed." Acts 1878, c. 24. The plaintiff claims, inasmuch as no specific penalty or mode of redress is provided for a violation of this statute, that, upon the principle that statutes made in relation to the same subject-matter are to be construed together, the provisions of the statute of 1870 are impliedly applicable for the protection of natural clam beds. There would be force in this claim if clams and oysters were substantially identical, but they are not, each being a dis-

inct species of shell fish, and it is apparent that the legislature has discriminated between them in the provision which it has made for their protection. The statute regulating the bedding of clams was made in 1874, by amending certain sections of the oyster law then in force, so that they should include clams and mussels. The sections thus amended provided merely for the designation of ground for planting oysters, by a committee to be appointed by the towns, but imposed no penalties, except for staking out natural oyster beds. Acts 1874, c. 41. The two sections in the oyster law immediately following those so amended made it highly penal to carry away planted oysters. In 1878 the legislature, in "An act relating to oyster grounds and fisheries," in the first and second sections, made provisions in the interest of persons to whom lots had been designated for planting clams, oysters, and mussels, and in the fifth section imposed a severe penalty upon persons who should unlawfully carry away planted oysters. Acts 1878, c. 24. A person planting clams in conformity with the statute is declared to be the owner of them, and has, of course, all the rights incident to such ownership, but we know of no specific statutory penalty for the unlawful removal of them. The legislature might have thought that no penalty in addition to the forfeiture to the public of the oysters, which would result from a violation of the statute of 1878, was necessary to effectuate its provisions. The committee find that placing oysters upon the clams would not injure the clams, and the clam-digger might be quite willing to submit to the inconvenience of removing the oysters, in view of the fact that he could appropriate them to his own use.

The claim that this proceeding can be maintained, and relief afforded, without reference to the statute of 1870, is not well founded. The statute of 1878 was enacted solely for the protection of the public right of fishery, and in the absence of any legislative permission to the town to sue, the state is the only party to enforce the remedy, if any exists, for its violation. *Rouse v. Smith*, 48 Conn. 447-449.

The superior court is advised to dismiss the complaint.  
(The other judges concurred.)

#### JUDD and another v. WEBER.

(*Supreme Court of Errors of Connecticut. January Term, 1887.*)

#### 1. FRAUD—IN SALE—REPRESENTATIONS AS TO FINANCIAL ABILITY—KNOWLEDGE—INTENT.

Where the representations as to his financial standing, which were made by the buyer to induce the seller to part with his goods on credit, were known by the buyer to be false, it is no defense to an action by the seller, to recover damages for the fraud, that defendant, in contracting the debt, had no definitely formed plan or settled design to defraud plaintiff, but, on the contrary, bought the goods with the expectation of being able to pay for them.<sup>1</sup>

#### 2. SAME—WRITTEN "STATEMENT" OF BUYER AS EVIDENCE OF FRAUD.

A manufacturer of woollen goods applied to a dealer in wool, November 15, 1883, "to open an account with, and to obtain a *line of credit* from," him. The manufacturer made the dealer a "statement" which he knew to be false, and the dealer, relying on its truth, sold him wool on credit. February 28, 1884, the manufacturer wrote the dealer a letter referring to the "statement" made in November, admitting that it was made, and reaffirming that it was true. The goods thus sold were paid for when the bill became due. *Held*, in an action by the dealer to recover damages for fraud in the purchase of goods subsequently sold on credit, that the "statement" and letter tended to prove fraud in obtaining a general credit, and that they were admissible in evidence.

#### 3. APPEAL—FINDINGS OF FACT—PRESUMPTION IN SUPPORT OF.

In an action to recover damages for fraud in the purchase of goods on credit, where the finding is that "the plaintiffs have suffered damage to the amount of

<sup>1</sup> If one represents as true that which is false, in such a way as to induce a reasonable man to believe it, and the misrepresentation is meant to be acted upon, and he to whom the representation is made, believing it to be true, acts upon it, and thereby sustains damage, an action for deceit may be brought. *Iron Co. v. Trout*, (Va.) 2 S. E. Rep. 713.

\$2,760, by reason of the premises," it will be presumed on appeal, in the absence of any showing to the contrary, that there was appropriate evidence to justify the finding.

Appeal from superior court, Hartford county.

The court (ANDREWS, J.) found the following facts:

"The plaintiffs are dealers in wool, residing and doing business in the city of Hartford. This suit is brought to recover damages for a fraud which they claim was practiced upon them, whereby they were induced to sell certain wool upon credit. The defendant, at the time of the sale, was a resident of New York. Frank S. Smith was a resident of Hampden, in the state of Massachusetts. The plaintiffs had known Smith for a number of years, as the agent and manager of the Lacousic Woolen Company, and knew that he had had experience in running a woolen factory, and in the manufacture of woolen cloth. That company had shortly before become bankrupt, and the plaintiffs understood and believed that Smith was not a man of much pecuniary means; of Weber, the defendant, they had no previous knowledge. On the fifteenth day of November, 1883, Smith & Weber called at the store of the plaintiffs, when Smith introduced Weber to them, and stated that he and Weber had formed a partnership, had purchased a woolen factory at Hampden, Massachusetts, formerly known as the Lacousic Woolen Mill, and that they proposed to go into the business of manufacturing woolen goods; and that they desired to purchase wool, and wished to open an account with, and obtain a line of credit from, the plaintiffs. The plaintiffs, believing that Smith was not possessed of much means, inquired of the defendant as to the capital and means which he possessed. And in response the defendant stated that they, Smith & Weber, had purchased the mill and the machinery in it for \$25,000, and that there was no incumbrance on it; that he was himself worth from \$25,000 to \$30,000; that he had put into the firm \$25,000 of his own money, and which was not borrowed, and that the firm of Smith & Weber had a capital of \$50,000, which would be at the risk of their business. By these statements, the defendant and Smith intended to have the plaintiffs believe, and they did believe, that the copartnership of Smith & Weber had a capital of \$50,000, that would be at the risk of the business in which they were about to engage, and at the risk of nothing else; in other words, that they had a capital of \$50,000 which would be liable for such debts as they should make in their business, and that there were no other debts, individual or otherwise, for which such capital could or would be made liable. Relying upon these statements the plaintiffs granted to Smith & Weber a line of credit, and sold them wool on credit on that day, and on sundry other days thereafter, and received payments from them from time to time on account.

"On the twenty-second day of February, 1884, the defendant and Smith were again at the store of the plaintiffs, and desired to make a large purchase of wool upon credit. They were then indebted to the plaintiffs about \$3,000. In answer to inquiries, the defendant then stated that the firm of Smith & Weber was at that time in as good condition, financially, as it was when they commenced business in the November previous; that there was no incumbrance on their mill; and that they then had a cash capital of from \$22,000 to \$23,000, not borrowed, all at the risk of their business. By this statement the defendant designed to have the plaintiffs believe, and the plaintiffs did believe, that the capital of Smith & Weber was of the amount so stated, and that there were no debts, other than the debts which they had made in the transaction of their firm business, for which their capital could be made liable. Relying on this statement, the plaintiffs sold wool to the firm on that day, to the amount of \$7,304.83, on credit. Prior to the fifteenth day of November, 1883, the defendant had been engaged in the storage business in the city of New York, which business was on that day in process of liquidation. He had no property or means of his own, of any kind, except his interest in that business.

The cash account of Smith & Weber showed only \$1,600 coming into the assets of that firm from the storage business. The defendant had on that day, standing to his credit in the Pacific Bank of New York, the sum of \$15,000, which was money that he had borrowed of one Fairweather. The Lacousic Woolen Mill had been deeded to the defendant, and the defendant had deeded an undivided one-half of it to Smith. Both the deeds were left for record on the afternoon of that day. Neither Smith nor the defendant had paid anything on the purchase price. All the sales of wool by the plaintiffs to Smith & Weber, and to the defendant, and all payments made to the plaintiffs on account, appear by the bill of particulars in the case.

"On April 1, 1884, Smith & Weber dissolved partnership, Weber taking the business and the assets, including the mill, and assuming all the debts, and undertaking to pay for the mill, for which, up to that time, nothing had been paid. The firm debts at that time, including the indebtedness for the mill, amounted to \$42,500. Smith conveyed his interest in the mill to Weber. While the partnership was in existence, the defendant had paid in the sum of \$16,600, of which \$15,000 was the money borrowed of Fairweather, and \$1,600 from the storage business. The defendant continued the business alone to the third day of September, 1884, when he made an assignment in insolvency, and conveyed the mill, and all his other assets, to his assignee. During the time that the defendant was in the business alone, he borrowed money of his mother, and others, to the amount of \$13,000. He made new debts in the business, and made payments on the old one. Of the firm debt he paid about \$12,500. He paid towards the mill \$2,000. At the time of his assignment he was indebted on account of the business, including the unpaid price of the mill, \$47,500; and for money borrowed \$28,000. In his deed of assignment, which was made in New York, he made preferences to those persons of whom he had borrowed money. Not including the mill, these preferences more than exhausted all his assets.

"The court finds that the defendant made representations to the plaintiffs, in substance, as set forth in the complaint; that such representations were made to induce the plaintiffs to sell wool to Smith & Weber on credit; and that the plaintiffs, believing such representations to be true, and relying upon them, did sell wool to Smith & Weber as hereinbefore stated, and that they would not have done so except for their belief that the representations were true. The representations were not true, and the defendant knew that they were not true, except so far as the facts herein set forth show them to have been true; and the defendant knew at the time he made the representations that the plaintiffs would not have sold wool to the firm on credit except that they believed his story to be true. It does not appear that in contracting the debt in question the defendant had any definitely formed plan or settled design to defraud the plaintiffs, or to defraud anybody. He had had no especial business training. He was not an accountant. He was wholly ignorant of the trade in wool. He had never had any experience in running or managing a factory, and knew nothing of the woolen manufacture. He had an exaggerated idea of the profits that could be made in that business, and had very much greater confidence in himself as a business man than the subsequent events would seem to justify. He was hopeful and trusting, and was actuated by that easy credulousness which comes from inexperience. He hoped and expected to pay all the debts that should be incurred from the profits which he hoped and expected to make. The facts, however, disclosed at the trial, show that there was never any reasonable ground for such expectation. Any person of reasonable prudence, and with a reasonable knowledge of business, who knew all the facts exactly as the defendant knew them, would have foreseen that failure was inevitable, and that somebody would have to be cheated. The plaintiffs have suffered damage to the amount of \$2,760 by reason of the premises."

There was a judgment for that amount. The defendant appealed, stating as reasons for the appeal, *inter alia*, the admission in evidence of the statement made November 15, 1883, and of the following letter in the handwriting of the defendant:

"HAMFDEN, MASS., February 28, 1884.

"*Messrs. H. C. Judd & Root*—GENT.: Your favor of the twenty-third inst. received in regard to a statement from us. The property we purchased from Mr. Hinsdale Smith, under foreclosure, for \$25,000, for which Mr. Frank Smith gave his individual note, which was not a time note. Mr. Weber put in \$25,000 in cash. The property has no incumbrances upon it except \$1,000 for looms, which the firm assumed. We presumed we had made a clear statement when we made our first purchase in November, and sincerely hope you will not use this letter any further than for your own information. Trusting this is satisfactory, we are yours, truly, SMITH & WEBER."

*W. Hamersley*, for appellant. *A. P. Hyde*, for appellees.

LOOMIS, J. The complaint in this case alleges, in substance, that the defendant, in order to obtain on credit from time to time large quantities of wool of the plaintiffs, for the firm of Smith & Weber, of which he was at the time a member, stated to the plaintiffs that the firm had a capital of \$50,000, solely at the risk of the business; that the defendant individually was worth from \$25,000 to \$30,000, and had contributed in cash from his own money, not borrowed, \$25,000 towards the capital of the firm; and that all these statements were false, and known to be so by the defendant when he made them, and that the plaintiffs, believing the statements true, sold and delivered the goods asked for on credit, and thereby suffered loss to the amount of \$2,760. The court finds that the defendant did make the false statements as charged, that he knew them to be false, that he made them for the purpose of inducing the plaintiffs to sell to the defendant's firm on credit, and that he knew the plaintiffs would not have given the credit except for their belief that the representations were true, and that the plaintiffs, believing the statements true, and relying upon them, did sell, on credit, wool to the defendant's firm as claimed by them, and that the plaintiffs suffered damage by reason of the premises to the amount of \$2,760. The court rendered judgment for the plaintiffs for this amount, and the defendant appealed.

The reasons for appeal, as stated on the record, are quite numerous, but they may all be disposed of by the answers we may give to the following questions: Does the finding of the court show that the defendant was guilty of actual fraud? and if so, did the plaintiffs suffer any injury in consequence, and did the court err in admitting evidence? The finding, as we have stated its substance above, gives a most emphatic answer to the first question, in the affirmative. But the defendant's counsel base their claim that there was no actual fraud upon an additional clause in the finding, which is as follows: "It does not appear that in contracting the debt in question the defendant had any definitely formed plan or settled design to defraud the plaintiffs, or to defraud anybody. He had had no especial business training. He was not an accountant. He was wholly ignorant of the trade in wool. He had never had any experience in running or managing a factory, and knew nothing of the woollen manufacture. He had an exaggerated idea of the profits that could be made in that business, and had a very much greater confidence in himself as a business man than the subsequent events would seem to justify. He was hopeful and trusting, and was actuated by that easy credulousness which comes from inexperience. He hoped and expected to pay all the debts that should be incurred from the profits which he hoped and expected to make. The facts, however, disclosed at the trial, show that there was never any reasonable ground for such expectation. Any person of reasonable prudence, and with a reasonable knowledge of business, who knew all the facts exactly as the defendant knew them, would have foreseen that failure was inevita-

ble, and that somebody would have to be cheated." This may have lessened the moral turpitude of his act, but it will not suffice to antidote and neutralize an intentionally false statement, which had already accomplished its object of benefiting himself, and of misleading the plaintiffs, to their injury. Actual or positive fraud consists in deception, intentionally practiced to induce another to part with property, or to surrender some legal right, and which accomplishes the end designed.

All that this additional finding shows is that the defendant's fraud did not consist in a preconceived design not to pay for the wool, but the fraud was directed to the obtaining of the plaintiffs' wool on credit, by statements known to be false, which he knew could not be obtained if he told the truth, and the fraud was complete when the end was accomplished and damage resulted. It is a mistake to suppose that it is essential to a fraudulent intent that it should reach forward and actually contemplate the resulting damage to the other party. There is a fraudulent intent if one, with a view of benefiting himself, by intentional falsehood, misleads another in a course of action which may be injurious to him. The ulterior hopes and expectations of the defendant, so much relied upon, were utterly immaterial. It is true that the motive to pay at some future time was innocent, but the motive to obtain present possession and title to another's property, by the use of falsehood, and false pretenses, throwing all the risk of loss on another, was corrupt. As well might the embezzler of another's funds plead his innocent purpose of ultimate restitution, or the forger of another's name as indorser of a note plead his purpose to pay the note himself at maturity. It is conceivable even that one might be guilty of larceny by taking another's money to meet some present exigency of his own, while pleading in the forum of conscience his purpose to make it all right at some future day. Such pernicious reasoning can be accepted neither in the forum of conscience nor in that of law. There are some decisions in other jurisdictions which we think misled the counsel for the defendant into the erroneous position we have endeavored to controvert. The case of *Morris v. Talcott*, 96 N. Y. 100, was cited. There, the court of appeals found error in the court below in denying a motion to vacate an order for the arrest of the body, but it was placed on the ground that "there was no evidence in the case to support the charge of fraudulent representations, except the fact that the defendant, upon being requested by the plaintiffs to give them an indorser upon a note for the balance of an existing account, refused to do so, saying he was "perfectly good and solvent without an indorser." So in *Dyer v. Tilton*, 23 Vt. 313, and *Jude v. Woodburn*, 27 Vt. 415, (cases not cited by the defendant,) we find the general proposition that an action for damage will not lie for false and fraudulent representations made by the defendant in reference to his own pecuniary responsibility and circumstances, whereby the plaintiff was induced to sell property upon credit. But these cases were expressly placed on the ground that the representations were expressions of opinion, and not false assertions of fact, and this is the important distinction which controls the case at bar. Here, there was false assertion as to specific facts which induced the delivery of the wool on credit.

The next question, whether the finding shows that damage to the plaintiffs resulted from the fraud, may be summarily disposed of by reference to the record. The finding is that "the plaintiffs have suffered damage to the amount of \$2,760, by reason of the premises." It is to be presumed, in the absence of anything to the contrary, that there was appropriate evidence to justify the finding, and this answer is conclusive. But the precise point which the defendant makes in this connection is that the subordinate facts, as detailed in the finding, do not show that the plaintiffs' debt might not have been collected out of Smith, the other partner of the defendant. The court finds that Smith was connected with a company that previously owned the premises purchased by the firm of Smith & Weber, and that this company

had become insolvent, and that, when the defendant bought the wool, the plaintiffs understood and believed that Smith was a man of no pecuniary means; and it is pretty obvious that the fact of Smith's insolvency was tacitly, at least, conceded by the defendant during the trial. At any rate, no question whatever was raised in the court below in regard to this matter, and we may accept the finding of the court in regard to the damage as conclusive, with full assurance that no injustice was done the defendant in this regard.

There remain to be considered only two questions respecting the admission of evidence, and these are of such a nature as to require little discussion. The court finds certain fraudulent representations made on the fifteenth of November, 1883, and again on the twenty-second day of February, 1884. The defendant objected to the statements made on the fifteenth of November, because it appeared by the plaintiffs' bill of particulars that the debt contracted on that day was afterwards paid, and because the question of a fraudulent obtaining of a general credit was not in issue. We think the evidence was admissible. On that day the defendant applied to the plaintiffs to purchase wool of them, not simply at that time, but from time to time in the future, to supply the mill of Smith & Weber. The finding is that he "wished to open an account with, and obtain a *line of credit* from, the plaintiffs," so that the representations on that day were the first and continuing moving cause to induce the plaintiffs to sell the defendant goods on credit in the future, and did tend to prove fraud in obtaining a general credit; and then the representations which followed on the twenty-second day of February were made to induce the plaintiffs to continue the credit, and expressly referred to and reaffirmed the truth of the false statements of the November previous, so that the statements were so interlocked as to become virtually one. The letter of February 28, 1884, which was objected to, expressly referred to the original statements in November previous, admitting that they were made, and reaffirming that they were true. It was therefore clearly admissible.

Another question of evidence is referred to in the last error assigned, but as no objection on that account was made in the court below it need not be considered.

There was no error in the judgment complained of.

(The other judges concurred.)

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ANTHONY, Ex'r, v. ANTHONY and others.

(Supreme Court of Errors of Connecticut. September 9, 1887.)

1. WILL—PROVISIONS IN LIEU OF DOWER.

Where, by the terms of the will, the widow takes two-thirds of the entire income of the personal property, and the use of nearly one-half of all the real estate, it will be presumed that such liberal provisions were intended to be exclusive of dower as such.<sup>1</sup>

2. SAME—INCOME PAYABLE ANNUALLY.

A legacy to the widow of "an income in cash of \$1,200 a year during her life" is payable annually, and not at periods during the current years at the discretion of the executors.

3. SAME—STATUTE OF PERPETUITIES. \*

The testator left \$4,000 "to be divided equally" among the widow's "legal heirs" after her death. *Held*, the will containing no words importing a present gift or bequest, that the legacy could not vest until the death of the widow, and it was therefore void, as contrary to the Connecticut statute of perpetuities.

4. SAME—"HEIRS" CONSTRUED TO MEAN CHILDREN.

The income of the residuary estate was left to trustees for the benefit of the testator's two sons, "and their families," during the lives of the sons. Upon the death of either leaving "no heirs," \$3,000 was to be paid to the widow, (who had

<sup>1</sup> As to right of the widow to take dower, and at the same time to avail herself of the provisions made in her behalf by the will of the husband, and as to the presumption in such cases, see *In re Blaney*, (Iowa,) 34 N. W. Rep. 768, and note.

already been liberally provided for,) if living. *Held*, that "heirs" meant children, and that, upon the death of one of the sons without children, the widow then living took the \$3,000; its payment not to impair the income already payable to her under the will.

**5. SAME—TERMINATION OF TRUST—DISTRIBUTION—FREE VESTING IN GRANDCHILD.**

Upon the death of the testator's son leaving "heirs," the trustee of the residuary estate was directed to pay over the income, as before the death, to his family, until the youngest child should reach the age of 21 years, "at which time the property may be divided equally among the heirs, if the trustee and the judge of probate shall think it safe to do so; it being my desire to place the estate so that it cannot be squandered by the action of my sons." This last clause contained the only final disposition of the residuary estate, and when the son died his only child was the sole heir at law of the testator. *Held* that, intestacy having the effect of defeating the spendthrift trust of the testator, it would not be presumed as against his grandson, although the provision for distribution was merely permissive, and that the trust was valid, the grandchild taking the fee at and from the testator's death.

Reserved case from superior court, New Haven county.

Suit for the construction of the will of Willis M. Anthony, deceased.

*E. H. Rogers*, for J. Hopkins Anthony and Frances G. Anthony. *J. W. Alling* and *J. H. Webb*, for Willis M. Anthony. *C. R. Ingersoll*, for Sarah Anthony. *J. G. Clark*, for Phoebe T. Anthony. *G. R. Cooley*, for Carrie Anthony.

**CARPENTER, J.** This is a suit for the construction of a will. The material parts of the will are as follows:

"*Second.* I give, devise, and bequeath to my wife, Sarah, if living at the time of my death, my life insurance policy of two thousand dollars, the deposit now in her name in the National Savings Bank, and all the furniture and other articles of housekeeping and clothing which I may be possessed of at the time of my death, of which there shall be no inventory taken, to be hers and her heirs forever. Also the free use or income of my house in Meadow street, and an income in cash of twelve hundred dollars a year during her life; and after her death to divide equally among her legal heirs four thousand dollars, which shall be theirs forever."

"*Fifth.* I give, devise, and bequeath to my two sons, Henry W. and Leman H. Anthony, the balance of income from my estate, after paying expenses and all demands against said estate, to be paid them by my executor and trustee in such sums and at such times as they may think best for the interest of my sons and their families, during the lives of my sons; and, in case of the death of either of them, to pay over to the widow, if living, three thousand dollars, providing he leaves no heirs; and, in case of heirs, the division to be made to his family the same as before his death, until the youngest child arrives at the age of twenty-one years, at which time the property may be divided equally among the heirs, if the trustee and judge of probate shall think it safe to do so; it being my desire to place the estate so that it cannot be squandered by the action of my sons."

The first question is, is the widow entitled to dower in addition to the provision for her contained in the second article of the will? The widow does not claim dower, and it is contended in behalf of other parties that she is not entitled to it. The case shows that by the terms of the will the widow takes about two-thirds of the entire income of the personal property, and the use of nearly one-half of all the real estate. We think that excludes dower as such.

The second question, whether the \$1,200 per year is payable to the widow annually, or at periods during the current years at the discretion of the executor, requires no discussion. The payments should be made annually.

The several questions contained in subdivision 3 of paragraph 9 of the complaint need not be separately considered. They are substantially disposed of by the view we have taken of the main question,—whether the legacy of \$4,000 to the heirs of the widow vested at the death of the testator. Its

validity depends upon the answer to that question. If it did not vest, it is conceded that the bequest is inoperative, being contrary to the statute against perpetuities. We think that it did not, and could not, vest until the death of the widow. There is no gift of this sum except by the provision for its distribution at the death of the widow, and there are no presumptions in its favor, such as presumptions in favor of offspring, against intestacy, and the like; and the will contains no words importing a present gift or bequest. Neither is there a class in existence at the death of the testator capable of taking. The class described is clear and definite,—the legal heirs. There is no uncertainty or ambiguity, but its members can only be ascertained when the time for distribution arrives,—at the death of the widow. In this respect it differs materially from ordinary class gifts to children, nephews, nieces, etc. The word “heirs,” in this place, is not the equivalent of nephews and nieces, and we cannot so interpret it. It is sometimes used in wills as synonymous with children, but seldom, if ever, as synonymous with nephews and nieces. Such relatives may become heirs; so, also, may persons who do not sustain that relation. No one is heir to the living; and presumptive heirs, as the term implies, may never become heirs in fact. So that Mrs. Anthony while living has no heirs. At her death, for the first time the class of persons here described springs into existence. Till then the individuals constituting that class are uncertain; consequently there is no class and no individuals capable of taking.

Under the fifth article of the will, all the parties in interest contend that the word “heirs,” as used in connection with the death of the sons, means children. We think that that is clearly the meaning of the testator, and that so construing it gives effect to his intention. One of the sons, Henry W., having died without children, his widow is entitled to the legacy of \$3,000; subject, however, to this condition: that its payment shall not impair the income payable to the widow. The other son died leaving one child, Willis M. Anthony, who is the only living descendant and the sole heir at law of the testator. The income of the estate—subject, of course, to prior bequests—is to be paid to Leman’s family, including the widow, till the child becomes 21 years old, at which time he takes all the estate not before disposed of, under the will, by purchase, and not by descent. It is true that the only language in the will importing a gift of the principal of the estate to Willis is found in the provision permitting a distribution to him when he arrives at the age of 21 years; but it is also true that that is the only disposition of the estate. If it is not given to him, it is given to no one. Hence the presumptions in favor of offspring, and against intestacy, come in to aid the inference to be drawn from the permissive distribution, that the testator intended that his grandchildren should take the fee in his estate from his death. In this connection the last clause of the fifth article is significant. He certainly intended that under no circumstances should the fee vest in the sons. Intestacy might have defeated that intention. The permissive character of the provision for a distribution, instead of a positive direction, is peculiar. It probably emanated from his abundant caution to prevent his estate from being squandered, and to secure it to his descendants. If so, and in any event, it should not be permitted to prevent the estate from vesting in the grandchildren.

We think the word “heirs,” in the provision for a final disposition of the estate, is used in the same sense in which it is twice previously used in the same article, and means children.

This view of the case renders it clear that the trust contemplated for the benefit of the family of Leman H. Anthony is legal and operative, and must continue during the minority of Willis M. Anthony.

The superior court is advised that the widow is not entitled to dower; that the annuity to the widow is payable annually; that the attempted gift to the heirs of the widow is void; that the word “heirs” in the fifth article of the

will means children; that the trust created by the fifth article is valid; and that the residue of the estate vests under the will in Willis M. Anthony.  
(The other judges concurred.)

HUTCHINSON, JR., v. ROBERTS and another.

(Court of Chancery of Delaware. September 10, 1887.)

PRINCIPAL AND SURETY — SURETIES ON APPEAL-BOND — PAYMENT TO ONE SURETY BY THIRD PARTY—CONTRIBUTION.

Plaintiff and the defendants were sureties for different amounts on separate appeal-bonds, given by one B. To indemnify them, B. gave them one bond, to secure to each, *pro rata*, the amount he might have to pay on the appeal-bond signed by him. Plaintiff and defendants were compelled to pay the bonds signed by them, and entered up judgment against B. on the indemnifying bond. The defendants assigned their interest in this judgment to the wife of B., she paying to each, from her own money, the amount he had paid on the bond on which he was liable. Plaintiff sued the defendants for a *pro rata* distribution of the money received by them. *Held*, that defendants were not liable to their co-surety for contribution for the money received by them from the purchaser of their interest in the judgment against their principal, when the money so received was not that of the principal debtor.

Bill in chancery, Kent county.

C. H. B. Day, for complainant.

All the sureties are entitled to share in the indemnity taken by one of the co-sureties. Where a co-surety or joint obligee receives more than his proportion or part of the indemnity, he becomes a trustee for his co-sureties, or joint obligees. *Brown v. Ray*, 18 N. H. 102; *Low v. Smart*, 5 N. H. 353; *Scribner v. Adams*, 73 Me. 541; *Jones v. Newhall*, 115 Mass. 244. A party co-surety may waive the right to any indemnity taken by another co-surety; and by the same reasoning those who are not co-sureties may take an interest in any property delivered for the benefit of two or more persons by contract. *Tyus v. De Jarnette*, 26 Ala. 280-289; *Steele v. Mealing*, 24 Ala. 285-290. A party may become co-surety by agreement. *Birkey v. Butler*, 18 Ohio St. 514-522. A party may proceed on his indemnity before paying the debt. 1 Poth. Obl. 284, 441, margin. A joint surety may waive the right of contribution. Why may not different sureties unite by a joint instrument to participate in the property of the defendant for indemnification. Story, Cont. § 644, p. 609; *Weston v. Mason*, 3 Burrows, 1727.

Nathaniel Smithers, for respondents.

SAULSBURY, Ch. Where there are two or more sureties for the same principal debtor, or for the same debt or obligation, whether on the same or different instruments, and one of them has actually paid or satisfied more than his proportionate share of the debt or obligation, he is entitled to a contribution from each and all of his co-sureties, in order to reimburse him the excess paid over his share, and thus to equalize the common burden. The same doctrine applies, and the same remedy is given, between all those who are jointly, or jointly and severally, liable on contract, or in the nature of contract. This principle does not apply where the debt or obligation for which there are two or more sureties for the same principal debtor is not the same. One or more obligees in a bond of indemnity given to three persons by a principal debtor for whom they were severally sureties, but not for the same debt or obligation, and on different instruments, according to their liability as such sureties for the principal debtor, are not liable to account in equity to their co-obligee in said bond for the sale or assignment of their individual interest in said bond of indemnity or judgment thereon, or for the money received from a purchaser of said interest for a valuable consideration. The complainant,

Samuel Hutchinson, Jr., was surety for John H. Bewley to one Tilghman Foxwell in a judgment bond for the payment of \$1,000. Samuel Roberts was surety for said Bewley to Charles Munbers in a bond, the debt of which originally was the sum of \$1,000. Daniel Palmatary was surety for said Bewley to William Sharp for the sum of \$700. Bewley, on the twelfth day of October, 1878, executed a judgment bond to said Hutchinson, Roberts, and Palmatary in the sum of \$3,900, conditioned for the payment to them of the sum of \$1,950. In the body of the bond there was a note in the words: "This bond is given as further security as my indorser on certain judgment bonds, and for the mutual benefit of each party named in the within obligation, according to liability for me as surety." Judgment was entered on the bond so executed by Bewley in favor of his said indorsers on the fourteenth day of October, 1878. The several sureties afterwards paid the several sums of money, respectively, for which they were respectively sureties. The sum paid by Hutchinson on the thirteenth day of July, 1882, was \$1,290. Samuel Roberts, on the twelfth day of December, 1881, paid the sum of \$630.05, principal and interest, to Charles Munbers. Daniel Palmatary paid to William Sharp, on the tenth day of December, 1881, the sum of \$875, principal and interest, and each of the sureties, respectively, took assignments of the evidences of their indebtedness, respectively, as sureties for said Bewley. On the twelfth day of December, 1881, Daniel Palmatary assigned, transferred, and set over all his part, share, and interest in the judgment in favor of Samuel Hutchinson, Jr., Samuel Roberts, and Daniel Palmatary *versus* John H. Bewley, unto Mary J. Bewley, wife of John H. Bewley, at her risk of collection, in consideration of the sum of \$700, with interest thereon from October 10, 1877; that being the amount for which he (said Palmatary) was liable as surety for said John H. Bewley, and which had been paid by him. On the same day, Samuel Roberts made a similar assignment of his part, share, and interest in said judgment for the sum of \$630, being the sum for which he was liable, as surety to said John H. Bewley, to Charles Munbers, unto the said Mary J. Bewley, wife of John Bewley, expressly at her risk of collection. The judgment of Samuel Hutchinson, Jr., Samuel Roberts, and Daniel Palmatary *vs.* John H. Bewley was the same judgment recovered by them against John H. Bewley on the said bond, executed in their favor, by Bewley to them, as his sureties, as aforesaid.

It is not disputed, but in fact admitted, that the money so paid to Palmatary and Roberts, as a consideration of their respective assignments in said judgment to Mary J. Bewley, was her own individual and exclusive property and money, and not the money of John H. Bewley, her husband. Hutchinson has never received anything from anybody in consideration or payment of his share, part, and interest in said judgment of himself, Roberts, and Palmatary against Bewley, and has never made any assignment thereof to any person. It seems that John H. Bewley was, at the time he executed the said bond in favor of Samuel Hutchinson, Jr., Samuel Roberts, and Daniel Palmatary, and is now, insolvent. In his bill filed in this case he, Hutchinson, the complainant, prays: (1) That the said "Samuel Roberts may be decreed a trustee for your orator for the sum of one hundred and seventy-eight dollars and twenty-six cents, with interest thereon from the twelfth day of December, one thousand eight hundred and eighty-one, and that the said Samuel Roberts be decreed to pay to your orator the said sum of one hundred and seventy-eight dollars and twenty-six cents, with interest thereon from the twelfth day of December, 1881. (2) That the said Daniel Palmatary may be decreed a trustee for your orator for the sum of two hundred and forty-seven dollars and fifty-six cents, with interest thereon from the twelfth day of December, one thousand eight hundred and eighty-one, and that the said Daniel Palmatary be decreed to pay to your orator the said sum of two hundred and forty-seven dollars and fifty-six cents, with interest thereon from the twelfth day

of December, 1881. (3) That the said Samuel Roberts and Daniel Palmatary may be decreed trustees for your orator for the sum of four hundred and twenty-five dollars and eighty-two cents, with interest thereon from the twelfth day of December, one thousand eight hundred and eighty-one, and that the said Samuel Roberts and Daniel Palmatary be decreed to pay to your orator the said sum of four hundred and twenty-five dollars and eighty-two cents, with interest thereon from the twelfth day of December, 1881. (4) That the said Samuel Roberts may be decreed a trustee for your orator for the excess he received beyond his just and equitable *pro rata* share or part which shall be found in the determination of this cause, and that he be decreed to pay the same to your orator, with interest thereon from the twelfth day of December, 1881. (5) That the said Daniel Palmatary may be decreed a trustee for your orator for the excess he received beyond his just and equitable *pro rata* share or part which shall be found in the determination of this cause, and that he be decreed to pay the same to your orator, with interest thereon from the twelfth day of December, 1881. (6) That the said Samuel Roberts and Daniel Palmatary may be decreed trustees for your orator for the excess they received beyond their just and equitable *pro rata* shares or parts which shall be found in the determination of this cause, and that they be decreed to pay the same to your orator, with interest thereon from the twelfth day of December, 1881. (7) That the complainant may have such further or other relief as the nature of the case may require."

The contention of the counsel for the complainant, if I properly understand him, is that the bond to Hutchinson, Roberts, and Palmatary, being joint, any payment by anybody for any interest therein, or as a consideration for the assignment of any interest therein, by any of the obligees therein, necessarily inures to the benefit of all the obligees, in *pro rata* proportions, or according to their respective interests therein, as the several sureties of the said John H. Bewley. His idea seems to be that, the bond of itself being property, anything received on account of any interest therein must be applied equitably for the benefit of all the obligees. Now, it is true that in one sense the bond executed by Bewley in favor of Hutchinson, Roberts, and Palmatary is property, but property not in Bewley, but the obligees in said bond; it is what is called a chose in action. As such it is payable to, assignable by, and descendible from, the obligees, beneficially, according to the interests of each therein. It is no property of John H. Bewley, nor assignable by, nor transmissible from, him. It is a burden or obligation upon him, which is legally enforceable against any estate he may have or acquire, and, in case of his death, remaining unpaid, it would not be assets of his estate, but would constitute a debt which the assets of his estate would be bound to pay. The only effect of the assignment of his interest in the judgment against Bewley, by Roberts, to Mrs. Bewley, was the substitution of her in his place, or rather to his interest therein, as his assignee. The same may be said in respect to the assignment by Palmatary to her. These assignments in no respect operate as a payment by John H. Bewley, or discharge him from obligation to pay any part of said judgment to any person entitled to any interest therein, whether as an original obligee, or as an assignee of such obligee. The obligation of Mr. Bewley remains the same, as to amount of payment on said judgment, as it was at the time of the confession thereof. The beneficial interests therein have only in part been changed by the assignments made by two of the obligees to Mrs. Bewley, at her own risk. So that, since the assignments, the beneficiaries in any money which may be received on said judgment are Samuel Hutchinson, Jr., and Mary J. Bewley, and not Samuel J. Hutchinson, Jr., Samuel Roberts, and Daniel Palmatary. But this in no manner affects the share and interest which Mr. Hutchinson will be entitled to receive out of the moneys which may be received hereafter from John Bewley, or his estate, on said judgment.

I do not understand that it was denied in the argument that each of the obligees in said bond had such a beneficial interest therein as was in equity assignable. Indeed, no question could have been raised in this respect. The right is too clear to be questioned. The only contention is whether or not Mr. Hutchinson, the complainant, is entitled in equity to have a *pro rata* share, according to the condition of the bond from Bewley to Hutchinson, Roberts, and Palmatary, of the money received by Roberts and Palmatary from Mrs. Bewley, as their assignee. If Hutchinson is so entitled, it must be upon the equitable principle of contribution among individuals subject to a common burden, and where one bears more than his proper share thereof. This right of contribution in equity may be thus described: "Where there are two or more sureties for the same principal debtor, and for the same debt or obligation, whether on the same or on different instruments, and one of them has actually paid or satisfied more than his proportionate share of the debt or obligation, he is entitled to a contribution from each and all his co-sureties, in order to reimburse him for the excess paid over his share, and thus to equalize their common burdens." The same doctrine applies, and the same remedy is given, between all those who are jointly and severally liable on contract, or obligation in the nature of contract. The right, however, may be controlled or modified by express agreement among the co-sureties or debtors. This doctrine of contribution rests upon the maxim, "Equality is equity."

Although contribution is based upon general considerations of justice, and not upon any notion of an implied promise, a jurisdiction at law has become well settled which is sufficient in all ordinary cases of suretyship or joint liability. The equitable jurisdiction, however, still remains, and has some important advantages. All the co-sureties and the principal debtor being parties to the equity suit, the liabilities of each, and their exoneration by the principal debtor, can be adjusted and established by a single decree. If one or more of the co-sureties are insolvent, the plaintiff can, in equity, obtain a proportionate increase of contribution from the others that are solvent. It seems, however, that the surety must first resort to the principal debtor, and that he can only compel contribution in equity when he has failed to obtain exoneration from the principal. In the case before me, however, it is admitted that John Bewley is insolvent. While the right to contribution exists among sureties, exoneration exists as against the original debtor, and hence it follows that any payment made by the principal debtor to one or more of the sureties, or any assignment or receipt by such of the lands, goods, chattels, rights, or credits of the principal debtor, will inure to the benefit equally of the other co-sureties to whom such an assignment or transfer has not been made; and they will be entitled to contribution by the sureties to whom such assignment or transference may have been made. See 3 Pom. Eq. Jur. § 1418, and notes, where the authorities are very numerous cited.

These principles conclusively show that the money, property, and effects which have been received by one co-surety in discharge or payment of a debt of a principal, or towards a relief from the payment of such debt, must be the money, property, and effects of the principal debtor, and not those of a purchaser of an interest due in an obligation by the principal to the sureties or other persons. It is not even suggested in the present case that either Roberts or Palmatary has ever received any money, property, or effects of John Bewley, the principal debtor, towards the payment of the principal debt, or towards the relief for the payment of the same debt or obligation. And it cannot be contended, successfully at least, that the money or other effects of Mrs. Bewley was subject to the payment of any debt of John Bewley. She had a perfect right to do what she pleased with her own; to throw it away, to give it away, or purchase from any one any property or debt to which such person might be entitled,—even these two sureties, Roberts and Palmatary, in an obligation due by her husband to Hutchinson and themselves,—and no

principle of equity, as administered in equitable tribunals, can compel them to share the amount so received by them from her.

The bill of complaint is dismissed.

### TOWN OF WOODBURY v. BRUCE.<sup>1</sup>

(*Supreme Court of Vermont.* Washington. November 9, 1887.)

#### MORTGAGE—FRAUDULENT DISCHARGE BY TRUSTEE—ESTOPPEL AGAINST BENEFICIARY.

N., as trustee of the United States surplus funds for the town of Woodbury, procured a mortgage from W. securing a note previously given by W. to the town, and also securing two other notes held by N. in his own right. Subsequently N. purchased the land upon which said mortgage was given, and without payment of the notes of the town discharged the mortgage and sold the land to B., who had full knowledge of such discharge, and of the fact that the note was unpaid. *Held*, that the discharge was a gross fraud, and that the town was not estopped from asserting its rights under the mortgage, and that as between the town and B. the town had the superior equity.

#### Appeal from chancery.

Bill to foreclose a mortgage. Heard on the pleadings and report of a special master, September term, 1886; POWERS, Chancellor. Decree that the foreclosure be granted, with the usual time of redemption.

The master found as follows: "That on the ninth day of February, A. D. 1874, one George H. Wells, then of said Woodbury, gave his promissory note to the trustee of the United States revenue money (surplus fund) of said town of Woodbury, or his successor in office, for the sum of \$100.20, payable one year from its date, with interest annually. That said note was then unsecured, except by the name of said Wells, and remained so until July 10, 1874, at which time one A. W. Nelson, of said Woodbury, then sole trustee of the surplus fund in said town of Woodbury, procured the said Wells note, together with a note due from said Wells, to himself, personally, and another note due to one A. E. Judevine, to be secured by a mortgage deed from the said Wells, and his wife, and in form running to said A. W. Nelson, personally, conveying lot 46 in Janes survey, so called, in said Woodbury, containing one hundred acres of land, more or less; that Wells paid a year's interest on his said note, due in February, 1875, but none of the principal; that said Wells died some time in the first part of the year 1876, and said A. W. Nelson soon after took out a letter of administration, and proceeded to settle said Wells' estate; that Edwin Bruce, the defendant in this cause, and one Hiram Putnam were the commissioners who adjusted the claims against said Wells' estate, and that on the fourteenth day of September, 1876, they allowed the amount of said surplus fund note against said estate at the sum of \$109.94. The commissioners' report is dated October 21, 1877, and was filed December 31, 1877, and it is in the handwriting of the said A. W. Nelson, except the signature of the commissioners, and of the justice who qualified them. A. W. Nelson continued to be sole trustee of the surplus fund in Woodbury till the annual March meeting in 1877. To settle the Wells estate he, as administrator, procured a license from the probate court sometime in 1876, to sell the real estate belonging thereto, either at public auction or private sale; and on the third of December, 1876, he sold and conveyed in form to one R. W. Bruce, by administrator's deed, said lot 46 for the sum of \$1,600. Said R. W. Bruce at the same time, by quitclaim deed, conveyed the farm back to said A. W. Nelson. I find that said farm was ample security for all the notes described in the Wells mortgage to Nelson. On the third day of December, A. D.

<sup>1</sup> Reported by Seuter & Kemp, Esqs., of the Montpelier bar.

1876, said A. W. Nelson indorsed the following discharge, or attempted discharge, upon the said mortgage, viz.: 'WOODBURY, December 3, 1876.

"Having received the contents of the notes specified in this mortgage, according to the tenor and effect of the same, I hereby discharge this mortgage in full.

A. W. NELSON. [L. s.]

"Witness: A. J. BATCHELDER."

"The exact time when said indorsement was made by Nelson on the mortgage is, as the case appears to me, a little uncertain whether made on that day or some time afterwards, but I find a balance of proof that it was written on the day of its date. Said discharge on the mortgage has never been recorded in the land records of said town of Woodbury, and there was no proof before me that it was ever offered for record. The Wells note and mortgage were both in the hands of said A. W. Nelson after they were given, till he gave the note over to his successor in office, trustee of surplus fund, in March, 1877. He kept the mortgage himself afterwards. I find that the said conveyance of the Wells farm to R. W. Bruce, by the administrator, was really a fictitious conveyance, and no consideration passed for it from or to Bruce, and that the farm was really bid off by A. W. Nelson, and that R. W. Bruce acted for him in the purchase, and he immediately quitclaimed the farm to Nelson according to an arrangement previously made between them. The deeds from Nelson, administrator, to R. W. Bruce, and from R. W. Bruce back to Nelson, both appear on the face of the papers to have been acknowledged by Loverin Lyford, a justice of the peace, on the fourteenth day of February, A. D. 1876. I find, however, by the oral proof of said justice and of Nelson that the said deeds were really acknowledged and completed on the fourteenth day of February, A. D. 1877, and that the date of the year, 1876, is an error.

"March 6, 1877, the town of Woodbury at the annual March meeting appointed P. R. Lyford, Joseph Benjamin, and said R. W. Bruce, as its selectmen, and I. G. Jewell, W. B. Goodell, and Thomas Harvey, trustees of the surplus fund, and they all entered upon the duties of their respective offices. A. W. Nelson went out of town office at that time. March 10, A. D. 1877, A. W. Nelson sold and deeded the said Wells farm to the defendant, Edwin Bruce, by a full warranty deed, for \$1,750. The trade included about \$50 worth of personal property. I find that Nelson informed Edwin Bruce at or near, and before, the time he deeded the farm to him how he considered the Wells mortgage to be discharged, and what he, Nelson, had done to discharge it, and to clear the title. This trade had been in negotiation about a month before the deed was executed. I find that the defendant, Bruce, acted in good faith in the matter, and that he and Nelson looked at the matter of the mortgage being discharged alike; they considered it a legal discharge of the mortgage, but defendant knew that the Wells note had not been paid by said Nelson to the town of Woodbury. I find that the defendant, Bruce, proceeded to pay Nelson for the Wells farm in different installments. He paid \$221 in cash, and turned over to Nelson a mortgage amounting to \$548.55 at the time he took his deed, and made payments at different times on it for a year or more following, until he had fully paid up the \$1,750 to Nelson. The exact time when he finished paying for the farm did not appear. Nelson finished settling up the Wells estate, paying debts, etc. He paid up the Judevine note that was secured in the Wells mortgage, and got his own paid by the sale to defendant. He did not pay to the town of Woodbury, or to any of its officers, any part of the principal of the Wells note for \$100.20, and has never done so; and I find, as a matter of fact, that this note has never been paid by said Nelson to said town of Woodbury, but is now due the surplus fund of Woodbury. Nelson has always, since the sale to said Bruce, claimed that the money to pay said note was received by him by his taking the Wells farm into

his own hands in December, 1876, and that the money has since remained in his hands and due from him to the town, and now is as his own debt, and the town looked to him to pay it till after he failed. He had been a merchant of considerable business and property in Woodbury for quite a number of years prior to this time, and was town clerk of Woodbury for twenty-four years, and held other town offices at different times before this. He was considered to be a man of property, and good financially in the year 1877, until the last part of 1878, or the first part of 1879. He became involved and embarrassed financially in 1879, and finally failed. Since that time he has not been financially good, and hard to pay debts. March 23, 1877, he met the new board of selectmen and trustees of the surplus of Woodbury, or rather they went to his store to settle up town matters with him, and get his town papers of him. They then looked over with him the surplus fund affairs of Woodbury, and he passed over to the selectmen the surplus fund notes of the town, including this Wells note. He did not claim that the Wells note had been paid directly, but did then claim that the amount of the said note had come into his hands by sale of the Wells farm, and that the debt was his to pay, or belonged to him to pay, and he said he would pay it to the town when the defendant paid him for the farm; and to this the town officers made no objection or agreement. It appeared that Nelson at that time was owing the town of Woodbury another note for about \$80 that was only secured by his name and one Hiram Putnam, and he was the owner of a certain 100-acre lot of timber land in the east part of Woodbury that was unincumbered, and he then wanted time both on the Wells note and his own, and he offered and urged the selectmen and surplus trustees at that time to put both these debts together, take his note for them, and secure it by mortgage on the timber lot. I find that said timber lot would have been fair security at the time for the amount of both debts. I do not find that Nelson then informed the selectmen or trustees that he had written a discharge of the Wells mortgage upon it, or that he considered said mortgage discharged. Some of the town officers testified that Nelson had the Wells mortgage there then, and that they examined it, and did not see or hear of any discharge at that time. I find that Nelson had the mortgage there, but that he retained it himself, and kept it afterwards. None of the officers of the town made any direct objection to Nelson to making the new arrangement he offered, and taking security on the timber lot, nor did they, as a board, or individually, make any agreement with him to do so. Some of them thought and said that the Wells note was well secured as it was; others thought and said that the new arrangement had better be made. Neither the selectmen nor the trustees of the surplus fund agreed about it among themselves, and nothing was really done about it at that time except to talk. It was a proposition to the town by Nelson that seemed 'to lie upon the table.' Some time afterwards, the same year, Nelson again urged some of the surplus trustees to accept the same proposition, but the trustees were not agreed about it. Nelson afterwards, the same year, made a new note signed by himself, and also a mortgage securing it on the 100-acre timber lot, and offered them to Ira G. Jewell, one of the surplus trustees; but Jewell would do nothing then, and he had not the Wells note in his possession, and nothing more was done. I do not find that his proposition or the new papers were ever accepted by the town. Nelson paid the two years' interest that was due on the Wells note, March 23, 1877, and he also paid the two subsequent indorsements of interest. I do not find any of the town officers, except Nelson, ever made any agreement to treat the Wells note as paid, or any agreement to release the mortgage, or any agreement to change the indebtedness. The town has been waiting for its pay on the note since that time. I find the amount of the Wells note, figured to September 15, 1886, to be \$154.98.

"Respectfully submitted.

JAMES N. JOHNSON, Special Master."

*Heath & Willard*, for defendant.

The mortgage was discharged. The discharge was made by one having full authority to do it. R. L. § 642. The acquiescence of the town in the discharge operates as a ratification. *Pownal v. Myers*, 16 Vt. 408. The conveyances from Nelson to Bruce, and from him back, constituted a discharge of the mortgage. *Welsh v. Phillips*, 54 Ala. 309. The town is estopped. Herm. Estop. § 939; *Railroad Co. v. Langdon*, 45 Vt. 137; *Strong v. Ellsworth*, 26 Vt. 373; *Holloran v. Whitcomb*, 43 Vt. 307.

*S. C. Shurtleff*, for orator.

It was a breach of trust in Nelson to attempt to discharge the mortgage without payment of the note. He could not discharge it without payment, and the defendant is in no better position to defend than Nelson.

ROYCE, C. J. While A. W. Nelson was trustee of the United States surplus revenue money for the town of Woodbury, he procured a mortgage, executed by George H. Wells, of the land described in the bill, securing a note which said Wells had given, payable to the trustee of said revenue money, or his successor in office of said town of Woodbury, and two other notes that said Nelson then held against said Wells. The land described in the mortgage was subsequently conveyed to Nelson, and on the day of its conveyance to him he made the following indorsement on the mortgage:

"Having received the contents of the notes specified in this mortgage, according to the tenor and effect of the same, I hereby discharge this mortgage in full.

[Signed]

"A. W. NELSON."

The indorsement was not recorded, and it is found that the note given to the town of Woodbury had not then and has not since been paid. That note and the mortgage remained in Nelson's possession until March, 1877, when he handed the note to his successor in office, and retained the mortgage. On the tenth of March, 1877, he sold the land described in the mortgage to the defendant, and before he executed the deed he informed the defendant how he considered the Wells mortgage to be discharged, and what he had done to discharge it and to clear the title; so that the defendant purchased the property with full knowledge that Nelson, while acting as trustee of the town of Woodbury, attempted to discharge the mortgage without the note secured by it having been paid, and that it had not then been paid.

The attempt of Nelson to deprive the town of the security it held for the payment of the note, and which he had obtained while acting as trustee, was, as between himself and the town, a gross breach of trust. The question presented is: Will the indorsement so made upon the mortgage bind the town, so that the deed from Nelson to the defendant will be operative to defeat the right of the town to the security given by the mortgage? It was an attempt to discharge the mortgage without payment of the note secured by it, and the statement that he had received payment of the note was false in fact, and must have been known by the defendant to be false, at the time he purchased the property. The right of the town to the security given by the mortgage was not prejudiced by the attempted discharge. The information given to the defendant when he purchased the property was, in our judgment, amply sufficient to put him upon inquiry. *Blaisdell v. Stevens*, 16 Vt. 179; *Locejoy v. Raymond*, 58 Vt. 509; 2 Atl. Rep. 156. And if he, with such knowledge, purchased and paid for the property without making provision for the payment of the note, he did so at his peril; and, as between him and the town, the town had the superior equity.

Neither do we find any fact that in law estops the town. The town did not participate in the purchase of the property by Nelson, nor in its sale to the defendant, and had no knowledge of the indorsement made upon the mortgage;

and there is no act or conduct of the town shown that influenced the defendant in making the purchase. He purchased the property equitably charged with the payment of the note, and has in no way been released from that obligation.

The decree of the court of chancery is affirmed, and cause remanded.

**BURRELL v. LAMM.**

(*Court of Appeals of Maryland.* November 3, 1887.)

**APPEAL FROM JUSTICE TO CIRCUIT COURT—JUDGMENT OF CIRCUIT COURT FINAL.**

Act 1882, Md. c. 355, provides for the institution of proceedings by a landlord against his tenant to recover possession of leased premises, before a justice of the peace. Plaintiff sued his tenant for the possession of rented property, and recovered judgment. Defendant appealed to the circuit court. *Held*, that as the justice of the peace had jurisdiction, and an appeal lay to the circuit court, the judgment of that court was final.

**Error from circuit court, Harford county.**

*William Young*, for appellant. *Herman A. Stump*, for appellee.

STONE, J. This is a writ of error from the circuit court for Harford county. The case is this: Proceedings were instituted before a justice of the peace for that county, by a landlord against his tenant, under the act of 1882, c. 355, to recover possession of the leased premises. The justice gave judgment in favor of the landlord, and the tenant appealed to the circuit court for Harford county, and the judgment of the justice was affirmed by that court. The tenant then brought the case here upon a writ of error from the circuit court for Harford county.

The writ of error in this case must be quashed. Where jurisdiction is given to a justice of the peace, and an appeal to the circuit court, the judgment of the circuit court is final, and no appeal lies to this court from the circuit court in such a case. An exception to this rule is found in the case of a justice of the peace who had no jurisdiction over the case tried before him. In such a case a writ of error or appeal might lie to this court from the circuit court to which an appeal from the justice had been taken. The writ of error is allowed in such case to this court, not for the purpose of correcting an erroneous judgment, but for the purpose of restraining an inferior tribunal from exercising a jurisdiction to which it was not entitled by law. But such is not this case. The act of 1882, c. 355, gives to a single justice of the peace the jurisdiction to hear and determine cases between landlords and tenants holding over after the expiration of their terms. This statute requires the landlord to make his complaint in writing to the justice. This complaint must state, in substance, that the landlord had rented or leased certain property to the tenant for a term that has then ended; that he had given the tenant notice in writing to quit, such as the law requires in his particular case, and that the tenant had not complied with it. When these allegations are made, the jurisdiction to hear and determine the case is vested in the justice. Now, every statement in writing required by the act of 1882, c. 355, and its amendment, the act of 1886, c. 470, to be made by the landlord, has been made in this case with great precision and certainty, and the justice had full power and authority to hear and determine the case. If the judgment of the justice was erroneous, it could only be corrected by the circuit court for Harford county, whose judgment is final.

Writ of error quashed.

## COUNTY COM'RS OF SOMERSET CO. v. MINDERLEIN.

(Court of Appeals of Maryland. November 3, 1887.)

## EVIDENCE—CROSS-EXAMINATION—ANIMOSITY OF WITNESS.

In an action against county commissioners to recover damages for personal injuries caused by a defective highway, defendant, for the purpose of showing the bias of a witness who had testified as to the bad condition of the highway, asked him, on cross-examination, whether he was on "good terms" with the road supervisor in whose district the injuries alleged occurred, and whether there had not been a bitter controversy between him and the friends of the supervisor over the latter's appointment, and whether he did not entertain feelings of animosity towards the commissioners on account of such appointment. The question was excluded on the ground that the supervisor was not a party to the action. *Held*, that the question was proper to show animosity towards the commissioners, and as the commissioners could recover from the supervisor the amount recovered by plaintiff, the relation of the supervisor to the suit was such as made the whole question proper.

Appeal from circuit court, Somerset county.

*Henry Page*, for appellants. *I. E. Ellegood*, for appellee.

ALVEY, C. J. This action was brought against the county commissioners of Somerset county to recover damages for an injury sustained by the plaintiff, by reason of alleged defects in one of the public county roads, while she was traveling thereon. The case was tried upon the general issue plea that the defendants did not commit the wrong alleged. And at the trial, three exceptions were taken by the defendants to rulings of the court, excluding evidence offered by the defendants for the purpose of showing bias or prejudice on the part of a witness examined for the plaintiff.

By the first bill of exception it is shown that the plaintiff called a witness, Alfred Hayman, by whom she proved that the public road, when and where the accident occurred, was greatly out of repair, and was in bad condition, and that Randall Hayman, the supervisor of the road at the time of the accident, was well aware of its bad condition, and had been aware of its condition for some time before the accident happened, but failed to repair the road until after the plaintiff was injured. Thereupon the defendants, on cross-examination of this witness, for the purpose of showing bias or prejudice on his part against Randall Hayman, asked the question whether he and Randall Hayman, the supervisor, were, at the time of the trial, "on good terms;" but, upon objection by the plaintiff, the court excluded the question, on the ground that Randall Hayman was not a party to the suit. To this ruling the defendants excepted. And in the third exception it is stated that the defendants, on cross-examination of this same witness, proposed to ask him whether he had not been engaged in a bitter controversy with the friends of Randall Hayman, the road supervisor, with reference to said Randall Hayman's appointment, and whether he, the witness, "did not entertain feelings of animosity towards the [then] county commissioners, or some of them, on that account." To this question objection was made, and the court sustained the objection, and the defendants excepted. The second exception presents no question that had any relevancy to the matter of inquiry, and, therefore, the question proposed to be asked was properly excluded by the court.

It is true, the supervisor of the road, Randall Hayman, was not a technical party to the action, but if the defective condition of the road which occasioned the accident existed in consequence of his neglect of duty as supervisor, he is liable over to the defendants for the damages that they may be required to pay as the natural result of his negligence. *Canal Co. v. Alleghany Co.*, 57 Md. 201; *Chicago v. Robbins*, 2 Black, 418, 4 Wall. 657. It does not appear whether or not a bond was given by the supervisor for the faithful performance of his duty; but, by the act of 1867, c. 290, which has been retained, and continued in force by the acts of 1868, c. 299, and 1884, c.

340, as to Somerset county, it is made the duty of the county commissioners of Somerset county to require the several road supervisors appointed by them to give bond to the state for such sum as they may deem proper, conditioned for the faithful performance of the duties required of such supervisor; and it is provided that such bond may be put in suit for the benefit of any person suffering by the neglect of the supervisor to keep the roads in his district in proper order and repair. It is but reasonable and just to presume that such bond was required, and was in fact given by the supervisor whose conduct was involved in this case. But, whether such bond was given or not, it can admit of no doubt that the supervisor is liable for the consequences of his neglect of duty; and if the defendants are required to pay damages by reason of such neglect, they have their remedy over against the supervisor.

Such, then, being the relation and liability of the supervisor to the defendants, though not a technical party upon the record, the question is whether evidence of feelings of hostility to him, that might influence a witness, examined on the part of the plaintiff, to exaggerate or give false color to his statements, prejudicial to the defendants, be admissible to impeach the impartiality of such witness. It is certainly of primary importance, in determining matters of fact dependent upon human testimony, that the general *status* of those who testify should be fully understood by the jury. The true relation and disposition of the witness to the parties to the cause, and the subject-matter of litigation should be made to appear, to enable the jury to form a proper estimate of the value of his testimony; and the evidence of such relation and disposition of the witness is in no sense irrelevant to the subject-matter of inquiry. This is a well-settled principle of evidence, and is of daily application. *Bleswing v. Hape*, 8 Md. 31; *Wyeth v. Walz*, 43 Md. 426.

As said by Chief Baron POLLOCK, in the case of *Attorney General v. Hitchcock*, 1 Exch. 100: "It is certainly allowable to ask a witness in what manner he stands affected towards the opposite party in the cause, and whether he does not stand in such a relation to that person as is likely to affect him and prevent him from having an unprejudiced state of mind, and whether he has not used expressions importing that he would be revenged on some one, or that he would give such evidence as might dispose of the cause in one way or the other. If he denies that, you may give evidence as to what he has said, not with the view of having a direct effect on the issue, but to show what is the state of mind of the witness, in order that the jury may exercise their opinion as to how far he is to be believed." In the same case, Baron PARKE said: "It may be shown that the witness acted through motives of malice, as every man who comes into the witness-box must come prepared to show that he gives his evidence from pure motives; and such evidence as shows he does not, would be admissible against him." He ought, however, to have an opportunity of explaining the impeaching evidence proposed to be produced against him. *The Queen's Case*, 2 Brod. & B. 312. And in the same case, just quoted from, Baron ALDERSON said: "The witness may be asked, as to his state of equal mind or impartiality between the two contending parties, questions which would have a tendency to show that the whole of his statement is to be taken with a qualification, and that such a statement ought really to be laid out of the case for want of impartiality." And so, in the case of *Merrills v. Law*, 9 Cow. 65, it was held that bad terms, or want of good understanding between a witness and the party against whom he was called to testify, or the indorser of that party, was matter of credit to be considered by the jury.

Upon these well-recognized principles of evidence, applicable as means to prevent imposition upon court and jury by a biased or prejudiced witness, this court is of opinion that there was error in the rulings of the court below, in excluding the questions asked of the witness, as stated in the first and third

bills of exception. For though the supervisor, Randall Hayman, was not a technical party to the record, yet his relation to the defendants, and his liability over for the consequence of his neglect, if by his negligence the injury was sustained, clearly placed him in such position as to be within the reason of the principle to which we have referred. Moreover, as stated in the third exception, it was proposed to show the animosity of the witness to the defendants, or some of them, as well as to the supervisor. The inquiry of the witness was not collateral, but was material and important, in order to disclose the motives and temper with which he testified, in regard to the parties and the subject-matter of investigation. We must therefore reverse the judgment, and award a new trial.

Judgment reversed, and new trial awarded.

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CLARK v. JACKSON.<sup>1</sup>

(Supreme Court of New Hampshire. Cheshire. July 15, 1887.)

**MORTGAGE—MORTGAGEE'S PURCHASE OF EQUITY OF REDEMPTION—PAYMENT—ESTOPPEL.**

The purchase of the equity of redemption in land, by the mortgagee, at a sale by the mortgagor's assignee in insolvency, does not amount in law to a payment of the mortgage debt; nor is the mortgagee estopped to sue for the balance of the debt.

Reserved case from Cheshire county; CARPENTER, Judge, presiding.

Writ of entry to foreclose a mortgage. The note secured by the mortgage was also secured by a mortgage of land in Massachusetts. Further facts appear in the opinion.

*B. Wadleigh*, for plaintiff. *Batchelder & Faulkner* and *H. W. Brigham*, for defendant.

**BLODGETT, J.** For the purposes of this case it is agreed that the value of the Massachusetts lands was much less than the amount of the mortgage debt, and that the plaintiff purchased the equity of redemption for a nominal sum at the auction sale by the mortgagor's assignee in insolvency, "because he believed that to be the least expensive way of foreclosing his mortgage." Under these circumstances, and as against those lands, the union of the titles of the mortgagor and mortgagee undoubtedly became perfected in the latter, and his remedy exhausted; but the mortgage debt was neither satisfied in fact, nor extinguished in law. To hold otherwise would obviously be inequitable, and in such case it is held that the union of titles will not, of itself, be considered a merger, so as to operate as payment or satisfaction of the mortgage debt; and this is the rule both at law and in equity. *Walker v. Baxter*, 26 Vt. 710. To the extent of the value of the property acquired at the time when the mortgagor's right therein was extinguished, the plaintiff's mortgage debt is to be regarded as satisfied, and his mortgage lien released, but no further. A foreclosure upon that property would have had this effect, (*Smith v. Packard*, 19 N. H. 575; *Green v. Cross*, 45 N. H. 574; *Fletcher v. Chamberlin*, 61 N. H. 438. 2 Jones, *Mortg.* § 950;) and no reason is perceived why the purchase of the mortgagor's equity should not have the same effect. The process of foreclosure is only one of the ways and remedies of a mortgagee to obtain an absolute title to the property. Among others, he may obtain such title by becoming the purchaser of the equity of redemption at a sale by the mortgagor's assignee in insolvency, or on execution, either of which may often be a convenient and inexpensive mode of procedure; and as the law gives the mortgagor the same right to redeem from a sale as from a foreclosure, and imposes the same accountability for rents and profits upon the mortgagee, there would seem to be no difference in principle between the

<sup>1</sup> Reported by R. E. Walker, Esq., of the Concord bar.

one mode and the other, in respect of the mortgage debt; and we are of opinion there is none. Such, also, is the weight of authority. "The purchase of the equity of redemption by the mortgagee, at a sale by the mortgagor's assignee in insolvency, or an execution, is not at law a satisfaction of the mortgage debt, and the mortgagee is not estopped from claiming that the property is of less value than the amount of the debt." 2 Jones, *Mortg.* § 950. *Murphy v. Elliott*, 6 Blackf. 482; *Johnson v. Watson*, 7 Blackf. 174; *Speer v. Whitfield*, 10 N. J. Eq. 107; *Lydecker v. Bogert*, 38 N. J. Eq. 136; *Walker v. Baxter, supra*; *Findlay v. Hosmer*, 2 Conn. 350; *Post v. Tradesman's Bank*, 28 Conn. 420. And see *Marston v. Marston*, 45 Me. 412; *Puffer v. Clark*, 7 Allen, 80; *Spencer v. Harford*, 4 Wend. 381; and *Hatz's Appeal*, 40 Pa. St. 209.

The plaintiff may, therefore, maintain this action, and, if no other means are or have been taken to ascertain the value of the Massachusetts lands embraced in his mortgage, it may be proved on the trial under the plea of *null disseizin*. *Green v. Cross, supra*.

Case discharged.

CARPENTER, J., did not sit. The others concurred.

### CRAIG and others v. CRAIG and others.

(*Supreme Court of Pennsylvania*. October 11, 1887.)

#### 1. EJECTMENT—ADVERSE POSSESSION—PAROL GIFT.

Where defendants claimed title against their co-tenants by adverse possession, evidence of a parol gift from the ancestor is properly submitted to the jury as tending to show that such entry was under claim of right and adverse to their co-tenants.

#### 2. SAME—BOUNDARIES.

An entry under claim of right by parol gift upon a tract of land, the boundaries of which, though not distinctly marked on the ground, are so designated as to be easily ascertained, is sufficient upon which to base a claim of title to the entire tract under the statute of limitations.

Error to common pleas, Armstrong county.

This was an action of ejectment for land in Madison township, Armstrong county. The plaintiffs are the minor children of Sarah Craig, deceased, daughter of Samuel Craig, and the defendants the widow and children of John B. Craig, deceased, who was a son of Samuel Craig. Defendants, who were tenants in common and co-heirs with plaintiffs, claimed absolute title to a certain portion of the land under a parol gift of the same by Samuel Craig to John B. Craig, and by adverse possession. The evidence tended to show that in 1847 Samuel Craig had declared that John had helped him pay for the land, and that he considered John had as good a right there as he had, and that he should have 50 acres if there should be nothing for the rest; and also that he had declared in 1849 that he had given John the land. John B. Craig, in 1851, commenced the clearing of the land, and the building of a house, and in 1852 he moved into the house, and occupied the land as his own until his death, in 1870; and his children and widow continued to occupy the same land until the present time. The evidence further showed that Samuel Craig had pointed out the line that divided John's land from his own, which was from a white oak tree at the corner to a chestnut tree, a distance of 60 or 70 rods; but no survey of the land was made during the lives of either Samuel or John B. Craig. The evidence further showed that John B. Craig paid taxes on the land from 1855 to 1870, and his children from that time to the present. The jury found for the defendants, whereupon, on the refusal of a new trial by the court below, the cause was brought to this court for review, and among other errors assigned was the following: "The court erred in allowing the jury to consider the defendants' claim of title under the stat-

ute of limitations, there being no evidence to justify this submission; the instructions on this point being contained in the general charge in the following words: 'Now, in the present case, we instruct you that if there was an executed gift on the part of Samuel Craig to his son John B. to this land, and pursuant to that gift John B. entered upon the piece at the western end of the track, cleared the same up to a certain line, held the possession of the same either by himself or others who claimed directly under him for a period of twenty-one years, and that such possession was exclusive, continuous, uninterrupted, open, and notorious, then his right to such land would be absolute. \* \* \* You have the evidence of Mr. Harvy in relation to the declarations of Samuel Craig as to giving the land or having given it to John B. You have the testimony of some other witnesses on that subject, none of them with any particularity as to the boundaries of the land excepting in the testimony of John A. Craig, who stated that the land embraced in the 50 acres was described to him by Samuel Craig as being on the western end of the tract, and within a line running from a white oak tree to a chestnut; then by a line running west and south sufficient to embrace fifty acres on that western end; and that the piece thus described and so designated would make a piece in the form of an ell. Considering that all the other lines would be outside boundaries on the part of the track, we think the designation sufficiently explicit as a designation.' "

PER CURIAM. John B. Craig certainly occupied the land in dispute long enough to perfect his title by the statute of limitations, and, though the parol gift from his father may not have been good in itself, yet it was evidence to show how he entered, not as tenant at will, but under claim of right, and adverse to all others. So the boundaries, though not distinctly marked on the ground, were nevertheless so designated as that they could be readily ascertained, hence the maxim properly applies that that is to be treated as certain which can be rendered certain. The judgment is affirmed.

#### NELSON v. NELSON.

(*Supreme Court of Pennsylvania.* October 4, 1887.)

#### JUDGMENT—DECREE IN SUIT FOR SPECIFIC PERFORMANCE—BAR TO EJECTMENT.

Decedent, in his life-time, entered into an agreement to sell certain lands to defendant, and after his death the lands were sold at an administrator's sale, through which plaintiff derives title. After the administrator's sale defendant obtained specific performance of the agreement, and paid the balance of the purchase price into court. Plaintiff appeared before the auditor, and laid claim to the money in court. The auditor awarded it to the administrator of decedent, and plaintiff excepted. The auditor's report was confirmed, and plaintiff did not appeal, but brought this action of ejectment, claiming a verdict for the land, to be released on payment of the balance of the purchase money under the agreement with decedent. *Held*, that the decree for distribution in the suit for specific performance concluded plaintiff from maintaining this action.

Error to common pleas, Jefferson county.

On April 1, 1861, John Nelson, the first, by agreement in writing, sold to George Nelson, the defendant, a certain piece of land upon which \$10 was paid, \$300 remaining unpaid. In May, 1862, John Nelson, the first, died intestate, and letters of administration upon his estate were issued to James Nelson. In September, 1862, James Nelson presented his petition to the orphans' court for leave to sell certain real estate of decedent, which included the land sold to defendant. The sale was ordered, and was made to Samuel Patton, to whom the administrator delivered a deed, February 16, 1863. On March 5, 1863, Samuel Patton and wife conveyed the land to James Nelson, who conveyed the same to John Nelson, the second, the plaintiff here, on July 6, 1885. James Nelson, the administrator, was discharged May 13, 1864.

Supplemental letters of administration on the estate of John Nelson, the first, were taken out by William J. Nelson, October 12, 1881; and, on November 10th following, George Nelson, the defendant, presented his petition to the orphans' court for specific performance of his contract with John Nelson, the first. On April 10, 1884, specific performance was decreed, with decree that, upon payment of \$721.28 into court, William J. Nelson, administrator of John Nelson, the first, execute and deliver to George Nelson a deed of the land in controversy. The money was paid into court, an auditor was appointed, and distribution made. John Nelson, the plaintiff here, appeared before the auditor, and claimed the money, and excepted to the decision awarding it to the administrator of John Nelson, the first. The auditor's report was confirmed, and no appeal was taken. John Nelson, the second, then brought this action of ejectment against George Nelson, and claimed a verdict for the land, to be released upon payment of the balance of the purchase money under the agreement aforesaid. On suggestion of the death of John Nelson, Sarah Nelson, as administratrix, was substituted as plaintiff. Defendant had judgment, and plaintiff brings error.

*John Conrad*, for plaintiff in error. *Jenks & Clark*, for defendant in error.

GREEN, J. It is certainly quite astonishing that for 21 years after the death of the first John Nelson neither his administrator, nor James Nelson, who purchased, as it is claimed, the right of John Nelson to have the residue of the purchase money due by George Nelson, ever made any attempt to recover it. Possibly the fact that James Nelson was both administrator of the deceased John Nelson, and also owner of the title which he sold to Patton, who immediately reconveyed to him, may have something to do with the explanation; but, however that may be, it is very certain that George Nelson's equitable estate was not affected by the orphans' court sale. He at least had the right to have his title perfected by proper proceedings for the enforcement of the contract of sale, and when he presented his petition to the orphans' court for that purpose that court certainly had jurisdiction to entertain his petition and give him relief. This was done; an administrator *d. b. n.* of the first John Nelson, with whom the contract was made, was appointed; the order for the delivery of a deed by the administrator, and the payment of the balance of the purchase money to him by George Nelson, was made; and the money was paid accordingly. After the money was paid to the administrator he filed his account, and an auditor was appointed to distribute the money. Before the auditor the money was claimed by both the administrator of the first John Nelson and by the second John Nelson. The auditor awarded it to the former, and the latter excepted to his decision, but the court confirmed the report, and from this decree no appeal was ever taken. We know of no good reason for not holding the parties bound by this decree. It was made by a court having jurisdiction of the subject-matter and of the parties. If the second John Nelson was dissatisfied, he or his representatives had a remedy by appeal; but they did not choose to avail themselves of that remedy, and, in our opinion, they are concluded. If the court had jurisdiction, and in pursuance of its decree George Nelson paid over to the proper person all the remainder of the purchase money which he owed, surely he cannot be compelled to pay that money a second time; yet such would be the necessary consequence if the plaintiff recovered in the present case. We think the learned court below was right in holding that this could not be done, and therefore the judgment is affirmed.

## THOMAS v. COMMONWEALTH.

## SANDERS v. SAME.

(Supreme Court of Pennsylvania. October 5, 1887.)

## INTOXICATING LIQUORS—LICENSE—REPEAL OF ACT—CONSTRUCTION.

On indictment found April 8, 1887, under the Pennsylvania act April 12, 1875, for unlawfully selling intoxicating liquors without a license, the defendant on the day of trial, June 21, 1887, defended on the ground that the said act had been repealed by the act of May 13, 1887, and that he could not be legally tried and convicted thereunder. *Held*, that the effect of the third section of the latter act is to permit the granting of licenses under former laws up to June 30, 1887, which necessarily keeps in full force all the previous provisions and penalties connected therewith up to the time of the expiration of such licenses.

*Certiorari* to court of quarter sessions, Greene county.

April 8, 1887, an indictment was found against Eli Thomas, plaintiff in error and defendant below, in which he was charged with selling vinous, malt, spirituous, and brewed liquors, and admixtures thereof, to be used as a beverage, without first having obtained a license. June 21, 1887, at the court of quarter sessions, the defendant was tried and found guilty as indicted; whereupon a motion in arrest of judgment was filed, alleging that the act under which the defendant was indicted, namely, the Pennsylvania act of April 12, 1875, entitled "An act to repeal 'An act to permit the voters of this commonwealth to vote every 3 years on the question of granting licenses to sell intoxicating liquors, and to restrain and regulate the sale of the same,'" was repealed by the act of May 13, 1887, entitled "An act to restrain and regulate the sale of vinous and spirituous, malt, or brewed liquors, or any admixture thereof," and that there was no law, or part of a law, then in force, under which defendant could be sentenced for the crime for which he was tried and convicted. The motion was overruled June 27, 1887, and on the same day defendant was sentenced to pay the costs of prosecution and a fine of \$200 to the commonwealth, or, in default thereof, to undergo imprisonment in the county jail for 90 days. The case of *Sanders v. Com.*, involves the same question of law as that raised in *Thomas v. Com.* The two cases were therefore considered together on appeal, and one opinion delivered covering both.

*James E. Sayers*, for Thomas, plaintiff in error. *P. A. Knox*, for Sanders, plaintiff in error. *D. R. P. Huss*, Dist. Atty., for Greene Co.

**PER CURIAM.** The effect of the third section of the act of the thirteenth of May, 1887, (Ph. L. 108,) is to permit the granting of licenses under former laws, up to the thirtieth of June, 1887. This necessarily keeps in full force all the previous provisions and penalties connected with the granting of such licenses, not only up to the time aforesaid, but until the expiration of such licenses. It would be a curious legal anomaly to hold that the liquor vendor might have his license under the former act, and yet be exempt from the conditions to which, by the same act, it was made subject. It follows that the court below was right in refusing to sustain a construction of the act of 1887 such as contended for by the defendants. The judgments are affirmed.

## HAYS v. CITY OF OIL CITY

(Supreme Court of Pennsylvania. October 6, 1887.)

## 1. CITY ATTORNEY—COMPENSATION FOR EXTRA SERVICES—PREPARATION OF DIGEST.

In an action brought by a city attorney to recover for services performed for the city, *held*, that the preparation of a digest or a codification of the laws applicable to such city is within the line of his duty as laid down by the city charter, which provides that he "shall do all and every professional act incident to the office which may be required of him" by the officers of said city.

2. TRIAL—DIRECTING VERDICT WITH QUESTIONS OF LAW RESERVED—FINDINGS OF FACT.  
 In an action brought by a city attorney to recover for services performed for the city outside of his duties as such officer, the court instructed the jury to render a verdict for the plaintiff, subject to three questions of law reserved, without a finding of facts or an agreement of the parties. *Held* that, since the questions were reserved upon the whole evidence, there was no error in not requiring a finding of facts.

Error to common pleas, Venango county.

The following is the opinion of TAYLOR, President Judge, on the reserved questions of law:

"This is an action of *assumpsit*, brought by the plaintiff, claiming to recover the value of certain services rendered to the defendant. F. W. Hays, Esq., was the regularly constituted solicitor for the city. A short time prior to the adoption by the city of the act approved May 23, 1874, and its supplements, to-wit, January 25, 1881, the question of having that portion of the act pertaining to the city digested, was discussed by members of the council when in session, and with individual members outside the council chamber. When the plaintiff was referred to, he informed them that he considered such services as being outside of his duties as the city solicitor, and, to the individual members at last, he told that for such services, if performed by him, he should expect to receive extra compensation therefor. At a meeting of the common council, held April 5, 1881, a resolution was passed as follows: 'Resolved, that the city attorney is hereby requested to make up a digest or pandect of the "Wallace Act," appertaining to cities of the fifth class, for the use of the city councils.' Carried. This resolution was passed by the select council. At this meeting of councils some members testify that the question of extra compensation for the work was talked of, while others, one of the movers of the resolution indicated, heard nothing regarding compensation. It may be fairly gathered from all the testimony that no amount was agreed upon, nor was there any official action that an extra compensation should be paid. More than a year after the passage of this resolution another was passed authorizing the publication, etc., of the ordinances. The work was completed by Mr. Hays. The acts of assembly and the ordinances were published in a volume, which was offered and accepted by the councils. If I remember correctly, no demand was made for payment for about two years after the completion of the work; and when made the authorities declined to pay,—alleging that there was no consent to pay, and that the services rendered were within the line of his duties as counsel for the city, and that he had been paid for such services by the payment of his annual salary.

"Upon the trial it was conceded that the value of the services for which the plaintiff was entitled to recover, if at all, was \$250, with interest. The jury were instructed to find a verdict for the plaintiff for the amount, subject to the questions of law reserved, viz.: (1) Whether there is sufficient evidence of a contract to impose a liability upon the municipality; (2) whether a party could recover for services like those proven, upon a *quantum meruit* against a municipality; (3) whether the services performed were, under the law of defining the duties of the city solicitor, outside the line of such duties. If the court should be of the opinion that all of these propositions should be affirmed, then judgment for the plaintiff upon the verdict. But if the court should be of the opinion that any one of them was against the plaintiff, then judgment for the defendant *non obstante veredicto*.

"The first and second propositions we may rule for the plaintiff without comment, but the third requires more careful consideration. The relation sustained by the plaintiff to the city and his duties are defined in the forty-eighth section of the charter, which provides for his election, his title, etc. And the seventh clause provides 'that the city solicitor shall receive a fixed annual salary, and all fees received by him in his official capacity shall be paid into the city treasury monthly, as hereinbefore provided.' There are

seven clauses defining his duties, but the third is the most important in this investigation. It provides: 'He shall prepare all bonds, obligations, contracts, leases, conveyances, and assurances which may be required of him by any ordinance of the corporation of the city, (to) commence and prosecute all and every suit and suits, action and actions, brought and to be brought by the corporation, for or on account of any of the estate, rights, trusts, privileges, claims, or demands of the same, as well as to defend all actions or suits brought or to be brought against the said corporation, or any officer thereof, within or whereby any of the estates, rights, privileges, trusts, ordinances, or acts of the corporation, or any branch thereof, may be brought in question, before any court in this commonwealth, and shall do all and every professional act incident to the office which may be required of him by the mayor of said city, or by any committee of the select or common council, or by any ordinance or resolution of the said councils, or either of them.'

"That the city solicitor is an officer of the corporation will not be questioned. In *Loan Ass'n v. Stonemetz*, 29 Pa. St. 534, and *Kilpatrick v. Bridge Co.*, 49 Pa. St. 118, it is ruled 'That corporations are not liable on a *quantum meruit* for services performed by their officers; there must be an express contract for compensation, or there can be no recovery.' This rule is somewhat modified in *County of Chester v. Barber*, 97 Pa. St. 455. Barber was counsel for the commissioners, and with reference to his right to recover the court say: 'Whether the plaintiff, Barber, can recover anything, will depend upon the terms of his previous engagement as solicitor to the commissioners.' In my opinion the principle which should apply to the construction of the contract between the plaintiff and the city, as their solicitor, as found in the third clause before recited, is laid down by Dillon on Municipal Corporations, (volume 1, p. 256, § 172,) as follows: 'It is a well-settled rule that a person accepting a public office, with a fixed salary, is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of these duties, even though the salary may be a very inadequate compensation for the services; nor does it alter the case that, by subsequent statutes or ordinances, his duties within the scope of the charter pertaining to the office are increased, and not his salary. Whenever he considers the compensation inadequate, he is at liberty to resign. The rule is of importance to the public. To allow changes and additions in the duties properly belonging, or which may properly be attached, to an office to lay the foundation for extra compensation, would soon introduce intolerable mischief. The rule, too, should be very rigidly enforced. The statutes of the legislature and the ordinances of our municipal corporations seldom prescribe with much detail and particularity the duties annexed to public offices; and it requires but little ingenuity to run nice distinctions between what duties may and what may not be considered strictly official; and, if these distinctions are much favored by courts of justice, it may lead to great abuse.'

"The charter becomes the contract between the plaintiff and the city. There are six clauses therein defining his duties. The third clause, before recited, in connection with the others, would seem to have been intended to cover every possible contingency, wherein the professional services of a solicitor could be required. After setting forth many items specifically, as if to cut off the controversy, it closes with this broad and sweeping assertion: 'And shall do all and every professional act incident to the office which may be required of him by the mayor of the said city, or by any committee of the select or common council, or by any ordinance or resolution of the said councils, or either of them.' Some light is thrown upon how the council regarded the services called for by the resolution, from the fact that at the same meeting resolutions were offered fixing the salary of the solicitor, both of which were negotiated, while this resolution itself, and the acts of councils, were entirely silent as to compensation. Lawyers may and possibly do honestly differ as

to whether the services performed and here claimed for were strictly incident to the office. It was most certainly the professional labor of an attorney. It strictly pertained to the lawful administration of the government of the municipality; and it was needed by the council in the performance of their official duties. Applying, now, the rule laid down by Dillon, before recited, that nice distinctions between what duties may and what may not be considered strictly official should meet with little favor by the courts, and that this rule should be rigidly enforced, although it may make a seeming hardship in particular cases, yet it is a salutary rule to be enforced for the public benefit.

"For the reasons given I am of the opinion that judgment should be entered for the defendant *non obstante veredicto* upon the reserved questions."

The plaintiff specified as error: "*First*, the court erred in reserving the questions of law without a finding of the facts by the jury or the agreement of parties; *second*, the court erred in entering judgment for the defendant *non obstante veredicto* on the reserved questions of law; *third*, the court erred in not entering judgment for the plaintiff on the verdict of the jury; *fourth*, the court erred in the opinion ruling the third reserved point against the plaintiff."

*William McNair*, for plaintiff in error. *Ash & Carey*, for defendant in error.

PER CURIAM. We cannot sustain the exception to the reserved points in this case, since they were reserved on the whole evidence. A finding of facts by the jury would have been to no purpose, as they could not find contrary to the evidence, and a finding in accordance with it would have been a mere restatement of the testimony. As to the remaining exception, we have only to say that the learned and able opinion of the president judge so clearly and fully justifies his judgment as to leave us nothing to do but to concur in it. The judgment is affirmed.

#### GRAY'S ESTATE.

#### Appeal of GRAY, Jr.

(*Supreme Court of Pennsylvania. May 2, 1887.*)

EXECUTORS AND ADMINISTRATORS—PAYMENT BY FOREIGN DEBTOR—ACCOUNTING IN COURT OF DOMICILE—SURCHARGE IN COURT OF ANCILLARY ADMINISTRATION.

The will of a decedent was proved by his executor in the orphans' court of his domicile, and a debtor resident in a foreign state voluntarily paid his debt to such executor, who accounted for it to the court. Subsequently the executor took out ancillary letters of administration in the state where the debtor resided, and he proved a claim against the estate there, which had arisen since the payment of his debt, and sought to surcharge the executor with the amount of the debt so paid. *Held*, that the executor, having accounted for such debt in the court of the domicile, could not be surcharged in the court of ancillary administration.

Appeal from orphans' court, Luzerne county.

Alexander Gray, Sr., domiciled in New Jersey, died there, testate, on the sixth April, 1878, leaving a widow and several children surviving; two of whom, John Gray and Alexander Gray, Jr., at once took out letters testamentary in the orphans' court of Middlesex county, New Jersey. At the time of his death deceased was possessed of considerable property in Pennsylvania. He carried on a banking business at Wilkes Barre, in partnership with one Joseph Brown, a son-in-law of his, who at the time of his death owed him \$10,000 and interest upon a promissory note. There was also standing to deceased's credit in the partnership bank a deposit of \$50,000. The executors duly filed inventories of the properties of the estate in the New Jersey court, which the court duly confirmed. The \$50,000 deposit was voluntarily paid by Brown to John Gray, who accounted for the same in the New Jersey court, which distributed it to the parties entitled.

In 1873, Joseph Brown opened an account in his bank at Wilkes Barre in the name of Alexander Gray, Jr., executor, and placed to his credit the amount due for principal and interest on the \$10,000 note, amounting altogether to \$11,624.89, which sum was voluntarily paid out by Brown to Gray, then living in New Jersey, upon checks issued by the latter, and paid into his own bank there. Up to this time no claim upon the estate, or any part of it, was made by any creditor from Pennsylvania.

On the twenty-fifth of June, 1875, Alexander Gray, Jr., filed his account in the New Jersey court, including therein the sum of \$11,624.89, but claiming to have retained and appropriated it towards the payment of a claim of \$20,000 made by him against the estate in respect of a mortgage of which he alleged he had been joint owner with the deceased. In April, 1874, ancillary letters of administration were taken out by John Gray and Alexander Gray, Jr., in the orphans' court of Luzerne county, Pennsylvania. In 1877, Joseph Brown, the former debtor of the estate, filed a bill in equity in Luzerne county, Pennsylvania, against the estate of the decedent, and final judgment for about \$22,000 was in 1882 obtained against the estate.

In January, 1882, some of the heirs in New Jersey, together with one in Pennsylvania, petitioned the Pennsylvania court, setting out the receipt by Alexander Gray, Jr., of the sum of \$11,624.89, and that he had not accounted therefor in that court, and asking for his dismissal. A citation was awarded and served; and on the sixth February, 1883, Gray answered admitting the receipt of the money, but claiming his having accounted therefor in New Jersey, and praying for delay until a mortgage known as the "Hutchinson Mortgage," then in process of collection, should be realized, which request the court granted. After the citation had been served upon him, and before filing his answer, Alexander Gray, on the fifteenth of April, 1882, filed an amended account in the New Jersey court for the purpose of withdrawing the item of \$11,624.89, from his 1875 account.

John Gray died in December, 1882, leaving Alexander Gray sole domiciliary and ancillary administrator. In March, 1882, the widow and certain heirs of the decedent proceeded in the New Jersey court, by petition praying that the letters testamentary granted to A. Gray, Jr., should be revoked; and in May, 1883, the court decreed his removal, disallowed his claim against the estate, towards which he had appropriated the \$11,624.89, and ordered him to pay over the latter sum to his successor, one Abram S. Meyrick, administrator *d. b. n.* in New Jersey. He subsequently appealed to the prerogative court, and thence to the court of errors and appeals, both of which affirmed the decision of the orphans' court.

The Hutchinson mortgage was in due course realized by process of law, and produced \$13,306.99, whereupon, on the eleventh January, 1883, Gray filed his account in the orphans' court of Luzerne county, including this amount and the \$11,624.89. To the latter item he appended a statement that he had accounted for this sum in the New Jersey court, and that after the proceedings in the Pennsylvania court he had filed in New Jersey an amended account which would supersede the 1875 account, if the court there allowed the amendment, but that it had not yet been allowed; that since its filing other creditors have arisen in Pennsylvania, particularly referring to Joseph Brown's decree for \$20,000; and, further, that, if he was relieved from his accounting in New Jersey, he would willingly account for the sum in Pennsylvania. After the disallowance of his claim against the estate in New Jersey, he preferred it again in Pennsylvania; apparently, however, seeking to restrict the satisfaction of it to the \$11,624.89.

The first report of audit was filed on first December, 1883, and in this Gray was charged with the sum of \$11,624.89, and with further interest upon the principal sum of \$10,000, amounting to \$4,151.15. In the same audit his claim against the estate, with the reasons for its disallowance, appears, as fol-

lows: "Alexander Gray, Jr., for amount due him on assignment by him to his father of his interest in a mortgage against Longstreet & Hozie, his interest being one-third of the same, \$20,000. As his domicile at date of decedent's death and now is in New Jersey, his claim cannot be allowed here. *Barry's Appeal*, 88 Pa. St. 131."

After exceptions had been taken, and the report amended in minor respects, the orphans' court of Luzerne county, Pennsylvania, by definitive decree, finally confirmed it, and Gray appealed (1) against the surcharge, and (2) against the disallowance of his claim. The appeals were taken together, and upon the first Gray was successful, but the second appeal does not appear to have been strongly argued, and the court merely dismissed it at appellant's cost and affirmed the disallowance of the claim, without expressing any opinion.

*Edmund G. Butler and I. Vaughan Darling*, for appellant.

A foreign (principal) executor may always collect securities, if he can do so without being obliged to resort to the domicile of the debtor. *Shakespeare v. Fidelity Co.*, 97 Pa. St. 173; *Williams v. Storrs*, 6 Johns. Ch. 357; *Parsons v. Lyman*, 20 N. Y. 112; *Klein v. French*, 57 Miss. 667; *Wilkins v. Ellett*, 9 Wall. 740; *Hutchins v. State Bank*, 12 Metc. 421; *Trecothick v. Austin*, 4 Mason, 33; *Merrill v. Insurance Co.*, 103 Mass. 245; *Mackey v. Coxe*, 18 How. 104; *Stevens v. Gaylord*, 11 Mass. 256; and especially in the absence of an ancillary administration. *Marcy v. Marcy*, 32 Conn. 327. It is now the better opinion that the *situs* of the debt is the creditor's domicile. Whart. Conf. Laws, (2d Ed.) § 363; *Speed v. May*, 17 Pa. St. 91. The courts of New Jersey having acquired control of the fund, the ancillary administrator is not responsible for it in this jurisdiction. *Magraw v. Irwin*, 87 Pa. St. 139.

*George R. Bedford and Henry W. Palmer*, for appellee.

Assets cannot be withdrawn from a jurisdiction in which there are either creditors or distributees. *Dent's Appeal*, 22 Pa. St. 514. An executor cannot appeal from a decree of distribution. *Gallagher's Appeal*, 89 Pa. St. 29. Where the domicile of a creditor is the same as that of a decedent, he cannot make claim to a fund in a foreign jurisdiction, but must resort to that of the domicile, and only the balance after payment of domestic claimants will be remitted to the domicile. *Barry's Appeal*, 88 Pa. St. 131.

TRUNKY, J. Alexander Gray, a resident in the state of New Jersey, died April 6, 1873, testate, and in the same month his will was probated and letters testamentary issued to John Gray and Alexander Gray, Jr. His widow and nearly all his legatees then resided and now reside in New Jersey. At the time of his death, debts were owing to him by persons living in Pennsylvania; and in April, 1874, ancillary letters of administration were granted to Alexander Gray, Jr., by the register of Luzerne county. John Brown, a son-in-law of the decedent, was his partner, at and before the time of his death, in the banking business at Wilkes Barre, Pennsylvania. Brown was indebted to the estate on a note to the amount of \$11,624.89, which sum he voluntarily paid to the executor in 1873. This money is the subject of the present contention. The sum of \$50,000, which was deposited in Brown & Gray's Bank, was paid by Brown to the executor, who accounted for the same in New Jersey, where it was distributed, by decree of the orphans' court, to the legatees. On January 25, 1875, the executor filed his account in New Jersey for said \$11,624.89, which Brown had paid before the grant of letters of administration in this state. After the appellant had been cited to file his account, to include said \$11,624.89, as executor, he applied to the orphans' court in New Jersey for leave to withdraw the item for said sum from his account, but it was finally adjudicated that he should account for the same; and on April 7,

1884, by decree, he was ordered to pay over said money to Abram S. Meyrick, administrator *d. b. n.* in New Jersey. This account was filed January 1, 1888, and includes the said \$11,624.89, with a statement respecting his accounting therefor in the place of the testator's domicile, his application to the orphans' court to amend the account, which he expected would be granted, and in that event "he prays the orphans' court of Luzerne county, Pennsylvania, to make distribution of said moneys as being realized by him in Pennsylvania as administrator *c. t. a.* in estate of Alexander Gray, deceased." He was disappointed in his expectation, and instead was ordered to pay over the money to his successor in office.

No fact appears to entitle the legatees to demand distribution of the money, the subject of contention, to be made in Pennsylvania. The executor in the place of the testator's domicile received the money, and he was there bound to account for it, and there the legatees may compel him to perform his duty. It is difficult to see that they have any interest, as to that money, in citing him to account for it as administrator here, other than to make him pay it twice for the benefit of the estate.

The real question is whether Brown, a creditor, may demand that the administrator be charged with said money. Brown's relationship to the decedent and to the estate gave him knowledge of the facts at the time he paid the money to the executor. He could not have been compelled to pay it. He might have refused payment until called upon by an administrator duly qualified in this state; but he could pay it to the executor; and, if there were no creditors in Pennsylvania besides himself, nobody had a right to complain. On receipt of that money by the executor, he was bound to account therefor in the court having jurisdiction of his accounts. There is no merit in Brown's claim now to surcharge the administrator with the money paid by himself to the executor, and he made no attempt to so do till over 10 years after the payment. An executor may collect debts due if paid voluntarily, and remove them to the state of the domicile, and there administer them. If a creditor of the state where the debtor lived, lies by without interposing by administration or suit until such assets have been fully administered in the state of the domicile, he waives his rights, and cannot afterwards enforce them. *Marcy v. Marcy*, 32 Conn. 327. If the creditor pays a debt owing by himself to the executor, the reason is stronger for holding that he waived his right to the money so paid. In that case, when the executor comes into this state, and the creditor attempts to compel him to pay that money on his debt, it is a good answer that he has already accounted for it in the proper court of the domicile, and has been ordered to pay it as set forth in the decree.

The auditing judge considered and corrected the account. He did more than to distribute the balance appearing on its face as originally filed. He says that the item of \$11,624.89 was accounted for in New Jersey, but was afterwards withdrawn, and he reports it as cash applied to his own debt. This is not in accord with the statement in the account; and appellant not only failed to get leave to withdraw, but a final decree was entered against him for the money. Had the administrator omitted this item, he would have done better. He preferred to account for the money here if he could withdraw it from the testator's domicile. His apparent object was to bring it here, and have it appropriated to himself as a creditor. That he failed to get leave to bring it, and that he could not come in as a creditor had he brought it, do not justify charging him as if he had brought it. The report shows a restatement of the account, additional charges and credits, and, upon proof that this item ought to be omitted because the orphans' court of the domicile retained its grasp of the money, the court below should have excluded the \$11,624.89, and all the interest thereon.

It may be noted that the statement of the evidence in the appellant's paper book, at the argument, was admitted by the counsel for the appellees.

Decree reversed, and it is now considered and decreed that the items of the account composing the New Jersey fund, amounting to \$16,729.54, be struck from the account, and the distribution thereof set aside, and that the decree as to the remainder of the account, and distribution thereof, be and remain in force; appellees to pay the costs. Record remitted.

#### GRAY'S APPEAL.

(*Supreme Court of Pennsylvania. May 2, 1887.*)

Appeal from orphans' court, Luzerne county.

TRUNKY, J. Decree affirmed, and appeal dismissed, at costs of the appellant.

#### PATTERSON'S APPEAL.

(*Supreme Court of Pennsylvania. April 11, 1887.*)

##### 1. CONTRACT—CONSTRUCTION—AGREEMENT BY HEIRS FOR DIVISION OF ESTATE.

A part of the legatees under a will, who were all blood-relations, but not all heirs at law, of the decedent, entered into an agreement, under seal, as follows: "This article of agreement, made by and between the subscribers, is to certify that, for good and sufficient considerations, we do hereby agree that, in case our effort to break the will shall succeed, each one of the said heirs who shall sign this paper shall retain in full such portion of the estate as may be received by any one of said heirs, or to which such said heirs would be entitled in the event of the establishment of said will; that is to say, that, in the event of the breaking of said will, only such portions of the estate shall be distributed to the heirs aforesaid as is not given by the said alleged will to the blood-relations of the deceased." Upon the breaking of the will, and the sale by the administrator of realty devised to one of the legatees, *held*, that such legatee, though not an heir of the deceased, was entitled under the agreement to the proceeds of such sale.

##### 2. SAME—CONSIDERATION FOR AGREEMENT TO RELEASE.

An agreement not under seal, and made by an heir at law of a decedent, in which he releases to one who is not an heir, but is a devisee under the will, all claim he may have to the property so devised, if the will is set aside, is invalid, unless there is proof of a consideration for the promise.

##### 3. DEED—LETTER BY HEIR AGREEING TO RELEASE INTEREST IN ESTATE.

A letter written by the heir at law of a decedent offering to release any claim she may have upon property which has been devised by will to one who is not an heir, in case the will is set aside, is not sufficient to convey her interest to such person.

Appeal from orphans' court, Fayette county.

Sydney Connell died November 17, 1875, having no lineal descendants, but a number of collateral heirs, to whom she left all her property, except a large portion which was left to Joshua M. Dushane, a party who was in no way related to testatrix. A number of bequests and devises were made to blood-relatives, among which was that of a house and lot, the home property of testatrix, which she devised to her niece Minerva Colestock, the appellant, who afterwards intermarried with M. M. Patterson. Shortly after the death of Mrs. Connell, her heirs being dissatisfied with that part of the will in which so great an amount of her property was devised to an utter stranger, entered into an agreement for a redistribution of the property in case an attempt to set aside the will should be successful. The agreement was signed and sealed by the legatees, blood-relations of the decedent, and was as follows: "This article of agreement, made by and between the subscribers, is to certify that, for good and sufficient considerations moving us thereto, we do hereby agree that, in case our effort to break the will of Mrs. Sydney Connell shall succeed, each one of the said heirs who shall sign this paper shall retain in full such portion of estate of the said Sydney as may have been received by any one of the said heirs at the time of signing this article, or to which such said heirs would be entitled in the event of the establishment of said will, clear and outside of any distribution which may be made in the event of the breaking of

said will; that is to say, that, in the event of the breaking of said will, only such portions of the estate shall be distributed to the heirs aforesaid as is not given by the said alleged will to the blood-relations, or any of them, of the said deceased. And we and each of us do hereby release to each and every other one of us, and to the heirs and assigns of each one, all our right, title, interest, and claim as aforesaid. In witness whereof," etc.

J. M. Dushane, who had been appointed by the will as executor thereof, entered upon his duties, and distributed the personal property according to the terms of the will. December 20, 1875, a sister of the deceased, and an heir at law, appealed from the decision of the register of wills admitting to probate the said will, and granting letters testamentary to J. M. Dushane, to the orphans' court, wherein the decision of the register was reversed, and the letters revoked, and a brother of the deceased was appointed in his stead. Dushane did not sign the agreement entered into between the legatees, and, as alienee of the interest of one of the heirs, he commenced in the orphans' court proceedings for the partition of the real estate devised to and occupied by Minerva Patterson. In pursuance thereof, the administrator made sale of the property, and rendered an account of the balance in his hands for distribution. A number of exceptions were filed, and an auditor was appointed to pass upon them, and to make distribution. The heirs who had signed the agreement now appeared before the auditor, and, in disregard thereof, applied for their share of the fund. A distribution was made among the heirs, without notice to Minerva Patterson, and in which she received no portion, except that of one of the heirs of whom she was alienee. To this report she filed exceptions, claiming the portions belonging to her, and which had been given to five of the signers of the agreement, and to one who had acquiesced in the proceedings by letter, and to one who had signed a paper which in effect was the same as the agreement. The letter was written by one of the relatives to another in which the former says: "According to your statement, she [Sydney Connell] has given it [the property] to strangers, and perhaps not in her right mind. I shall say to you, for my mother, take the responsibility on yourself in the prosecution of this matter, and for your trouble, if you are successful, I agree to do as the others, and, if you are not successful, you shall be at all the expense of the prosecution. And as for Miss Colestock, or Mrs. Patterson, I am willing for her to keep what she has." The paper signed by J. A. Williams, but without seal, was as follows: "For value received, I do hereby agree that in the event the will of Sydney Connell is set aside or broken by her heirs, in the action soon to be brought for that purpose, I will, as one of the said heirs, make no claim to any part of the real or personal estate given to Mrs. Minerva S. Patterson, late Colestock, but do further agree that she shall have the same interest in said estate that she will take in case said will is sustained." Upon hearing these exceptions, the court referred the matter back to the auditor, who made a second report, in which he disputed the validity of the agreements and the letter, and refused to recognize them in the proceedings. The report was confirmed by the court, and Mrs. Patterson appeals.

*Boyle & Mestrezat and Morrow & Hertzog*, for appellant. *John Collins and Nathaniel Ewing*, for appellees.

TRUNKEY, J. Sydney Connell's will was probated on November 22, 1875. It contained a bequest and a devise to Minerva Colestock, and a number of bequests and devises to other persons; the residue of the estate to J. M. Dushane. Some of the objects of the bounty of the testatrix were not of kin to her; others were of kin, but not entitled to share in her estate in case of intestacy; and some who would be entitled as heirs and next of kin were not named in her will. The contest of the alleged will was successful.

A number of those interested in the result of the contest entered into an

agreement, which, if not artistically drawn, is not void for uncertainty as to its meaning. No objection was made to its admission in evidence, and the auditor gave no reason for throwing it out of consideration other than that its validity was disputed. The subscribers to the instrument mutually agree that, if they succeed in their efforts to break the will, each one shall retain such portion of the estate as he or she may have received under the will, and only such portions of the estate shall be distributed to the subscribers as is not given by the will to the blood-relations of the decedent, and each release to each and every other all his or her right as aforesaid. It is declared in the instrument that it is made for good consideration, and the parties affixed their seals. The heirs of the decedent who are not parties are not affected by its covenants, and they are entitled to their respective shares in the estate, and to the remedies for recovery, provided by the intestate laws. The parties to the covenant could not prevent the partition and sale of the real estate, and the proper place for them to assert their covenant rights is in the distribution of the proceeds. Those who covenanted with Minerva Colestock that she should have the land devised to her in the will, and released to her their interest in the same, are not now entitled to take any of the money arising from sale of that land. They agreed that no distribution should be made to them of any part of the estate given by the will to a blood-relation. It was error to disregard the covenant as foreign to all questions arising in the distribution.

The appellees contend that the agreement, if valid at all, is only valid between the heirs of the decedent; and Minerva Colestock, not being an heir, has no right under the covenant. But she was a party interested in the contested will, and became uninterested because of the agreement. The agreement is by and between the subscribers. The word "heirs" relates to the subscribers. A clause provides relative to each one of said heirs who shall sign the paper. If the will falls, "such said heirs" shall take what is given them in the will, and the other portion of the will shall be given to the "heirs aforesaid." It is manifest that the word "heirs" is not used in its technical sense. By it, as shown by the context, the parties meant the subscribers to the agreement, both heirs at law and persons interested in the alleged will.

The letter of Sydney Jennison to Gilmore, in itself, is not sufficient to convey her interest to Miss Colestock.

Without proof of consideration, the contract signed by J. A. Williams, dated January 13, 1876, is invalid. No evidence was given of the inducement, or of the attendant circumstances, showing consideration. On its face, the paper is for the benefit of Minerva S. Patterson, late Colestock, and, if made for good consideration, it binds the maker.

Had not the auditor cast aside the agreement, he would not have put the costs of the second audit on Minerva Patterson. That imposition of costs was right upon the adjudication; but, if her claim be established, the case will be different.

Decree reversed, at the costs of appellees, and record remitted for further proceedings.

### Appeal of MCGUIRE.

(*Supreme Court of Pennsylvania. October Term, 1887.*)

#### WILL—DEVISE DURING WIDOWHOOD "IN FEE-SIMPLE"—LIFE-ESTATE.

A testator had devised a parcel of land to one of his sons, in fee-simple, but the son having died in the life-time of the father, a codicil was added devising the same parcel to the widow of such son, "while she remains the widow of said John McGuire, deceased, in fee-simple." *Held*, that she took only a life-estate terminable on her marriage.

Appeal from common pleas, Westmoreland county; JAMES A. HUNTER, Presiding Judge.

Bill of Eliza J. McGuire, appellant, to compel specific performance of a contract made with her by Robert H. McGuire, by which she agreed to convey certain land to him in fee-simple, and he to pay her \$3,000. He refused to take the plaintiff's deed and pay for the land, contending that plaintiff is not the owner in fee. Plaintiff's title comes to her by devise from James McGuire, her father-in-law. By his will he devised the land in question in fee-simple to his son, John McGuire, who was appellant's husband. John having died, James McGuire made a paper writing which he called his last will and testament, indorsed on the same sheet of paper on which the foregoing will was written, in which, *inter alia*, he says: "I devise to my daughter-in-law, Eliza J. McGuire, the widow of John McGuire, deceased, while she remains the widow of said John McGuire, deceased, in fee-simple the tract of land upon which the said widow now resides, in Derry township, on both sides of the Pennsylvania railroad, containing ninety-seven acres and nineteen perches," etc. "Also I devise the said Eliza J. McGuire one hundred dollars, when collected, which the Pennsylvania Railroad Company owes me for damages sustained on the above-described land." And appointed, in said paper writing, his sons, Alexander and Josiah, executors "of this my last will and testament which relates to the part of my will concerning John McGuire." This codicil was proved along with the will on November 14, 1865. The bill was dismissed, and complainant appeals.

*H. P. Laird*, for appellant.

If the clause, "while she remains the widow of said John McGuire," should be held to place any restraint upon the fee-simple title he had given her, then that clause will be repugnant to the principal devise, and void. 1 Jarm. Wills, marg. p. 810; 4 Kent, Comm. marg. p. 131; 2 Jac. Law Dict. tit. "Condition," 5, 6, 8. The devise could not be a base fee. 2 Bl. Comm. 109. Where two clauses in a will are repugnant, effect should be given to the latter. *Lewis' Estate*, 3 Whart. 162; *Stickle's Appeal*, 29 Pa. St. 234; *Newbold v. Boone*, 52 Pa. St. 167; *Snively's Ex'rs v. Stover*, 78 Pa. St. 484. The eighth section of the act of April 8, 1833, (2 Purd. Dig. p. 1711, pl. 14,) which was intended to prevent the lapsing of a devise or legacy in favor of a child, saved "to every testator the right to direct otherwise." In this case the codicil to the will did direct otherwise; and the direction, in the statute, could not take effect, because, by the terms of the statute, it must take effect, if at all, in favor of the issue to the full extent of the devise to the ancestor.

*John B. Keenan*, for appellee.

"The intent of the testator is to be gathered from the four corners of the will, taken as a whole." *Lynn v. Downes*, 1 Yeates, 518; *Edmonson v. Nichols*, 22 Pa. St. 74. "Wills are to be construed as wholes,—parts should interpret and modify other parts,—and the intention, which permeates the whole, cannot but be accepted as the final meaning of the instrument." *Shreiner's Appeal*, 53 Pa. St. 108. "Particular expressions that would stand in the way of the general intent of the testator, are to be construed in subordination to it or disregarded." *Musselman's Estate*, 5 Watts, 9; *Schott's Estate*, 78 Pa. St. 40. "When the \* \* \* insertion of words has \* \* \* wrongly expressed, what, from the whole tenor of the will was the intention of the testator, the court will permit the will to be read as if the words had been \* \* \* omitted." *McKeehan v. Wilson*, 53 Pa. St. 74.

If James McGuire had died after the death of his son, John, and without making the codicil, clearly, under the act of April 8, 1833, § 12, this land would have gone directly to the children of John McGuire, deceased, of whom the appellee is one; and Eliza J. McGuire, the appellant, would have no claim to it, or any part of it. The devise to John McGuire did not lapse at his death; it survived to his heirs. Act of April 8, 1833, § 12, (P. L. 1833, p.

250.) The codicil did not revoke the devise to John McGuire; it simply arrested the devise in its descent to the children by interposing the estate, *durante viduitate*, in their mother.

"The principle of not disinheriting the *heir* without sufficient words, ought, if possible, to be more strictly observed here than in England; because there the *eldest* son is the heir, but here the law is more equitable, and all the children together are considered as heirs." *French v. McIlhenny*, 2 Bin. 20; *McIntyre v. Ramsey*, 23 Pa. St. 320; *Rupp v. Eberly*, 79 Pa. St. 144.

The question of conditions, repugnant or otherwise, does not properly enter into this case, and requires no discussion upon our part. The clause, "While she remains the widow of said John McGuire, deceased," is not a condition, but a limitation, creating an estate, *durante viduitate*, a *particular* estate. And, as to the *remainder*, the testator, with the help of the act of April 8, 1833, devises it to the children of his son, John. The argument, based upon the favor with which the law looks upon the latter of two irreconcilable clauses in a will, is indeed a strong one; but it loses its force when we perceive that this latter clause is the work of an ignorant scrivener, is opposed to the plain intent of the testator gathered from the whole will, and is opposed also to that policy of the law which favors the heir instead of a stranger.

**PER CURIAM.** Eliza J. McGuire could not comply with the terms of her contract, of June 1, 1886, with Robert H. McGuire, by conveying to him the fee-simple of the land therein described, and until she is in a position to do this, he cannot be compelled to pay the purchase money. We are inclined to think with the learned judge of the court below, that under the will of James McGuire she took but a life estate. At best, however, her estate was no more than a conditional fee, hence liable to expire on breach of the condition. But this was not the kind of a fee that the appellant agreed to take, and the court was therefore right in refusing to compel him to pay the purchase money.

The decree is affirmed at the costs of the appellant.

#### COEN v. ADAMSON.

(Supreme Court of Pennsylvania. October 6, 1887.)

##### 1. CONTRACT—AMBIGUITY—PAROL EVIDENCE TO EXPLAIN.

An agreement for the sale of a stock of merchandise contained the following stipulation: "Said Adamson [the purchaser] further agrees to pay all rents on building where goods are found for which said Coen is liable, and to receive all rents coming to said Coen on the above-named building, from the day of the completion of invoice until the first day of April, 1883." Parol evidence was offered to show that Coen was then indebted for the rent of the building for the entire year, and that the purchaser was aware of that fact, and had agreed to pay such rent. *Held*, that the language of the stipulation was unambiguous, and the oral testimony properly excluded.

##### 2. SAME—CONSTRUCTION—PAYMENT OF RENT.

*Held, also*, that under such stipulation Adamson was liable only for the rent for the period beginning with the completion of the invoice.

Error to common pleas, Green county; JAMES INGRAM, Judge.

*Assumpsit* brought by plaintiff in error.

Plaintiff had been engaged in the grocery business, and occupied a store in a building which he had leased by written agreement from Uriah Ingram for a term of one year, beginning April 1, 1882, for the annual rental of \$400. On February 6, 1883, the defendant purchased plaintiff's business under an agreement which, among other things, contained the following stipulation: "Said Adamson further agrees to pay all rents on building where goods are found for which said Coen is liable, and to receive all rents coming to said Coen on the above-named building, from the day of the completion of the in-

voice until the first day of April, 1883." The invoice was completed on or about the tenth of February, 1883, and Adamson immediately went into possession of the grocery and premises, and paid Coen the whole of the purchase money substantially according to their agreement.

Adamson received the rents from the sub-tenants from the date of the completion of the invoice up to April 1, 1883, and has always been willing and ready to pay the amount of rent for which Coen was liable to Inghram, for the same time. Coen refused to accept this, and brings this suit to recover \$400,—the full amount of rent due and paid by him to Inghram for the year beginning April 1, 1882, and ending April 1, 1883,—alleging that the whole of said rent was unpaid at the execution of the Coen-Adamson agreement, and that Adamson, by the terms of their written agreement, had bound himself to pay the same.

The plaintiff offered in evidence the article of agreement between himself and Uriah Inghram, for the purpose of showing the amount of rent he was to pay Inghram for the building, and that he was at the time of the execution of the Coen-Adamson agreement liable for the whole year's rent, and this to be followed by parol evidence that he had paid the whole year's rent. This was admitted for the purpose of showing the amount of rent due to Inghram, and by whom paid. The plaintiff then offered parol proof of the various propositions that passed between Coen and Adamson prior to the time of the execution of the written agreement between them, "for the purpose of showing that the defendant, when he signed the article of agreement of February 6, 1883, knew the amount of rent he was agreeing to pay to the said Inghram, and for the further purpose of showing the consideration for which said defendant agreed to pay all the rents on said building where the goods were for which said Coen was liable was \$400." This, in connection with the written agreement already in, "for the purpose of showing the extent of the plaintiff's claim under the agreement." This testimony was excluded, and the court instructed the jury to find for plaintiff the amount admitted to be due.

#### A. A. Purman, for plaintiff in error.

The writing of February 6, 1883, refers to the liability of the plaintiff for all rents on the building; hence the liability of plaintiff for the rent, to whom liable, and the amount for which he was liable, were all part of the *res gesta*. To understand and interpret that writing, we must have it with all the surrounding circumstances which properly constitute a part of it. 2 Whart. Ev. § 1015; Wells, Law & F. § 49; 1 Greenl. Ev. §§ 285, 286; *Miller v. Fichthorn*, 31 Pa. St. 252; *Young v. Com.*, 28 Pa. St. 504. The intention of the parties as to the amount of rent that Adamson was to pay can be ascertained only by parol proof of the amount of rent Coen was liable for on the building where the goods were at the time of the sale, and by the knowledge of Adamson at that time of the amount of rent Coen was liable for. As far back as 1750 the king's bench held in *Jones v. Newman*, 1 W. Bl. 60, that parol objections may be encountered by parol evidence; and this court in 1835 held, in *Ellmaker v. Ellmaker*, 4 Watts, 90, that a marriage settlement would not exclude the wife from a share in the personal estate under the statute of distribution. The parol evidence offered in this case introduces nothing conflicting with the obligation of February 6, 1883. 2 Whart. Cont. §§ 660, 661, 910. This contention is between the original parties; hence the writing may be helped by averments and parol proof to carry into effect what the parties meant, no matter what are the words they have used. 1 Whart. Cont. § 202. The parol evidence offered in this case tended to explain and define the subject of the writing of February 6, 1883, and was therefore admissible. *Church v. Clime*, 19 Wkly. Notes Cas. 361, 9 Atl. Rep. 163.

The court ought to have instructed the jury that under the writing of Feb-

ruary 6, 1883, and the agreement of January 25, 1882, and the admissions of the defendant, the plaintiff was entitled to recover \$400, and its interest from September 12th. The writing of February 6, 1883, was offered in evidence of a fact, *i. e.*, the amount of rent to be paid by defendant to Mr. Inghram, and it, with the other facts proved and admitted, was proper to go to the jury for construction to ascertain what amount of rent the defendant agreed to pay when he purchased the goods. Now, intention is a question of fact, and may be averred and helped by parol evidence. *Moss v. Riddle*, 5 Cranch, 351; *Clift v. White*, 12 N. Y. 538. Thus in *Crossman v. Turnpike Co.*, 3 Grant, Cas. 225, it was held that "whether the seal affixed to an alleged instrument "be the defendant's seal, a jury only can determine."

In *McKean v. Wagenblast*, 2 Grant, Cas. 463, it was held that where a written document is offered as evidence of a fact, or where it is to be considered in connection with the situation of the parties, or in reference to other facts proved by parol, the meaning of the written document is not matter of law for the court, but must be left to the jury. In *Sidwell v. Evans*, 1 Pen. & W. 388, it is said by GIBSON, C. J., "that an admixture of parol with written evidence draws the whole to the jury." In *Reynolds v. Richards*, 14 Pa. St. 206, it is held that the mere fact of evidence being in writing does not entitle the court to interpret its meaning conclusively. Where the question is on its effect as evidence of a collateral fact, it is to be submitted to the jury. In *Railroad Co. v. Livermore*, 47 Pa. St. 465, the court submitted to the jury whether the word "appurtenances" in a mortgage included certain town lots. This court has very recently held in the case of *Church v. Clime*, 19 Wkly. Notes Cas. 361, 9 Atl. Rep. 163, that parol evidence may be admitted to show the circumstances at the making of a writing, the intention of the parties may be ascertained by extrinsic testimony, and that the admission of parol testimony for such purpose does not infringe upon the rule which makes a written instrument the proper and only evidence of the agreement contained in it. The parol evidence offered in this case does not contradict or vary the terms of the writing, but explains the subject-matter of the agreement. *Gould v. Lee*, 55 Pa. St. 99. The parol evidence offered in this case does not attempt to show that the writing of February 6, 1883, meant nothing, nor does it attempt to show that the writing meant something else than is written, but to explain the subject-matter of the agreement, *i. e.*, "all rents on building where goods were found for which said Coen was liable." Hence the same is both competent and relevant.

The following cases, relied on by counsel for defendant upon the motion for a new trial, do not rule this case in his favor. The case of *Denison v. Wertz*, 7 Serg. & R. 372, recognizes the doctrine that, where matters of fact are intermixed with a written instrument, the whole must go to the jury. In *Bryant v. Hagerty*, 89 Pa. St. 261, the liability depended upon what was shown by the face of the paper, and not a question of intention. *Collins v. Rush*, 7 Serg. & R. 148-151, recognizes the doctrine that mixed questions of law and fact carry written instruments to the jury. *Beatty v. Insurance Co.*, 52 Pa. St. 456, holds that, where an ambiguity arises on a written document from extrinsic evidence, it must be solved by the jury, and the application of the meaning is a question of fact. *Heath v. Page*, 48 Pa. St. 143, holds that a question of intention belongs to the jury, because the intention is to be collected from a variety of circumstances. *Watson v. Blaine*, 12 Serg. & R. 131, holds that, where a written instrument cannot be understood without reference to facts *dehors* the writing, the jury are to judge of the whole together. *McCullough v. Wainright*, 14 Pa. St. 171, holds that where ambiguity exists in a written contract, arising from its reference to extrinsic objects, it may be explained by parol testimony as to the situation and character of those objects at the time of the contract, and such evidence is for the jury.

*R. F. Downey*, for defendant in error.

The court did not err in rejecting the evidence of the plaintiff offered "for the purpose of showing the extent of their claim under the agreement." There was no ambiguity in the paper, and it has always been held that in such cases it is the duty of the court alone to put a construction upon written instruments. In *Bryant v. Hayerty*, 87 Pa. St. 261, SHARSWOOD, C. J., says: "This was submitting to the jury the construction of a written instrument, which is exclusively the province of the court."

"It is the right of every suitor to have the opinion of the court on such matters as by the law of the land the court is bound to decide, and one of these matters is the construction of written contracts." *Denison v. Wertz*, 7 Serg. & R. 376. The same doctrine is held in *Collins v. Rush*, 7 Serg. & R. 151; *Reaney v. Culbertson*, 21 Pa. St. 512; *Gass' Appeal*, 73 Pa. St. 46; *Heath v. Page*, 48 Pa. St. 143.

It has been held that, even where there is ambiguity on the face of the printed or written document, it is for the judge to explain. *Beatty v. Insurance Co.*, 52 Pa. St. 457. But where the ambiguity arises from extrinsic evidence, then it must be solved by a jury. In this case there was no such extrinsic fact to be left to the jury. The Inghram article was admitted for the purpose of showing the amount of rent that Coen was liable for, and the fact that such rent had been paid. These facts are not disputed, and the writing was admitted for that purpose. But it and all parol evidence was excluded as incompetent for the purpose of placing a construction upon the plain language of the Coen-Adamson article. The case of *Denison v. Wertz*, *supra*, was a question of rent very similar to that raised in the present case, and TILGHMAN, C. J., says: "Here was an agreement to pay rent intermingled with no facts which operated on the construction. The jury, indeed, would have had to decide, in case it had been material in this action, what was the rate of the present rent, but the time for which it was to be paid was to be determined from the writing itself, and was exclusively the province of the court." But, even where there may be extrinsic facts to be ascertained, they must be such facts as are doubtful or disputed. *Edelman v. Yeakel*, 27 Pa. St. 30. In *Gould v. Lee*, 55 Pa. St. 108, WOODWARD, C. J., says: "Parol evidence is not admissible to alter or contradict what is written, upon the very obvious principle that the writing is the best evidence of the intention of the parties."

The court having held that the language of the agreement meant that Adamson was only to pay rent from the completion of the invoice up until April 1, 1883, to have admitted parol evidence to show that he was to pay rent for the whole year would certainly be an attempt to vary and alter the terms of the writing, or to show that it meant something else than was therein written, and this could not be done. *Church v. Clime*, 19 Wkly. Notes Cas. 363, 9 Atl. Rep. 163.

"Where parties without any fraud or mistake have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement." *Bowman v. Tagg*, 8 Atl. Rep. 384; *Albert's Ex'rs v. Zeigler's Ex'rs*, 29 Pa. St. 50; *Martin v. Berens*, 67 Pa. St. 461; *Thorne v. Warflein*, 100 Pa. St. 526. But even if the plaintiffs had alleged that there was fraud or mistake in the execution of the contract, their offer does not propose to establish what occurred at the execution of the agreement, but what occurred previous thereto, and this they cannot do. *Stine v. Sherck*, 1 Watts & S. 195; *Railroad v. Shay*, 82 Pa. St. 203; *Caley v. Hoopes*, 86 Pa. St. 493.

PER CURIAM. We agree with the learned judge of the court below in his construction of the contract involved in this suit. Its terms are plain and obvious. Adamson was to pay the rent on the premises for that time only

during which he received rent from Coen's tenants; that is, from the day of the completion of the invoice until the first of April, 1883; and, as the case depended on the interpretation of an unambiguous written contract, all oral testimony was properly excluded. Under this view of the case, none of the plaintiff's exceptions can be sustained.

The judgment is affirmed.

### Appeal of JOHNSTON and others.

(Supreme Court of Pennsylvania. October 6, 1887.)

#### 1. EXECUTORS AND ADMINISTRATORS—POWER OF ORPHANS' COURT TO REMOVE—DELEGATION OF AUTHORITY BY ADMINISTRATRIX.

Acts Pa. March 29, 1832, and May 1, 1861, authorizing the orphans' court to remove executors and administrators for causes therein set forth, do not empower it to revoke letters of administration upon a petition showing that the administratrix has given a stranger to the estate an irrevocable power of attorney to act for her in settling the estate.

#### 2. SAME—LIABILITY OF ADMINISTRATRIX FOR INTEREST.

An administratrix, having collected large sums of money belonging to the estate, deposited them in a bank near her home, where they were subject to her check, she receiving no interest on such deposit. It was sought to surcharge her account with interest on the sums so deposited. *Held* that, as she was not required to put the money at interest, and was not shown to have profited by the deposit, she could not be chargeable with interest.

#### 3. SAME—COMMISSIONS.

A charge of 4 per cent. on the amount realized by an administratrix who files her account within one year after her appointment is not extravagant, and no cause of complaint exists in the fact that she divided her commission with her agent in the settlement of the estate.

Appeal of A. A. Johnston, Jr., Isabella Copperstone, Caroline Murphy, John Barclay, guardian of William F. Johnston and Estella Johnston, minors, John Keenan, guardian of Elizabeth Johnston, minor, from the decree of the orphans' court of Westmoreland county; JAMES A. HUNTER, Presiding Judge, settling the account of Caroline Johnston as administratrix.

The heirs at law filed exceptions to the account, and petition to remove the administratrix, on the ground that she had given an irrevocable letter of attorney for an alleged valuable consideration to one S. H. Baker, constituting him her attorney irrevocably in settling the estate; the petition alleging that Baker is a stranger to the estate, without any interest therein, and being a debtor to a large amount. The court referred all the questions raised to an auditor, who made the following findings of fact: That Mrs. Caroline Johnston is the administratrix of A. A. Johnston, deceased; that she charged a commission of 4 per cent. on \$88,275.24, or \$3,377.58, as compensation for her services; that she employed S. H. Baker to assist her, and paid him out of her *own* commission at the rate of one-half thereof; that she kept her account as administratrix with the Citizens' Bank of Latrobe; that she has not received, and will not receive, any interest on any of this deposit. He finds that the commission charged is proper to be allowed, and says:

"No general rule can be established with respect to the commission to be allowed to administrators or executors. *Pusey v. Clemson*, 9 Serg. & R. 209. \* \* \* The usual commissions to an executor are  $2\frac{1}{2}$  per cent. on sales of real estates and 5 per cent. on other receipts; and these should not be varied except for cause. *Eshleman's Estate*, 74 Pa. St. 45. Five per cent. has been allowed as a reasonable compensation in most cases upon the amount of personal estate, and  $2\frac{1}{2}$  per cent. upon the proceeds of real estate; but this is a mere method of measuring compensation. The compensation of a trustee of any character may be arrived at as a matter of convenience by the way of a percentage on the amount of receipts and disbursements. But after all, on all authority, it is a question not of *percentage*, but of *compensation*.

When the court has fairly responded to the interrogatory, *how much has the trustee earned?* it has discharged its whole duty in the premises. *Montgomery's Appeal*, 86 Pa. St. 234. GIBSON, C. J., states the rule thus: 'Compensation is usually awarded in the form of a commission. The rate is not determinable by any established practice or rule, being graduated to the responsibility incurred, the amount of the estate, and the sum of the labor expended.' *Harland's Appeal*, 5 Rawle, 323. Commissions are given as a compensation for labor and responsibility; and where neither the one has been performed, nor the other incurred, there is nothing to be compensated. *McCauseland's Appeal*, 38 Pa. St. 466; *Gable's Appeal*, 36 Pa. St. 396. This is the idea that runs through all the cases. While a percentage is constantly spoken of and used because of its convenience, yet it is compensation,—nothing more nor less,—that is steadily kept in view. *Montgomery's Appeal*, *supra*; 1 Rhones, O. C. 303 *et seq.*

"Under these authorities, our present inquiry is whether the commission of 4 per cent. charged by Mrs. Caroline Johnston, administratrix, was a fair and just compensation for the services rendered by her in settling this estate. In order that your honor may the more readily understand what these services were, and that we may more correctly arrive at a conclusion as to what a just and fair compensation would be, it will be necessary to refer to some of the facts as they appear in the account, and were adduced at the hearing. The inventory shows that the estate, as it came into the hands of the administratrix, consisted almost wholly of money in banks and securities. She is charged with \$117,944.13, and of this amount \$53,094.30 consists of money deposited in banks, \$51,100 consisted of judgment notes, judgments, and mortgages on record, and promissory notes and due-bills. She is also charged with some \$12,000 of doubtful paper, which it is her duty to save, if possible. The account itself shows that at the time it was filed she had collected in for the estate \$125,619.93, an increase over the inventory of \$1,675.90, and that the sum is made up of interest on the large number of claims held by the estate. All this demands the closest kind of attention, and has received it, when we consider that no one complains of this, and no one charges that any assets have been lost for lack of attention. In the matter of the disbursement of this large sum, the account shows a long list of claims, although only small claims, paid. The vouchers offered in evidence show payments to the heirs, beginning January, 1835, and extending up to September 22, 1886, aggregating \$49,382.86. To thus promptly collect and pay out so large an estate indicates diligence. To thus gather in and correctly disburse this amount of money necessitated careful attention, much time and trouble, and incurred a very great responsibility. The responsibility in this case is certainly very great, and must be considered in estimating the compensation."

One of the grounds of exception to the account was the claim that the accountant or her attorney in fact had collected various sums which were drawing interest, and deposited them with a bank largely owned and controlled by said attorney. In regard to this the auditor says:

"The liability of an administrator or executor for interest in this state has been the subject of legislative enactments as follows: 'Sec. 17 No executor or administrator shall be liable to pay interest but for the surplusage of the estate remaining in his hands or power when his accounts are or ought to be settled and adjusted in said register's office; provided, nothing herein contained shall be construed to exempt an executor from liability to pay interest where he may have made use of the funds of the estate for his own purpose previous to the time when his accounts are or ought to be settled as aforesaid.' Act twenty-ninth March, 1832, (1 Purd. 50; P. L. 207,) it is also made the duty of an administrator. 'And also a just account and settlement thereof in *one year*, or when thereunto legally required to make.' Act of fifteenth March, 1832, (1 Purd. 517; P. L. 53.)

"In examining this branch of the exception, these acts must be kept steadily in view, because they impose a duty on the administratrix, and also indicate her liability. The present law and practice in this commonwealth is that administrators are allowed one year after the grant of letters for the settlement of their accounts, and during that period they are not chargeable with interest upon the funds of the estate lying in their hands. This is fair and just, because during the year the administrator must keep funds of the estate disengaged or on deposit, subject to check, to meet the constant demand of creditors. But, if an administrator actually receives interest during this time, he ought to account for it, for, being in the nature of a trust, he is not permitted to use it to his own benefit. This liability of an administrator to pay interest when the trust fund *has actually earned it*, and such *interest has come into his hands*, or when he has failed to settle his account, and pay over the fund to those entitled to it, is well settled in our courts. In no event will the trustee be allowed to profit out of the trust funds. *Norris Appeal*, 71 Pa. St. 125, cases cited; Rhones, O. C. It is said in *France's Estate*, 16 Wkly. Notes Cas. 350, the duty of an administrator or executor to collect the assets of the decedent precedes the duty to pay the debts. The latter cannot be compelled until a year from the grant of letters, while the former begins immediately after making the inventory. An executor or administrator is under obligation to diligence in preparing for distribution. *Neff's Appeal*, 57 Pa. St. 97; *Long's Estate*, 6 Watts, 46; *Charlton's Appeal*, 34 Pa. St. 475.

"What are the facts? When Mrs. Johnston took out letters, April 16, 1886, she found that her late husband had had accounts with two banks. In the Citizens' Bank of Latrobe she found a certificate of deposit for \$5,000, bearing interest at 2 or 3 per cent., and an open account subject to check, for \$1,802.75. In the Barclay Bank she found a certificate of deposit for \$4,600 bearing interest at 3 per cent., due February 3, 1886, and a small open account for \$291.55. April 20, 1885, the administratrix opened an account in the Citizens' Bank as 'Mrs. Caroline Johnston, administratrix of A. A. Johnston, deceased,' and began to collect the assets of the estate, and deposit them in this account in this bank. Four days after the grant of letters the account of decedent was closed, and transferred to the administratrix, and from that time on all the money of the estate that was collected was deposited to this account, and was under the control, and subject to the check, of the administratrix. From the date of opening the bank-account until the seventeenth of April, 1886, the day the administratrix filed her account, is three days less than a year, and but a year and one day from the grant of letters; which indicates great diligence on the part of the administratrix in the management of the estate, and a full compliance with the acts aforesaid, by filing the account when the same 'are or ought to be settled and adjusted in the said register's office.'

"The administratrix also used care and prudence by depositing the money with either of the banks her husband had made his depository. If, then, she has not made use of the funds, or received interest thereon previous to the time of filing her account, she cannot be surcharged with interest. This inquiry is cleared up by the testimony of the administratrix herself: '*Question*. As administratrix of the estate of A. A. Johnston, deceased, at what bank did you have the funds of the estate deposited? *Answer*. At the Citizens' Bank of Latrobe. *Q*. State whether or not you, as administratrix of said estate, have ever received any interest on those deposits, or contracted to receive any interest with or from the said Citizens' Bank of Latrobe. *A*. No, sir. *Q*. \* \* \* Was it kept there as you would leave it at any other bank to be lifted when you called, as you stated? *A*. Yes, sir.' From this it is clear that the money was deposited in the Citizens' Bank of Latrobe in the name of 'Caroline Johnston, administratrix,' subject to her check, and under

her control, and that she has not, nor will not, receive any interest therefor. What the Citizens' Bank did with these funds is immaterial, provided the checks of the administratrix were always honored, and funds furnished her whenever requested.

"The administratrix appears to have paid per checks and drafts on the Citizens' Bank to the heirs the following amounts, at the respective dates:

February 4, 1886, Carrie Johnston, - - - -	\$ 7,000 00
March 28, 1886, S. Fretz, Guard., - - - -	10,000 00
July 29, 1886, John Barclay, - - - -	10,000 00
July 29, 1885, Mrs. Copperstone, - - - -	5,000 00
December 30, 1885, Alex. B. Johnston, - - - -	2,000 00
February 18, 1886, Alex. B. Johnston, - - - -	3,512 00
March 23, 1886, John B. Keenan, Guard., - - - -	3,800 00
September 22, 1886, A. A. Johnston, - - - -	4,800 00
Widow for Minor Heirs, - - - -	3,770 86

\$49,382 86

"The payments of these sums at the dates given would indicate that the money was on deposit, subject to the checks of the administratrix; and as interest is not allowed on such deposits, and the decedent did not receive interest on his open account, hence it would be unreasonable to charge this accountant interest. The Barclay certificate was not collected until due, and no interest was lost on it. The Baker notes and certificate on Citizens' Bank were on interest until paid. Hence all the interest these moneys earned has been accounted for. The money was collected for the purpose of making a distribution in June, 1885, to the heirs. This the administratrix was bound to do. *Neff's Appeal* and cases *supra*.

"The fact that this was an 'increasing account' does not change the responsibility of the administratrix. We are of opinion that she cannot be surcharged interest on any of the fund collected in by her prior to filing the account. That she cannot be charged interest while her account is pending before your auditor, or during the pendency of the exceptions in court, is abundantly established in *McElhenny's Appeal*, 46 Pa. St. 350, per STRONG, J.: 'Trustees should be held to a strict performance of their duty, but when they have performed it they should not be compelled to pay interest on the trust funds which they have not received.' See, also, *Hoopes v. Brinton*, 8 Watts, 73; *Dietterich v. Heft*, 5 Pa. St. 94; *Wither's Appeal*, 16 Pa. St. 151; and *Hantz v. York Bank*, 21 Pa. St. 291. This exception is therefore dismissed."

The court rendered the following opinions and orders in the matters:

#### OPINION ON THE PETITION TO REMOVE ADMINISTRATRIX.

"BY THE COURT. There is no doubt but that the orphans' court has power to remove executors or administrators, as proposed by counsel for the rule, but the causes for which they may be removed are designated in the statutes, and the orphans' court is but the creature of statutory law, and derives its powers entirely therefrom. The acts of March 20, 1832, and May 1, 1861, authorize the orphans' court, for causes therein set forth, to discharge executors and administrators, but there is nothing in the petition that brings the respondent within the terms of these acts. The record shows that letters of administration were granted by the register to the widow. She had the first right under act of March 15, 1832. And from this decree of the register there has been no appeal. Now the application is to *revoke* the letters; but what authority has this court to revoke letters upon petition simply, and without appeal or any application had to the register to reconsider his decree, if improvidently made? But we must also remember that the administratrix has filed her account, and that exceptions have been filed thereto by the parties here complaining. If

injured, ample redress can be had in this way, which is the most direct way. These exceptions are now before an auditor, appointed for the purpose of hearing the parties in interest. We need only add that the bond is ample, and I can see no danger to the rights of the complainants. And now, August 30, 1886, rule discharged at the cost of petitioners. (Exception to opinion and order by counsel for the rule.)"

#### OPINION ON EXCEPTIONS AND DECREE MADE.

"BY THE COURT. The widow was entitled to administration. So far as the estate is concerned, the power of attorney to S. H. Baker amounts to nothing. She and her bondsmen are responsible. In removing a portion of the funds from the bank in Greensburg to a bank in Latrobe, I see no objection. Latrobe was the nearest point for persons to whom checks may have been granted. The accountant was not required to put the money at interest, but, if there was proof that the accountant profited from a deposit of the money, she would be chargeable with such profit; but there is no such proof here. Large sums of money, from time to time, are paid into court, and deposited in a bank, and the practice is the same elsewhere. This was especially true in the court of bankruptcy. That such banks may profit thereby may be true, but that is an advantage peculiar to the business. They have risks to run, while it is always safest to have money in a solid bank than to keep it in a bureau drawer. The cost of closing the estate was but 4 per cent., and by the weight of the authorities 4 per cent. is not extravagant. The whole trouble here is that the accountant and her agent divided the compensation in stating her account, and without this the matter would have been stripped of question. The closing up of so large an estate in so short a time shows the hands of a business man, and I do not think there is any cause for complaint. And now, February 19, 1887, the exceptions are dismissed, and the auditor's report confirmed. (Exception by counsel for exceptants.)"

*Welty McCullogh*, for appellants. *Wentling & Miller* and *Marchand & Gaether*, for appellee.

**PER CURIAM.** The opinion of the court below, though short, so justly and properly disposes of this case that nothing remains for us but to concur in it. Decree affirmed, and appeal dismissed, at the costs of appellant.

#### CLARKE v. DILL.

(*Supreme Court of Pennsylvania.* October 7, 1887.)

#### CONTRACT—FAILURE TO GIVE NOTES FOR INSTALLMENTS—REMEDIES.

Where a contract of sale stipulates for payment by installments, to be secured by promissory notes, which notes the buyer after delivery of the goods refuses to give, the seller may either treat the contract as broken, and sue for damages, or regard it as subsisting, and sue for each installment as it falls due.

Error to court of common pleas, Westmoreland county.  
*Moorhead & Head*, for defendant in error.

**PER CURIAM.** By the contract between the contestant parties the tables were to be paid for in two payments of \$175 each, at six and twelve months, and to be secured by promissory notes. When the defendant refused to give the notes as per contract, the plaintiff had either of two remedies: He might treat the contract as broken, and sue for damages; or, on the other hand, he might elect to regard the contract as subsisting, and sue for the installments as they became due. He chose the latter alternative, and the court below did only what was just and lawful in sustaining his contention. The judgment is affirmed.

## Appeal of ALEXANDER.

*(Supreme Court of Pennsylvania. October 8, 1887.)*

## 1. SPECIFIC PERFORMANCE—NECESSARY PARTIES.

M. entered into a contract for the purchase of land of A. B. paid A. the consideration money; it being agreed between the parties that, when A. conveyed to M., B. should receive a mortgage on the property for the money advanced. In a bill by the heirs of M. for specific performance, *held*, that B. was a necessary party.

## 2. SAME—CONSTRUCTION OF CONTRACT—PARTY'S SUBSEQUENT OPINION IMMATERIAL.

A. contracted to sell certain lands to M., reserving to himself certain mining privileges. After the death of M., and before the conveyance of the land, A. wrote to M.'s heirs offering \$100 "in lieu of my omission to reserve the coal in the bottom lands." A. finally tendered a deed in substantial compliance with the terms of the original contract. *Held*, that what was said in the letter was merely an expression of opinion, and could not control the meaning of the language of the contract; and that the conveyance should be made in accordance with the intent of the contract.

Appeal from court of common pleas, Jefferson county. In equity.

Alexander contracted to sell to Moody a tract of land, reserving to himself certain rights of cutting timber, and "free mining privileges of all kinds." He received from Mrs. Rebecca Brown, the sister of Moody, \$2,000, on account of the contract, agreeing to make a conveyance to Moody, and that he would execute a mortgage to her on the land for the \$2,000. Moody died before the conveyance of the property. After his death, Alexander wrote the heirs, and offered \$100 for the reservation in his deed of the coal-mining privileges. The heirs demanded a deed without any mining reservations. Alexander offered one in substantial compliance with the contract, which the heirs refused, and filed a bill for specific performance. From a decree granting it, and excluding from the conveyance the reservation contended for by Alexander, he appeals.

*R. C. McMurtrie and Alexander C. White, for appellant. E. H. Clark and Charles Corbett, for appellees.*

STERRETT, J. One of the questions suggested by the record is, whether Mrs. Rebecca Brown should not have been made a party to the bill, so that her right to a mortgage, simultaneously with the conveyance, securing \$2,000 purchase money advanced by her in December, 1879, might have been considered and decided.

In the third paragraph of the bill it is averred that the purchase money has been fully paid, but this is denied in the answer, wherein appellant says Mrs. Brown, a sister of John Moody, deceased, and at his request, advanced \$2,000, with which that much of the purchase money was paid, under an agreement that the same shall be secured by a judgment bond and mortgage on the property, etc., and refers to the receipt given when she paid the money. That paper, after acknowledging the receipt of the \$2,000 from Mrs. Brown on account of Moody's contract of July 1, 1879, for purchase of the land therein described, provides that, in consideration of the sum thus advanced by Mrs. Brown for Moody, appellant is to convey the land to him, "and he to execute a judgment bond to her for the amount, secured by mortgage on same property." As to the \$2,000 above referred to, it is not even alleged by appellee that it was paid in any other way; and, if they claim the benefit of it as a payment on account of the purchase money, they cannot in equity and good conscience repudiate the terms on which it was advanced by Mrs. Brown. She is at least entitled to an opportunity of proving the allegations contained in appellant's answer, and that her brother was a party to, or acquiesced in, the arrangement. If she succeeds in doing so, the court should decree that before the conveyance is made to appellees, or simultaneously therewith, the sum advanced by her should be secured on the premises.

Another subject of contention is the true construction of the clause in the

agreement of July 1, 1879, excepting and reserving certain timber on the land therein described; also, all oil and gas in or under the same, "with free mining privileges of all kinds; right of way for roads of all kinds; also free ingress and egress over, into, upon, and under said lands, any and all parts thereof, at all times," together with other rights and privileges therein specified.

It is claimed by appellant that the language of a conveyance, executing the contract, should be such as to carry out its true intent and meaning, in forms of expression usual in approved conveyancing, and not in the very words of the contract. He accordingly executed and tendered a deed embodying the exceptions and reservations referred to, expressed in due form, and, as he contends, carrying out the true intent and meaning of the executory contract. Construing the contract, without the aid of evidence *dehors* the instrument, we think his position is substantially correct; and this appears to have been the view entertained by the learned master until he discovered what he regarded as the key to the proper construction of the agreement, viz., the expression contained in appellant's letter of September 29, 1883, in which he says: "I want you to tell me by return mail what your family has to say to my offer to give them one hundred dollars in lieu of my omission to reserve the coal in the bottom lands. As a matter of fact my omitting the reserve can be of no possible good to your family, but I prefer to have all my titles alike, and it may at some time be an advantage to me, and so I propose to give them \$100, and hope it will be satisfactory to all of them." This letter was addressed to one of the appellees after the decease of his father; and the master regarded it as conclusive evidence that the phrase, "with free mining privileges of all kinds," and other expressions contained in the excepting and reserving clause of the agreement, was not intended to embrace coal and other mineral substances. In this he was mistaken. What was said by appellant in the letter referred to was merely an expression of opinion as to the construction of the agreement, and ought not to control the meaning of the language employed therein. In their bill, plaintiffs below pray specific execution of the contract as written. There is no allegation, or even a suggestion, in the pleading, that the language of the contract does not convey the real intention of the parties. If the agreement, properly construed, excepts the coal, surely the erroneous opinion or supposition of either of the parties cannot alter it. We are therefore of opinion that the learned court also erred in decreeing specific performance of the contract, "with the reservations and conditions provided for in said contract as interpreted by the master's report."

In view of all the circumstances, the costs should not have been imposed wholly on appellant. As the case now presents itself on the evidence before us, an equal division of the costs would have been more just and equitable. But, inasmuch as the case goes back for further proceedings, it may assume a different phase when a final decree is reached, and hence it is unnecessary to express any opinion on the subject that might be regarded as interfering with the sound discretion of the court below in finally passing on the question of costs.

Decree reversed, at the costs of the appellees, and record remitted, with instructions to proceed in accordance with the foregoing opinion.

### FISK v. EQUITABLE AID UNION.

(Supreme Court of Pennsylvania. October 10, 1887.)

#### 1. INSURANCE—MUTUAL BENEFIT—CHANGE OF BENEFICIARY.

A benefit certificate was issued by defendant to Mrs. H. R. Fisk, payable in the event of her death to her husband, subject to change at her pleasure, on presenta-

tion of the certificate with a new application to the supreme secretary. *Held* that, notwithstanding her husband paid the assessments on the certificate, Mrs. Fisk had the right, on presenting the certificate, to effect a change in the beneficiary.<sup>1</sup>

**2. SAME—ISSUE OF NEW CERTIFICATE—SIGNATURE OF OFFICERS.**

A new benefit certificate issued to change the beneficiary, upon application made in accordance with the by-laws of the union, and signed by the supreme president and secretary of the union, and sealed with the seal of the supreme union, is not invalid because not signed and sealed by the officers of the subordinate union.

Error to common pleas, Mercer county.

Mrs. Fisk was a member of the Equitable Aid Union, one of the objects of which association was "to establish a benefit fund from which a sum not to exceed \$3,000 shall be paid, at the death of a member, to whomsoever the member shall designate, or, if the legatee be not mentioned, to the heirs at law of the deceased." Mrs. Fisk, upon application in the manner prescribed by the by-laws of the union, obtained through the subordinate union at Greenville a benefit certificate for the sum of \$1,175, payable to Albert A. Fisk, her husband, "subject to change at pleasure, on presentation of this certificate, together with new application to the supreme secretary." This certificate was given into the keeping of A. A. Fisk, and he paid all the assessments on it. Afterwards, Mrs. Fisk executed an application for a changed certificate, in accordance with the requirements of the union, paid the proper fees for the new certificate, and surrendered the old one. The secretary of the subordinate union forwarded the new application, with the fee and old benefit certificate, to the supreme union. The proper officers of the supreme union received the same, made out a new certificate, had it signed by the supreme president and secretary, and sealed with the seal of the supreme union, and forwarded it to the secretary of the subordinate union, who, without having it signed by the officers or sealed with the seal of the subordinate union, delivered it to Mrs. Fisk a few days before her death. The new certificate was payable in part to A. A. Fisk, and in part to the mother and children of Mrs. Fisk. An action of debt was brought on the first policy by A. A. Fisk against the union. On the day of trial, an interpleader was granted by the court, directing the other beneficiaries under the second certificate to appear and plead. A verdict was rendered for the union, and it thereupon paid the amount of the benefit into court, and the controversy was left to the remaining parties. Plaintiff brings error.

**STERRETT, J.** The benefit certificate issued by defendant to Mrs. Hattie R. Fisk was made payable, "in the event of her death," etc., to her husband, the plaintiff, subject to change at her pleasure, "on presentation of this certificate, together with new application, to the supreme secretary." Notwithstanding the fact that the certificate was delivered to plaintiff, and the assessments thereon were paid by him, his wife had the right, on presenting it to the supreme secretary, to apply for and effect a change in designation of the beneficiary named therein. Having obtained possession of the certificate, —in what manner does not appear,—she surrendered it, and obtained a new one, payable as follows: To her husband, Albert A. Fisk, \$375; to her mother, Mary Fisk, \$300; to her son Freddie F. Fisk, \$300; and to her sons Jimmie and Truman Fisk, each \$100,—subject to change as provided in original certificate.

When plaintiff accepted the original certificate, and paid the assessments thereon, he knew, or ought to have known, that he held it subject to the right of his wife to change the designation of those to whom the insurance money should be paid upon her death. There is no evidence that she ever waived that right, or in any manner estopped herself from exercising it. The

<sup>1</sup> As to the right of a member of a mutual benefit association to change the beneficiary named in the certificate, see *Lamont v. Legion of Honor*, 31 Fed. Rep. 177, and note.

second certificate became a substitute for the first, and hence the money is payable as therein designated, unless the surrender of the original and issue of the new certificate was irregular and invalid. The learned judge's construction of defendant's by-laws, and his instructions relating to the regularity of the transaction, were substantially correct; and, in view of the facts which the jury must have found in reaching the conclusion they did, the validity of the second certificate cannot now be questioned. Indeed, the association defendant appears to have always recognized its validity as a substitute for the original; and since the rendition of the verdict in this case it has paid into court \$1,175, the full amount of the insurance; thus leaving the court to determine whether it shall be paid out as designated in the original, or as specified in the second, certificate. The affirmance of this judgment virtually determines that, as one of the beneficiaries designated in the second certificate, plaintiff is entitled to \$375, and no more, and that the other beneficiaries are entitled to the sums payable to each of them, respectively, according to the terms of same certificate.

It is unnecessary to notice either of the assignments of error specially. There is nothing in any of them that requires a reversal of the judgment. Judgment affirmed.

#### LAUDER v. TILLIA.

(*Supreme Court of Pennsylvania.* October 10, 1887.)

#### 1. JOINT-STOCK COMPANIES — LIABILITY OF MEMBERS — ISSUE OF EXECUTION AGAINST — PROCEDURE.

Pennsylvania act of June 2, 1874, relating to joint-stock companies, provides that when execution, or any other process in the nature of execution, shall have been issued against the effects of a company, and returned unsatisfied, an execution, sequestration, or other process shall issue against the individual members to the extent of their unpaid subscriptions, but only on the order of the court in which the action shall have been instituted; and the court may compel the production of books showing names of members, and amounts unpaid on their subscription. *Held*, that no execution can issue against the members of such a company, by rule on the company to show cause why execution shall not issue against the individual members, but the rule should be upon the individual members sought to be charged.

#### 2. SAME — SERVICE OF RULE ON NON-RESIDENT.

The rule should be served, and, if the defendant is a non-resident, such order as to the manner of service as the case requires should be made, and service had in accordance therewith.

Error to court of common pleas, Lawrence county.

The Wampum Iron Company, Limited, was on or about February 1, 1881, organized as a limited partnership, under the provisions of the act of June 2, 1874. This partnership was composed of George Lauder, the plaintiff in error, T. H. Oliphant, and Stephen Oliphant.

On the sixteenth of February, 1883, Peter Tillia, the defendant in error and appellee, sued out two writs of summons, on two different causes of action, against the Wampum Iron Company, Limited, returnable to second Monday of March, and also, on the same day, rules on said defendant to file an affidavit of defense. These writs and rules were returned by the sheriff as having been served by giving copies to J. D. Irwin, book-keeper of said company, at its place of business. No appearance or affidavit of defense was entered by or on behalf of the company, and on March 2, 1883, judgments were entered against the defendant company for want of affidavits of defense. On the following twenty-first day of March, the attorneys for the defendant company moved the court to set aside and strike off said judgments, as having been entered before the return-day of the writs; no appearance having been entered for defendant. This motion was forthwith granted, and the judgments set aside. On March 23d, plaintiff's attorney moved the court for judgments for

want of affidavits of defense, and same day judgments were so entered. Writs of *fi. fa.* were then sued out on these judgments against the Wampum Iron Company, Limited; which writs were, on April 1, 1888, returned *nulla bona*.

On July 11, 1885, the plaintiff filed a petition stating that he was the holder of said judgments, which remained unsatisfied after executions issued; that the defendant company, against which said judgments had been obtained, was composed of George Lauder, F. H. and S. Oliphant; that he (the petitioner) was informed and verily believed that the amount of the capital stock subscribed for by the members, and set forth in the statement, had not been paid in; that said association had become insolvent and ceased to do business, etc. Wherefore he prayed the court for a rule to show cause why the books of the defendant association should not be produced in open court, and why execution should not issue against the individual members of said association. Upon this petition the following order was made:

"Now, July 11, 1885, rule granted on defendant to show cause why they should not produce the books of the association in open court. Also rule granted on defendant to show cause why execution should not issue against the individual members of the association to collect the debt, interest, and costs on within stated judgments. Returnable to September term.

"PER CURIAM."

These rules were returned by the sheriff as follows:

"Now, July 11, 1885, served the within rule on D. B. & E. T. Kurtz, attorneys, giving to them a true copy, and made known the contents.

"So answers

WM. F. DOUDS, Sheriff."

The Messrs. Kurtz declined to accept service of said rules, or to appear or answer the same, not having been employed or authorized so to do, either by the association, or by any member thereof. Subsequently the following order was entered in both cases:

"And now, to-wit, February 23, 1886, it appearing to the court that the within rule has been served on D. B. & E. T. Kurtz, attorneys for defendant company on record in the within case, and that no answer has been filed, the rule is made absolute, and the defendant is ordered and directed to produce the books of the company showing the names of the members thereof, and the amount of the capital remaining to be paid upon their respective subscriptions, before W. D. Wallace, Esq., who is hereby appointed commissioner to take testimony, and report the facts to the court, in reference to how much, if anything, is due from any member of said association of the capital stock subscribed by him, and whether or not the capital stock subscribed has been paid in cash or otherwise.

PER CURIAM."

On the twenty-sixth of May, 1886, Mr. Wallace, the commissioner, filed his report in the following terms:

"The undersigned commissioner appointed by said court to take testimony, and report facts in said cases to said court, in reference to how much, if anything, is due from any member of said association of the said capital stock subscribed by him, and whether or not the capital stock subscribed has been paid, in cash or otherwise, makes the following report: After first being duly sworn, according to law, your commissioner issued a subpoena commanding George Lauder, F. H. Oliphant, and S. D. Oliphant to appear on the fifth day of May, which said subpoena also commanded said parties to produce their books, etc., before said commissioner. Said subpoena was returned by Wm. G. Warnock, sheriff of Lawrence county, as follows: George Lauder, F. H. Oliphant, S. D. Oliphant, and Wampum Iron Company, Limited, not found in my bailiwick. The office formerly occupied by said company is no longer used or occupied as an office. Upon the fifth day of May there appeared before your commissioner B. A. Winternitz, Esq., attorney for Peter Tilia, plaintiff, and Peter Tilia in person, whose testimony was taken by your com-

misioner. As there was no other person present, and no other witnesses, your commissioner's means of ascertaining the facts were very meager and limited. From the testimony taken before your commissioner, it appears that the Wampum Iron Company, Limited, was composed of the following persons and amount of stock:

George Lauder, 100 shares,	-	-	-	-	-	-	\$10,000
F. H. Oliphant, 60 shares,	-	-	-	-	-	-	6,000
S. D. Oliphant, 40 shares,	-	-	-	-	-	-	4,000
							<hr/> \$20,000

"That the total amount of said capital stock was \$20,000; that \$15,000 of said stock was paid in in cash, and that there was then, and is now the sum of \$5,000 unpaid, and that said \$5,000 is still due and owing to said Wampum Iron Company, Limited, by George Lauder of Pittsburgh, Pa., as shown by testimony of Peter Tillia, where George Lauder stated to said Tillia at said Tillia's house that there was only \$15,000 of said capital stock paid in, and that there was due from George Lauder \$5,000; and therefore your commissioner reports the above to said court.

"W. D. WALLACE, Commissioner."

Subsequently the following order was entered: "Now, to-wit, September 14, 1886, it appearing to the court that executions were issued in above stated cases against the property and effects of the said Wampum Iron Company, Limited, and there could not be found sufficient property or effects of said company whereon to levy and enforce said executions, and it further appearing to the court by the report of a commissioner duly appointed to report to the court how much, if anything, is due from any member of said company, upon the capital stock subscribed by him, that there is due and unpaid by George Lauder, a member of said company, upon his subscription to the capital stock of said company, the sum of \$5,000. It is therefore ordered and decreed that execution shall issue upon the above judgments against George Lauder to the extent of \$5,000; to-wit, upon the judgment at No. 228, April term, 1883, execution shall issue against George Lauder to the extent of \$4,294.65, and upon the judgment at No. 229, April term, 1883, execution shall issue against George Lauder to the extent of \$705.35."

To this judgment or decree a writ of error has been sued out in each case, also a *certiorari* and appeal on behalf of George Lauder.

*George Shiras, Jr.*, for plaintiff in error. *B. A. Winternitz* and *S. W. Dana*, for defendant in error.

**WILLIAMS, J.** This case depends on the construction of the second section of the act of June 2, 1874, relating to joint-stock companies. The section declares that the members of any such association shall not be liable under any judgment, decree, or order obtained against such association, further or otherwise than in the manner provided for therein. That part of the section which points out the manner in which the members are to be made liable is as follows: "If any execution, sequestration, or other process in the nature of execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient thereof whereon to levy or enforce such execution, sequestration, or other process, then such execution, sequestration, or other process may be issued against any of the members to the extent of the portion of their subscriptions respectively in the capital of the association not paid up: provided, always, that no such execution shall issue against any members, except upon an order of court, or of a judge of the court in which the action, suit, or other proceeding shall have been brought or instituted; and the said court or judge may compel the production of the books of the association showing the names of the members thereof, and the amount of capital remaining to be paid upon

their respective subscriptions, and from them, or other sources of information, ascertain the truth in regard thereto, and may order execution to issue accordingly."

The question now raised upon this section is whether the member of the association against whom it is proposed to issue execution has any right to notice before he is adjudged a debtor of the association, and subjected to execution process. This precise question has not been passed upon by this court, but the general principle involved is one that is too well settled to need the citation of authorities in its support.

A person must be brought into court by the service of the process of the court upon him, before the court acquires jurisdiction over him. He must have an opportunity to be heard in his defense before judgment can be rendered against him. The application of this principle disposes of the case in hand. The association is, at least primarily, the debtor. The action is brought against it. The service is made upon it by serving one of its officers, and the judgment is rendered against it. When its property is exhausted, the court is allowed to subrogate the creditor to its demands against its members for unpaid subscriptions to its stock. These members may be many in number, and the settlement of their accounts may require an examination extending far beyond the subscription books. It cannot be done by a rule on the association to show cause why execution shall not issue against the individual members, as was done in this case, for the association, as such, is in no position to show cause; but the rule to show cause should be upon the individual members sought to be charged. His accounts with the association must be settled, and the amount due from him individually must be fixed by the court before an execution against him can be awarded.

The rule should be served. If the defendant is not a resident of the county in which the court sits, such order as to the manner of service as the case requires should be made, and service had in conformity therewith. But a judgment against the "Wampum Iron Company, Limited," does not, without more, bring George Lauder and his individual estate under the jurisdiction of the court so as to justify an award of execution against him. If the company sought to compel payment of any balance due upon his subscription it would not be doubted that he would be entitled to notice, and an opportunity to defend, before execution could be awarded against him. The judgment creditor of the company acquires the right to compel the payment of the balance due to the company, to himself; but he cannot escape the necessity of first adjusting the claim of the company against the member whom he seeks to pursue, before he is entitled to process for its collection. As to this subject, he stands in the shoes of the company whose claims he is seeking to collect.

The award of execution is reversed and set aside, and the record remitted for further proceedings.

### HILL v. TRUBY.

(*Supreme Court of Pennsylvania.* October 10, 1887.)

#### 1. WITNESS—COMPETENCY—TRANSACTIONS WITH DECEASED—CO-OBLIGORS.

Under the Pennsylvania act of 1878, a defendant, one of two joint makers of a promissory note, is competent, after the death of his co-obligor, to testify as to matters occurring between himself and strangers, although pertaining to the questions at issue between the payee and makers of the note, and occurring prior to the death of the co-obligor.

#### 2. EVIDENCE—RELEVANCY—PAYMENT OF TAXES AS DEFENSE TO NOTE.

After a sale by the sheriff of certain property, the original owner was permitted by the purchaser to remain on the land for a certain time, upon consideration of a promissory note to the purchaser, and other valuable consideration. In an action brought upon the note, one of the defendants offered to testify that he paid certain taxes, while the tenant of the plaintiff, under and by plaintiff's direction,

but his offer did not specify that they were taxes which plaintiff was legally bound to pay, and nothing appeared to show that they were. *Held*, that the evidence was properly rejected as irrelevant.

### 3. SAME—OFFER OF, MUST DISCLOSE ADMISSIBILITY.

An offer of evidence must of itself disclose all the facts which are necessary to establish its admissibility.

Error to court of common pleas, Armstrong county.

John W. Hill was the owner of a farm containing 178 acres, situate in Parks township, Armstrong county. This farm was sold by the sheriff in June, 1883, but a final disposition of the sale was not made till some time in July. Shortly after, notice was served on Hill to leave the premises by Simon Truby, who was the purchaser at that sale. In the latter part of July, Truby had an interview with Hill, and made the suggestion that Hill remain on the farm till April 1, 1884, as the tenant of Truby, who was to have possession from the time of the execution of the agreement then verbally made. The amount to be paid to Truby as rent until the first of April was to be ascertained by three men, to be mutually chosen by the parties. They met in Apollo, August 11, 1883, and a justice of the peace drew up an agreement between them. The agreement was executed and signed, and the amount to be paid by Hill to Truby was ascertained by the persons they had selected, all of which was reduced to writing. One provision was that Hill was to give his note to Truby for the payment of \$125 on the first day of April, 1884, with approved security. John H. Townsend, who was one of the arbitrators, became the security of Hill. A note was drawn, and signed by Hill and Townsend, which is the note in suit.

Truby, by the arrangement made, was enabled to go on and put out a fall crop. After that, the tax collectors went, as they alleged, to make the taxes out of the personal property on the premises, all of which belonged to Mr. Hill. He, to save his property from levy and sale, paid taxes to the amount of \$91.90. These taxes in the said arrangement were to be paid by Simon Truby. Before the maturity of the note above mentioned Hill went to Truby, and offered to lift the note given by himself and Townsend, and tendered the receipts of the taxes, and the residue in money. The plaintiff refused this, and brought suit on the note before a justice, from whose judgment an appeal was taken.

Before the case was put on trial-list in the common pleas, Townsend died. Mr. Freely, the attorney of Truby at that time, on his motion, at the suggestion of his death, had N. E. and F. Townsend, the administrators, substituted as defendants. There was a verdict and judgment for plaintiff for \$187.87. Defendant assigns as error:

"(1) The court erred in this: John W. Hill, one of the defendants, was called to the witness stand and sworn. *By Mr. Barclay: Question.* What relation did Mr. Townsend occupy to that note? *Objected to. By the Court.* Objection sustained.' *First Specification.* In not allowing the question put to the witness to be answered. *Second Specification.* In sustaining the objection to the question, which objection was as follows, to-wit, 'Objected to.'

"(2) The court erred in this: *By Mr. Leason.* Defendants propose to prove by John W. Hill, having already shown that he is the tenant of Simon Truby, certain acts which he performed as tenant of Simon Truby, to-wit, that he paid, while tenant and in possession of the land, certain taxes. With this transaction John H. Townsend had no connection whatever, this transaction occurring in the year of 1883, or the early part of the year 1884, and John H. Townsend's death on the fifth of October, 1884. *By Mr. Buffington.* We object to the witnesses testifying as to matters prior to the death of John H. Townsend, when not done in the presence of Mr. Truby. *By the Court.* We will sustain the objection.' *First Specification.* In overruling the above-stated offer. *Second Specification.* In sustaining the above objection.

"(3) The court erred in this: '*By Mr. Leason.* Defendants propose to prove by John W. Hill that, while the tenant of Simon Truby, he paid \$91.90 taxes assessed upon the farm and property of Simon Truby, under and by direction of Simon Truby; that his personal property was threatened immediately, and liable to be distrained, for the payment of these taxes, which he paid; that before the bringing of this suit he tendered to Simon Truby, the plaintiff, the balance due upon this note, the debt and interest in full over and above the amount of taxes paid by him,—the defendant having already shown that John H. Townsend, whose administrators are parties defendant in this suit, was but bail on the note, and had no connection with the contract or dealings between Simon Truby and John W. Hill. *By Mr. Buffington.* The offer is objected to. *By the Court.* We will admit the evidence for the present, and give you an exception. We do it with some reluctance. *By Mr. Leason: Question.* Had you any conversation with Mr. Truby concerning the payment of taxes? Objected to because the witness is incompetent to testify as to that. Objection sustained. *By Mr. Leason.* Defendant's counsel propose to ask the witness, if, while as a tenant of Simon Truby and living upon the land,—Truby's land,—he was called upon by the tax collector for taxes, and if he referred the tax collector to his landlord, Simon Truby, and if afterwards the tax collector returned and insisted upon the payment of the taxes by Hill, stating that Truby had so directed; that the witness was compelled to pay the taxes in order to save his property, and that now he holds in his hands the receipts for said taxes.' *By Mr. Buffington.* Objected to—*First*, that the witness is incompetent to testify as to these facts; and, *second*, that the testimony is irrelevant and incompetent. *By the Court.* In relation to the first proposition, the court was guided by the fact that it was proposed to show a transaction directly between the plaintiff and the present witness, and that what occurred there in the presence of the parties, or in direct pursuance of any arrangement made between them at that time, that the transaction would be within the act of '78. But when it is shown, as now proposed, that this was not in pursuance of another arrangement with the plaintiff and this witness, but between another party, not shown to be the agent of the plaintiff, we think that the proposition is not covered by the provisions of the act of '78, and that as the plaintiff himself would be excluded as a witness, because of the death of a co-defendant, there is such an inequality now presented by the proposition that we think it would be improper to admit the testimony under the proposition, and therefore the objection is sustained. *First Specification.* In not admitting the testimony offered in the above first-named proposition. *Second Specification.* In sustaining the objection above stated. *Third Specification.* In not admitting the testimony as offered in the latter proposition. *Fourth Specification.* In sustaining the objection above quoted to the latter proposition."

- *M. F. Leason and David Barclay*, for plaintiffs in error. *Joseph Buffington and John F. Whitworth*, for defendant in error.

GREEN, J. We think it was error to reject the offer to prove by Hill what occurred between him and the tax collector, on the ground of incompetency of the witness. We held in *Ash v. Gule*, 97 Pa. St. 493, that the spirit of the act of 1878 embraces the survivor of two or more who jointly contracted, and therefore the plaintiff could testify as to the matters occurring between himself and the surviving defendants; but we did not mean to decide that he could not testify as to relevant matters which occurred between himself and strangers. There would be no propriety and no necessity for such a decision. Such matters were not excluded by any interpretation of the act of 1869, except that which declared the general incompetency of the witness. That incompetency was removed by the act of 1878 in the case of the survivor of joint obligors. It is true, the act in terms qualified the witness to testify to

matters having occurred between the surviving party and the adverse party on the record; but that was because it was that class of matters which were specially excluded by the construction which had been given to the act of 1869, and that was the evil intended to be more particularly remedied by the act of 1878. But there could be no good reason for excluding other matters occurring between the witness and other persons who were not parties. Such exclusion had been, previously to the act of 1878, merely the result of a personal incompetency to testify at all; but, when that general incompetency was removed, matters which were otherwise unobjectionable could not be excluded on that account. We are clearly of opinion, therefore, that other and indifferent matters, between the witness and a stranger, might be proved as well by a surviving obligor or his adversary, providing only that they were relevant to the issue trying.

But, while it was error to reject the proffered testimony on the ground of the incompetency of the witness, we are of opinion that it should have been rejected on the ground of irrelevancy. The offer does not disclose facts enough to make the testimony admissible. Hill was the owner of the farm up to the time of the sheriff's sale, which was June 2, 1883. He remained on the farm by agreement with Truby made on August 11, 1883. The offer was to prove payment of taxes assessed upon the farm upon the theory that they were taxes which Truby was legally bound to pay. But that very essential fact does not appear in the offer, and we cannot infer it. It is not possible to infer that taxes had been assessed against the farm as Truby's property after June, and before August, 1883. Naturally, if the question must be determined by inference, we would be obliged to infer that the taxes had been assessed against Hill as owner, and therefore that he, and not Truby, was legally liable for their payment. But it is not necessary to put the matter upon that ground. The offer must itself disclose all the facts which are necessary to establish its admissibility, and this is not done by the offer in question.

There was therefore no error in excluding the testimony, and hence there is nothing to reverse. Judgment affirmed.

### LOGAN and others v. QUIGLEY.

(*Supreme Court of Pennsylvania. October Term, 1887.*)

#### 1. EJECTMENT—EVIDENCE—WRIT OF EJECTMENT NOT SET OUT IN ABSTRACT OF TITLE.

The admission of a writ of ejectment, though not set forth in a plaintiff's abstract of title, in an action of ejectment, is not error.

#### 2. SAME—TENANT BY CURTESY—EVIDENCE OF ELECTION.

Where a husband brings ejectment for land belonging to his deceased wife, the election by which he took his wife's real estate as tenant by curtesy, instead of assenting to her will, is evidence pertinent to such issue.

#### 3. SAME—POSSESSION BY TENANTS—NOTICE TO QUIT—PROVINCE OF JURY.

A charge to the jury in an action of ejectment that they would determine whether or not the tenants of the land in question were holding under lawful authority, or as tenants under the plaintiff, and, if the latter, that the action would not lie if no notice to quit had been given, or demand of possession made, is correct, and it is also proper in such action to leave the question of possession to the jury.

Error to court of common pleas, Armstrong county.

Action of ejectment.

Sharon M. Quigley, the plaintiff below, was married to Mattie A. Logan on the sixth of June, 1883. Quigley was about 10 years older than his wife, and owned considerably more property. Mrs. Quigley owned 40 acres of land at Logansport, which is in controversy in this suit. Mrs. Quigley died on the twenty-second of March, 1885, leaving no children. Quigley filed his election to take all her land as tenant by curtesy, renouncing all right to claim a share of his wife's personal property. He then demanded possession of the land, which was held at the time by William F. Logan, Thomas J. Logan,

Frank Logan, and Peter Klingensmith. Possession of the land was not given, and on the twentieth of May, 1885, he commenced this suit to recover from the defendants the land in controversy. The case was tried on the seventeenth of September, 1886, and a verdict was returned in favor of the plaintiff for the land described in the writ, against the defendants above named. There was no dispute that Mrs. Quigley was the owner of the land at the time of her death. Both parties claimed title through her,—the plaintiff, as tenant by curtesy, and the defendants as devisees under her will. The contention of the plaintiff below was that he had a right to the land in dispute, as surviving husband, notwithstanding this will, and that he was entitled to recover the possession of it by this action of ejectment.

#### ASSIGNMENT OF ERRORS.

(1) The court erred in this: Plaintiff's counsel offer the writ of ejectment in this case, marked paper "A." Defendants' counsel object to the offer because (writ) not set out in abstract of title. *First Specification.* In admitting the writ in evidence. *Second Specification.* In overruling the objection as follows, to-wit: *By the Court.* "We will admit it."

(2) The court erred in this: Plaintiff's counsel offer the election of Sharon M. Quigley to take all his wife's real estate, paper marked "B." Defendants' counsel object, as irrelevant and incompetent. *First Specification.* In admitting in evidence, and allowing to be read, paper marked "B." *Second Specification.* In overruling the objection as follows, to-wit: *By the Court.* "I don't think it is essential, but let it be considered in evidence."

(3) The court erred in this: Plaintiff's counsel propose to prove that Mr. Quigley has a comfortable house and a farm up near Brattonville, for the purpose of rebutting the suggestion of the defendants that there was abandonment by the plaintiff of the keeping of his wife, to be followed by proof that she left that house of her own accord. Defendants' counsel object to the proposition as not rebutting. *First Specification.* In admitting in evidence the testimony of witnesses under said proposition. *Second Specification.* In overruling the objection as follows, to-wit: *By the Court.* "We will overrule the objection."

(4) The court erred in this: *First Specification.* In charging the jury as follows, to-wit: "But these are leases where it is included in the lease itself that they shall deliver over possession *without notice to quit* upon the termination of the lease, and if they fail to do that, then the landlord would have the right to proceed by his action of ejectment, or whatever form of action he considers best, to recover that possession." *Second Specification.* In charging the jury as follows, to-wit: "It becomes a question of fact for you to determine whether these parties, or any of them, were then holding under Mr. Quigley, and if they were, and they had such a right to hold under him by virtue of the power under which they entered, and no demand made for possession, and no notice given, then the action of ejectment would not lie as to them, because they were in possession under him; they are bound to hold under him as their landlord; they cannot under any circumstances, until they place themselves in a hostile possession, deny the title of their landlord."

\* \* \* You will have to determine whether or not they were holding there under lawful authority, or as tenants under Mr. Quigley himself, under a lease not then expired by virtue of its own terms, or a lease not yet terminated because of any obligation that rested upon Mr. Quigley to demand the possession, —to give notice to quit." *Third Specification.* In charging the jury as follows, to-wit: "Gentlemen, in this action of ejectment one of the essentials of it is that the *persons* against whom the action is brought shall be in the actual or *constructive* possession of the land *themselves*. If you find that these devisees under the will, namely, Wm. F. Logan and Thomas J. Logan, had taken that kind of possession of the land, that they assumed the authority to rent the

land to those persons who were in the actual occupancy of it as their tenants, and received the rent, then that would be such possession as would justify an action of ejectment being brought, and including them as parties in possession, although they may not have their feet upon the land at the time the writ was served; yet if they had any persons there as tenants under them, that would be occupancy by them." *Fourth Specification.* In charging the jury as follows, to-wit: "The law has made the return of the sheriff upon the writ legal evidence, and when that return says that these defendants were in possession, it, when offered in evidence, is to be considered as evidence of the fact of an adverse possession on the part of the defendants named in the writ."

*Fifth Specification.* In charging the jury as follows, to-wit: "We say to you that the facts of the marriage, the wife's ownership of the land, and her death, gave to the husband the right of possession, particularly after he has elected to take as a tenant by the curtesy. You have that in evidence, and may consider it as establishing his right of possession, but you have to go further. (Quoting the second and fifth sections of the act of assembly, 1855.)

\* \* \* Now, gentlemen, do you find under this second section that from drunkenness, profligacy, or other cause, the husband has neglected or refused to provide for his wife; or has he deserted? The evidence shows that there was a marriage and an amicable separation, that is, a friendly separation from each other, which proved to be a permanent separation. Was that caused by the drunkenness of Sharon M. Quigley, or by his profligacy? It is shown in evidence that he is not a profligate or drunken man. 'Or other cause;' we may say to you that the other cause must be some justifiable cause,—something in the nature of harshness or cruelty on the part of the husband to his wife, such as made his relation to the wife unbearable to her, and cohabitation with her husband almost, if not altogether, impossible. That she was, in other words, driven, by his unkindness to her, to a separation from his bed and board. Have you any evidence of that kind? They seem to have been on friendly terms when they were last seen together. He appears to have written a letter to her asking her to return to his home. She failed to do so. \* \* \* The other section is when a husband shall willfully neglect or refuse to provide for his wife: You are to determine under all the evidence whether there was a willful neglect on his part in that respect. You are to take a fair, legitimate meaning of those words, and determine for yourselves whether there was a willful neglect or refusal to provide for his wife. Is there any evidence in this case that she gave him any information at all of her necessities, or of her willingness or desire to have him come to see her? She had left his bed and board. She had taken herself to another home, and there she had lived and continued to live separate and apart from her husband. Was there any further necessity on his part than what he did—writing to his wife, not in an unkind spirit, asking her to come to him, that a home was ready for her, or whatever his words were? Does that under the evidence in this case disclose such a willful neglect as is intended by that act of assembly? \* \* \* If you find that this was not the case, then the husband is entitled as tenant by the curtesy to a life-estate in her real estate; he has the right to the occupancy of that real estate for and during the term of his life, and consequently he had the right to bring this action of ejectment, provided he was not in actual or constructive possession of it himself." *Sixth Specification.* In charging the jury as follows, to-wit: "It would be your duty to find a verdict against all of them, if they all have made a defense, and have not shown to your satisfaction that they were not in possession at the time of the bringing of this action and issuing of the writ. We will not go over the testimony in respect to that, because it has been fully commented upon by counsel. We have to say to you here that the mere fact that a demand of possession of one of these defendants, Mr. Wm. Logan, and that he did not give it, is not evidence that he had the possession. \* \* \* If

he was in possession, and he refused to give it, if there was an actual demand, —if he was in possession, either actual or by some person under him, and he refused it, then there was a demand of possession, and a refusal on the part of Mr. Wm. F. Logan. \* \* \* But that does not apply to all of the defendants in this case, because it is clearly in evidence that two of the defendants in this action were in possession. It is their duty to satisfy you that they were in possession there under Mrs. Quigley, *by virtue of a lease obtained* from her before her death, and which was not terminated at the time of the bringing of this action; otherwise, if the lease had terminated, and they had no right there, and being found in possession, it would be your duty to return a verdict as to them for the land described in the writ, the land in dispute."

(5) The court erred in this: *First Specification*. In not affirming the defendants' second point as put, which point is as follows, to-wit: "That if the jury believe from the evidence that Frank Logan and Peter Klingensmith were in the possession of the premises under Mattie A. Logan, the wife of the plaintiff, at the time of the service of the writ, under whom he claims by the curtesy, his duty was at the very start to demand their possession from them, and unless there is evidence of such demand and refusal on their part, the plaintiff cannot recover in this action against them, and in this regard the jury should find in their favor." *Second Specification*. In the answer to the defendants' second point, which answer is as follows, to-wit: "Affirmed, if the jury believe the parties named in this point were at the time of the beginning of this action holding over by reason of a right of possession under Mrs. Quigley, which right or tenancy was subject to some act of demand on the part of the landlord or his successor in title, before such tenancy was to terminate. We have explained that to you in our general charge."

(6) The court erred in this: *First Specification*. In not affirming the defendants' third point, which point is as follows, to-wit: "That the plaintiff not having shown title in himself, and not having shown entry or ouster, he cannot recover in this action, and the verdict of the jury should be for the defendants generally." *Second Specification*. In the answer to the defendants' third point, which answer is as follows, to-wit: "That point is refused."

(7) The court erred in this: *First Specification*. In not affirming the defendants' fourth point as put, which point is as follows, to-wit: "That if the jury believe from the evidence of the plaintiff's witness, P. H. McGrann, that the plaintiff agreed to live with her (Mattie A. Logan) in her own home, if she did not like his home, before they were married; and believe from the evidence that from some cause he did neglect or refuse to provide for his wife, and did refuse to pay her doctor's bills, and that he willfully neglected or refused to provide for his wife for a period exceeding one year, then the plaintiff cannot recover, and the verdict must be for the defendants." *Second Specification*. In the answer to the defendants' fourth point, which answer is as follows, to-wit: "We can hardly give you a direct answer to that point. In one aspect it may be affirmed; we have explained it fully to you in our general charge, and if you find that there was such a separation as gave her the right to exercise ownership of the land under either of those sections of the act of assembly, the point would be affirmed; if not, then the point is refused."

(8) The court erred in this: *First Specification*. In not refusing the plaintiff's fourth point, which point is as follows, to-wit: "If the jury believe that Sharon M. Quigley, before suit brought, expressly demanded possession from Mr. Wm. Logan, and such demand was then refused by said Wm. F. Logan, without notice of disclaimer at any time before jury sworn, he is particularly estopped from disclaiming now, and by such disclaimer avoiding liability for costs." *Second Specification*. In the answer to the plaintiff's fourth point, which point is as follows, to-wit: "That point is affirmed if the jury believe the facts to be as stated. In that respect you will recollect the

testimony of Sharon M. Quigley, and also the fact that under the will he was one of the executors, and as such executor would have the right to receive the proceeds of the personal property belonging to her."

*David Barclay*, for plaintiffs in error. *W. D. Patton* and *James P. Colter*, for defendant in error.

**PER CURIAM.** The writ of ejectment and return were properly admitted in evidence, though not set forth in the plaintiff's abstract of title. Quigley's election to take his wife's real estate as tenant by the curtesy was evidence pertinent to the issue trying. The instructions with reference to the lessees are unexceptionable; and as to the question of possession, the court properly left it to the jury, with full and careful instructions. So, what bad treatment and neglect by Quigley of his wife would deprive him of his right in her estate were left, under the facts of the case, to the jury, accompanied by a careful exposition of the legal rules governing the matter. Without dwelling further on particulars, we regard this contention as well and skillfully disposed of in the court below. The judgment is affirmed.

### ALLEMANIA INS. CO. v. WHITE and others.

(*Supreme Court of Pennsylvania*. October 11, 1887.)

#### INSURANCE—FORFEITURE—ACTS NOT INJURIOUS TO COMPANY.

Where the principal defense of an insurance company, against whom an action on a policy was brought, was that the plaintiff had forfeited the policy by committing acts in violation thereof, but the acts complained of were those which would rather diminish than increase the danger of fire, *held*, that such defense was without merit.

Error to court of common pleas, Lawrence county.

This was an action against the defendant insurance company upon a policy containing a clause as follows: "This policy shall become void, and of no effect, \* \* \* (7) by the failure or neglect of the assured to notify this company of all increase of hazard by change or use of occupancy, vacancy, or non-occupancy, or by the erection of neighboring buildings; or, if operating manufacturing establishments, in whole or in part, over or extra time, or suspending operations therein, without special agreement indorsed on this policy." In regard to this clause the court charged the jury as follows: "The particular clause relied upon by the defendant as availing this policy is the latter part of this section, or clause 7, that it is claimed that the policy became void if operating manufacturing establishments, in whole or in part, over or extra time, or suspending operation therein, without special agreement indorsed on the policy. I have read this clause with as much care as I have been able to give to it, and listened attentively to the arguments this forenoon in hopes they would give me some light upon it, and had to come to the conclusion that it was too vague and uncertain to allow anything to be predicated upon it, but, after reflection, I have come to the conclusion, and now instruct you, that it substantially means, that its purport is,—I mean this last clause, the last clause of clause 7,—that its purport is that if the property insured be a manufacturing establishment, and all of the establishment or part of it be operated over or more than the so-called or usual time for operating such establishments, if it be operated extra time, or if operations are suspended in it, without special agreement indorsed on the policy permitting such operating during insured time or extra times, or permitting such suspension, then the policy shall become void, and of no effect. That leaves out of the question the argument which was made by the defendant's counsel to the court, that this clause means that suspension in whole or in part of operation in the establishment avoids this policy. The question then narrows itself to this: There is no allegation in this case that this particular planing-

mill, insured under this policy, was operated over time, or was operated any extra time, or during any unusual hours different from those which establishments of that character or rank are usually operated."

And the court continued in substance: That a suspension as to part of that establishment would not be a suspension of operations, as is contemplated in this clause of the policy. They might quit running one machine or many machines; they might quit operating in one particular line of their business, so long as they continued operating in some other line of their business, in the usual and ordinary way of operating a planing-mill. Then there would not be such a suspension of operations as is contemplated in this clause of the policy, requiring permission to suspend; but if there was suspension; if they ceased to work in that building, employed at the business that it was bought and employed for, to-wit, as a planing-mill, for the manufacture of lumber, doors, sash, mouldings, and things of that character; if the work then entirely ceased, so that no operations of that description were going on in the usual and ordinary way,—then, by the provisions of this policy, it would be avoided. But, if those operations in any way continued in the ordinary way in which establishments of that kind are operated, then the policy would not be avoided. Whether there was or was not such suspension, the court submits as the only question to be passed on by the jury.

The defendants alleged a breach of the contract of insurance as embodied in the above clause, and stated in their affidavit of defense as follows: "The facts that defendant will prove are that the building insured, and in which were the items of property specified in said policy, was a manufacturing establishment, used as a planing-mill; that when the said policy was issued to plaintiffs by defendant, said manufacturing establishment was in full operation; that plaintiffs undertook to close out business, and dissolve their partnership, and appointed Joseph S. White, one of them, as a liquidating partner; that during the process of the closing out of business, and under the management of said White, said establishment was not run as it had been run at the time of the issuing of said policy as aforesaid, but there was an increase of hazard by reason of change, and use of the occupancy of said building and establishment, as follows, to-wit: Said establishment was run off and on with no regularity,—running parts of days, and then not being run at all; that plaintiffs did not notify defendant of said changes; that the same largely increased the hazard of loss by fire; that during said time, and after the issuing of said policy as aforesaid, said building and establishment was vacant and unoccupied, and not run for days at a time; that plaintiffs did not give defendant any notice of this, as required by their said policy to do; that said manufacturing establishment had suspended operations practically for several months prior to the fire which destroyed the said building with its contents, insured as aforesaid; that no regular business was done therein, in the line of the business of said establishment; that no notice of this was given by plaintiffs to defendant, no special agreement was made to cover the aforesaid changes and suspension of operations, and none were indorsed upon the said policy; that, by reason of the foregoing facts, the said policy by its terms became void and of no effect, and plaintiffs are not entitled to recover anything from the defendant in this suit."

A verdict was rendered for plaintiff, and defendant appeals.

*Geo. H. Treadwell*, for plaintiffs in error. *W. H. Falls*, for defendants.

**PER CURIAM.** There is absolutely nothing at all in this case, for the principal complaint is that the plaintiffs forfeited their policy, not by doing that which increased the risk; on the contrary, by doing that which materially decreased that risk. Extended comment on a case such as this would be to no purpose whatever. The judgment is affirmed.

## KENNEDY and another v. WIBLE.

(Supreme Court of Pennsylvania. October 11, 1887.)

## 1. LIMITATION OF ACTIONS—ADVERSE POSSESSION—CLAIM UNDER TITLE BY GIFT.

In an action of ejectment in which defendant set up the statute of limitations, and proved possession for 30 years, claiming under a title by gift, the court charged that "if it is shown \* \* \* that it was an actual, *bona fide*, absolute gift, and he went into possession under that gift, then \* \* \* from the time he entered in pursuance of that gift, and held and continued to hold the premises embraced by the gift by hostile, adverse acts, in a notorious manner, visible, open to all the world, and held that possession in that continued manner for a period of 21 years, and the possession was actually in himself, or by some one under him, directly under him, then we say to you that that would vest in such person good and valid title, under the statute of limitations of 1785." Held, that the charge was more favorable than plaintiff could require, as it was only necessary that defendant should have entered under a pretense of gift, and thereafter have claimed the property as his own, for the statute to perfect his title.

## 2. EVIDENCE—DECLARATIONS TO PROVE ADVERSE POSSESSION.

The declarations of a party claiming an adverse possession of lands, as well as the understanding of his neighbors, is competent evidence to show the nature of his claim and possession.

Error to court of common pleas, Armstrong county.

Action in ejectment for certain lands which had been held by defendant more than 30 years under an alleged gift. The points in the charge and in the evidence of which plaintiff complains are embodied in the following assignments of error:

"*First*. The court erred in charging the jury as follows: 'Now, then, in this case you are to inquire, in the first place, whether or not the plaintiff has title under any circumstances to this piece of ground, or would have title under any circumstances to the piece of ground claimed in this action.'

"*Second*. The court erred in charging the jury as follows: 'But, gentlemen, in the present case we are not going to say that all those things must be proven if it is shown that there was a gift. A gift may have been made, and that is entirely for the jury, and it may have been of such a character that justified this defendant going into possession of those premises. If it was an actual, *bona fide*, absolute gift, and he went into possession of the premises under that gift, then we say to you that from the time he entered in pursuance of that gift, and held and continued to hold the premises embraced by the gift, by hostile, adverse acts, in a notorious manner, visible, open to all the world, and held that possession in that continued manner for a period of 21 years, and the possession was actually in himself, or by some one under him, directly under him, then we say to you that that would vest in such person good and valid title under the statute of limitations of 1785.'

"*Third*. In charging the jury as follows: 'The possession must be of such character that those who come upon the ground can, when they see the premises, know of the occupant or possessor, by his manner of possession, by his buildings and by his improvements, and by the use of the land in the way that farmers generally use their land from year to year, and it must be claimed by or to certain distinct boundaries; he cannot to-day claim to one place, and to-morrow claim to another, but it must be an actual claim of a definite amount of land, in order to bring it within the statute of limitations. It must be against everybody else. He cannot claim it as a tenant of any one. He cannot set up an adverse claim, if he is a tenant of anybody else. If he is even there by my direction as a tenant for a year without any written agreement, yet he comes in in a fiduciary way, in such a subordinate way that he cannot deny my right as a landlord. He must be there in subservience of the contract under which he enters so long as he remains there, unless some act, definite, distinct act, is done that interrupts and puts an end to that relation.'

"*Fourth*. In charging the jury as follows: 'You are to determine under

all the facts, whether or not there was such an actual, absolute gift of this piece of land made by Isaac Wible to his son, John Wible, in the year 1854, or at any other time prior to that, under and by virtue of which he entered into possession of that piece of land now claimed by him. In order to ascertain that, you have to take into consideration *all the evidence in this case*. You have his declaration that he gave the land to John, that he gave the land to John for a home, that he had given the lower end of the place to John, and other such declarations as have been proven by the witnesses who have been called, several of whom have detailed *the various conversations and declarations of Isaac Wible*. You are to determine, then, under that evidence, whether or not there was an actual, absolute gift of the premises to John when he made his entry there.'

"*Fifth*. In charging the jury as follows: 'We say to you that so far as the admissions of John Wible or his father are concerned, while they are in actual possession of the land their assertions of claim may be received in evidence; it is competent evidence. You have heard the testimony of the witnesses upon that subject, and it will be for you to say whether or not that was a claim by John Wible of the land, while he was in possession of the land.'

"*Sixth*. In charging the jury as follows: 'Isaac Wible, on the other hand, by the declarations made at the time he executed that lease, gave you some evidence as to his claim of the whole land. You have the lease in evidence, and you will consider it in respect to the claim made in it to this land. We may say to you that if the title under the statute of limitations had been complete, if there was title, if you find that John Wible had acquired title before the execution of that lease, why the lease would amount to nothing; any declaration made after that title had become vested and complete would amount to nothing. Then again, gentlemen, you have the mortgage that was executed in 1874, that was within the period of the original entry,—20 years from the original entry,—that is the declaration of Isaac Wible that may be considered a declaration of his ownership of that land; it was before the 21 years had expired, and while he may have claimed the actual possession. The possession would be his own if John was there under him; the possession would be actual if you find that was a part of the tract of land. This much as to the assertions of claim made by the parties. You have also, gentlemen of the jury, some evidence with respect to assessment. We tell you that you are to consider the payment of taxes and the assessment of land as evidence; strong or weak, it is for you. We cannot define how strong that evidence may be, because if a man could acquire title by paying taxes for another, simply, men's land would be jeopardized by the payment of taxes; the right owner might not know that these taxes were paid until the time when the person who had volunteered and made payment would step in and claim his land; but where there is an assessment, and that assessment is produced in court before the jury, it is to be considered with the other testimony in the case. You have the assessment book produced by the plaintiff, and you have also the assessment books produced by the defendant, and you have heard the testimony with respect to the assessment, and the payment of the taxes, and you will take that into consideration with the other evidence.'

"*Seventh*. In charging the jury as follows: 'Then, gentlemen, it has been set up here on the part of the plaintiff that the giving of this mortgage changed the relation even if there had been an original gift; that it was such a gift that it could be revoked, and was revocable at any time within 21 years; and that the execution of the mortgage on the part of Isaac Wible was a revocation of that gift. Now we do not hold that view of this case. It was, as we say, a deed, and whoever took that deed took it subject to any rights of any person claiming adversely. He did not take it without notice; if it was without notice the case would be different. If you find under the testimony in this case, and it is entirely for you, that John Wible had a house upon this

land at or about the time, and he or his family were living in that house, and had a shop erected upon this land at or about the time and probably previous to the time when this mortgage was executed, whoever took that mortgage we instruct you, took it with notice of the occupancy of this piece of land. He was bound to know that somebody was on the land if he took a deed of and he had a right to enter; then any time before the right to that host claim could mature and become valid, he had something like a year within which to enter the land and eject whoever was there. That is not done. Now there are two kinds of notice: there is legal notice, where a person has claim to a piece of land and has nothing else for his claim but a deed that is recorded; that is notice to all the world, legal notice of that claim, and that title is in the person who holds the deed. Then there is also actual notice; that is, notice that a person gets from going upon the ground and seeing somebody there—seeing who occupies it. If a man is in occupancy of a piece of ground, it is just as conclusive as if he has a deed of it recorded. So far as notice is concerned, if this mortgage was taken by the plaintiffs in this case, at a time when John Wible was actually living, and resided upon this land, we instruct you that that would be notice of his occupancy, and they would be bound by it.'

"*Eighth.* The court erred in charging the jury as follows: 'Gentlemen, again, should you find that the plaintiff is entitled to recover under all the evidence in this case, it will be for you to determine whether the plaintiff is entitled to recover all the land embraced in the writ, or a certain part of it. You will say that in your verdict. If you find that the defendant is entitled to your verdict, you have simply to find in favor of the defendant. If you find for the plaintiff you will say in such a definite manner,—you will have a draft with you,—and if you find for the plaintiff you will designate your finding the draft exhibiting the land claimed by the plaintiff that you find in favor of the plaintiff the land described in the writ, which would be sufficient,—that you find for the plaintiff all the lands described in the writ. If you only find a certain part, it will be necessary for you to make use of the draft; we do not say that it is the only one,—there is another one; you will designate what you find for the plaintiff, if you find any. If you find in favor of the plaintiff your verdict would be that you find in favor of the plaintiff the land described in the writ, with six cents costs, and six cents damages. Should you find in favor of the defendant, it is generally in favor of the defendant.'

"*Ninth.* The court erred in this: 'Defendants propose to prove by this witness, (James Drake,) that in his conversation with John Wible there was shown to him the house that he claimed the land as his own, for the purpose of showing his claim under his possession.'

"Plaintiff's counsel object to the proposition as irrelevant.

"*By the Court:* 'The objection is overruled.'

"*Question.* 'State now what he claimed when he talked to you about the farm.' *Answer.* 'He said that he owned that land, that his father had given it to him.'

"*Tenth.* The court erred in this: *Question.* (To James Noble, a witness) 'In whose name was the land always called, or how did it go?'

"Objected to. Objection overruled.

"*Answer.* 'The land by the neighbors and through the community was called "John Wible's Place."'

"*Eleventh.* The court erred in this: 'Defendants propose to prove by this witness, (James Drake,) a conversation with Isaac Wible prior to 1874, in which he said to this witness that he had given certain lands to Robert and James, his sons, and also to his son John, and what he had given to him; for the purpose of showing that Isaac Wible had no claim to this land, and that it was a gift from him to his son John.'

"Plaintiffs object to the proposition as irrelevant and incompetent; second

because in the defendant's abstract of title they set up no gift, and are not entitled to show any gift without its being set up in their abstract.

*"By the Court:* 'The objections are overruled, and a bill of exceptions sealed to the plaintiff.'

*"Question.* 'What did he say?' *Answer.* 'He said he had given Jas. Wible and Robert Wible, his two sons, fifty acres, and that he had given the lower end of his farm to John Wible to make himself a home.'

*"Twelfth.* The court erred in this: (Witness Daniel Slagle.) 'When I was in the commissioner's office some time in 1864, Isaac Wible came in, and asked to get an exoneration of what he said was John's land. He said that John was in the army.'

'Plaintiff's counsel object to any conversation in Kittanning off the land, and not in the presence of the defendant.'

*"By the Court:* 'Testimony admitted.'

*"Answer.* 'He said John was in the army, and had no right to pay the bounty tax on his piece of land. I don't recollect whether there was any land assessed to John or not.'

*"Thirteenth.* In the answer to plaintiffs' fourth point, which point and answer are as follows: (4) 'That if the jury believe that the entry of John Wible on the land in dispute was made under an alleged gift from his father, then his entry was not adverse, but in subserviency to his father's title, and the statute would not run so long as the relation continued.' *Answer.* 'This point refused. If the entry was made in pursuance of an actual gift of the land it would be adverse to the donor, and although the gift might in itself be insufficient by reason of the statute of frauds and perjuries to vest title in the donee, John Wible, still an entry under such a gift, if absolute and actual, would constitute such an independent relation between Isaac Wible and his son John, consistent with an adverse claim on the part of John.'

*"Fourteenth.* In answer to plaintiffs' ninth point, which point and answer are as follows: (9) 'The alleged title of John Wible is wholly dependent upon an alleged gift of the land in dispute to him by his father. That if a gift at all, it was by parol, and in violation of the statute of frauds and perjuries, and therefore could be recalled by the donor at any time within 21 years. That the transferring the land by a legal transfer to another was a cancellation of the gift, and destroyed the adverse possession of John Wible without having actually ejected him from the land.' *Answer.* 'Refused.'

*"Fifteenth.* In the answer to plaintiffs' tenth point, which point and answer are as follows: (10) 'That the evidence in the cause is not sufficient to constitute a title to the land in John Wible under the statute of limitations, and if the jury believe the land in dispute was included in the mortgage given by Isaac Wible to Mary J. Kennedy, the verdict must be for the plaintiff.' *Answer.* 'Refused.'

*"Sixteenth.* In the answer to plaintiffs' eleventh point, which point and answer are as follows: (11) 'If the jury believe the land in dispute is covered by the mortgage offered in evidence, and that at the time of the execution of the said mortgage by Isaac Wible to Mary J. Kennedy, to-wit, February 7, 1874, the defendant John Wible has not been in possession of the land in dispute for a period of 21 years, then they are instructed that the execution and delivery of the mortgage of Isaac Wible was a cancellation and destruction of any gift which Isaac Wible may have made to his son John, the defendant, and the said defendant's possession prior to that time was reduced from hostile, independent, and adverse possession to that of a tenant at will or sufferance, and cannot avail the defendant to support a title under the statute of limitation against the mortgagee.' *Answer.* 'Refused.'

*"Seventeenth.* In the answer to the defendant's seventh point, which point and answer are as follows: (7) 'That if the jury find from the evidence that the defendant had acquired title under the statute of limitations, as stated in

the preceding point, then the fact that the land in controversy was not assessed to him, if such be the fact, would not have any effect on such title.' *Answer.* 'That point is affirmed.'"

Verdict for defendant, and plaintiffs appeal.

*Buffington & Buffington* and *McCain & Leason*, for plaintiffs in error.  
*David Barclay* and *W. D. Patton*, for defendant in error.

**PER CURIAM.** This thing of attempting to take from a man land which he has claimed and peaceably occupied for more than 30 years, is a serious undertaking, and generally, as in this case, results in failure. The learned judge charged more favorably for the plaintiff than he had a right to require. An absolute and perfected gift from Isaac Wible to his son John was not necessary to the perfection of John's title under the statute. If he entered even under the pretense of a gift, and thenceforward claimed the property as his own, it would be sufficient if the other requisites of the statute were complied with.

Nor can the exceptions to evidence be sustained; his own declarations while in possession of the premises, as well as the understanding of his neighbors, were proper evidence of the character of his claim.

The judgment is affirmed.

#### PENNSYLVANIA INS. CO. v. CARTER.

(*Supreme Court of Pennsylvania.* October 6, 1887.)

##### 1. INSURANCE—DELIVERY OF POLICY—PAYMENT OF PREMIUM TO AGENT.

A policy of insurance, executed and attested as required by the act incorporating the company, and containing no stipulation making an actual payment of the premium a condition precedent, or that default in its payment should constitute a forfeiture, was, without prepayment, delivered to an agent for the purpose of being delivered to plaintiff. Plaintiff paid the premium to the agent, and the stock insured was destroyed by fire. *Held*, that the company was liable.<sup>1</sup>

##### 2. SAME.

Where the usual course of dealing between an insurance company and its agent is for the company to treat the agent as its debtor for the premiums on policies delivered to him, and to render statements or bills for the same periodically, payment of the premium by the insured to the agent is payment to the company.

Error to court of common pleas, Jefferson county.

Action brought by defendant in error to recover the amount of a fire insurance policy issued by the plaintiff in error. The principal facts appear from the charge to the jury in the court below. After the fire by which plaintiff's store was burnt, a Mr. Allewelt called on him, claiming to represent four of the companies interested, including the defendant. Plaintiff subsequently met Allewelt and other adjusters, and arranged a compromise adjustment of the loss. Allewelt made out a statement and a proof of loss, which plaintiff handed to the defendant, by whom they were retained until produced at the trial. The rulings of which complaint is made are: *First.* The admission of plaintiff's evidence that he had paid the premium to Jacob Zeitter. *Second.* The admission in evidence of the following paper:

"PITTSBURGH, May 25, 1885. The agreement of settlement with Mr. Carter was for a cash settlement, without waiting sixty days. Carter would accept thirteen thousand, and, if not paid cash, the claim would be for a total loss.

"J. B. KREMER, Special Agent.

"D. B. ALLEWELT, Adjuster."

*Third.* That part of the charge which reads as follows: "The plaintiff further offered in evidence the execution of the policy, forthwith notice, delivery of proofs of loss, date of fire, ownership and value of property destroyed, and general affirmation performance of his required covenants."

<sup>1</sup>See *Insurance Co. v. Humes*, (Pa.) 8 Atl. Rep. 163; *Elkins v. Insurance Co.*, (Pa.) 6 Atl. Rep. 224.

The charge to the jury delivered by THEOPHILUS S. WILSON, P. J., is as follows:

*"Gentlemen of the Jury:* On the fourth day of August, 1885, R. J. Carter, the plaintiff in this suit, brought his action of covenant against the Pennsylvania Fire Insurance Company of Pittsburgh, to recover the sum of one thousand dollars. In his statement filed he claims the sum of one thousand dollars, with interest from the fifth day of May, 1885, the time of the fire, to the present date, one hundred and twenty-two dollars, which, with the principal, aggregates the sum of one thousand one hundred and twenty-two dollars.

"The plaintiff at the same time, or soon after, filed his sworn statement of claim, wherein he stated that he was the plaintiff, and the Pennsylvania Insurance Company, the defendant, was justly and legally indebted to him in the sum of one thousand dollars, with interest from the second day of June, 1885, which indebtedness arose upon a certain instrument of writing called a 'policy of insurance,' sealed by the defendant, and signed by the president and secretary of the defendant company, which was delivered to the plaintiff on the twenty-fourth day of April, 1885, and in which the defendant agreed to indemnify him for the term of one year from the twenty-fourth day of April, 1885, in the sum of one thousand dollars, against loss or damage by fire on his stock of merchandise contained in the building then occupied by him, and situated near Punxsutawney, in Young township, Jefferson county, Pennsylvania; and a true and correct copy of the policy of insurance was annexed to and made part of the statement of claim. The policy has been offered in evidence. The plaintiff further stated that the said stock of merchandise, upon which the defendant agreed to indemnify him against loss or damage by fire, was destroyed by fire on the fourth day of May, 1885, at the place described in the said policy of insurance, and while the said policy was a subsisting covenant of indemnity; and by reason of the fire he suffered loss on his merchandise in the sum of at least fourteen thousand five hundred dollars, and he verily believed that his loss was really a much larger sum; that at the time of the fire he was interested in the merchandise to the full value thereof, and was the absolute owner of it; and that, as soon after the said fire as possible, he notified the defendant of said loss, and rendered to it a particular statement thereof,—whereby he became entitled to demand of the defendant the said sum of one thousand dollars, which sum the defendant was legally bound to pay the plaintiff, and which he did demand of the defendant company, and which the said company has refused and neglected to pay, in whole or in part thereof, and therefore suit was brought to recover the same.

"To this statement of claim made by the plaintiff, the defendant company filed an affidavit of defense on the fifth day of September, 1885, wherein it alleged that it had a true, just, and legal defense to the whole of the plaintiff's claim, the nature and character of which was that neither the said plaintiff, nor any other person for him, had paid the premium on the policy of insurance mentioned to the company, its officers or agents, or rendered any value to it for the same in any manner whatever, and that it was not liable for any loss that may have occurred by fire to the plaintiff; there being no payment, offer of payment, or tender of payment to defendant company, its officers or agents, in any manner or form, previous to the fourth day of May, 1885. It was further stated that the defendant or its officers never made or authorized any person to adjust any loss, as claimed by the defendant; all of which it expected to be able to prove on the trial. It further filed its plea in court, denying any liability; and later, in September, 1886, filed a special plea, wherein they alleged the plea of non-payment of premium on the policy by the plaintiff to the defendant.

"The plaintiff, to support the allegations contained in his statement of claim, which has been read in your hearing, offered evidence to show that on the twenty-fourth day of April, 1885, he applied to Jacob Zeitler, in Punxsutaw-

ney, for insurance on his stock of general merchandise in the sum of four thousand dollars, one-fourth of which was taken in the defendant company. The application was sent by Mr. Zeitler to Robert Thorn, in the city of Pittsburgh, who received from the defendant the policy of insurance in evidence, and transmitted it to Mr. Zeitler, who delivered it to the plaintiff on the twenty-fifth day of April, 1885, and was paid by him the sum of twelve dollars and fifty cents, mentioned in the policy for the premium. This premium was sent by draft to Mr. Thorn, at Pittsburgh, on the thirtieth of the same month.

"Robert Thorn, in behalf of plaintiff, testified that in the year 1858 he was appointed general agent of the defendant company, and received a commission from it signed by its officers, and that from that day to this he has been giving the company business. When he was appointed such agent, he received a book designated as a book of instructions to agents of the Pennsylvania Insurance Company, the title of which is 'Instructions to Agents, and Rates of Insurance, of the Pennsylvania Insurance Company of Pittsburgh. Chartered capital, three hundred thousand dollars. Incorporated 1854. Office, No. 63 Fourth street;' and printed by W. S. Haven in the year 1855. On page 13 of this book of instructions, under the ninth subdivision of the special instructions to the agents as offered in evidence, are these words: '*Ninth.* The premium is to be paid in cash on delivery of the policy, unless you deem proper to grant a temporary accommodation on your own responsibility, and advance it to the company in regular monthly report.' And on the twentieth page of the same book, under the title of '*Remarks in Conclusion,*' is this: 'This book is designed for the exclusive use of the agents of this company, and those co-operating with us. It is to be preserved, and returned whenever your business connection with us ceases.'

"On the twenty-fourth day of April, 1885, Mr. Thorn took the description of the property of Mr. Carter, received from Mr. Zeitler, and gave the company at its general office a written form, which it adopted, and afterwards handed him the policy in suit, and the same night he mailed the policy to Mr. Zeitler with instructions to deliver it to Mr. Carter, collect the premium, and transmit it to him in the usual course of business, which instructions were complied with at the end of that month. In his transactions with the insurance company, Mr. Thorn settled on periodical reports of transactions as made up by the company, on which settlements were made and the several amounts due paid over. The form and manner of the settlements were evidenced by several statements and checks covering the transactions. After notice of the loss had been received, Mr. Thorn called at the company's office, and requested the usual report, which was to include the premium on this policy. This request was refused, and the premium was deposited in the bank, where it has since remained. This statement was called for in the month of May, soon after the fire. Mr. Thorn further testified that this policy was handed to him by the company, for the plaintiff, and that this was done under his work as agent; that he was not the agent of the plaintiff, and was not interested in the amount to be recovered. The plaintiff further offered in evidence the execution of the policy, forthwith notice, delivery of proofs of loss, date of fire, ownership and value of the property destroyed, and general affirmative performance of his required covenants.

"The defendant, to maintain the issue on its part, introduced evidence to show that Mr. Thorn was acting as an insurance broker, and not as a general agent of the company. The secretary of the company testified that he had been acting in his present capacity for fourteen years last past, and during that time Mr. Thorn had not been the agent of the company in any sense, and he could not recall any case in which Thorn was authorized to act, and none as agent; that this premium was never paid before the fire, or offered to be paid, and no authority was given Mr. Thorn to collect this premium; that he never gave Mr. Thorn a commission as agent, but gave him his usual broker's

commission for services, and he was acting as broker for the parties, and was not in any sense an agent for the company. This was supplemented by the testimony of the assistant secretary that the premium was not paid, nor offered to be paid, before the fire.

"The defense set up by the defendant is non-payment of the premium, and that under a condition in the policy such omission on the part of the assured avoided the policy, and relieved the company from any liability. The clause, letter F, section 1, reads: 'Only such persons as shall hold the commission of this company shall be considered as its agents in any transaction relating to this insurance, or any renewal thereof, or the payment of premium to the company. Any other person shall be deemed to be the agent of the assured, and payment of the premium to such person shall be at the sole risk of the assured.'

"The plaintiff claims that Robert Thorn held a commission from the company, duly authorized, as recited in the policy, and that during the period covered by this entire transaction it remained in full force, never having been revoked by the officers of the company; that he had never resigned the agency of the company, and his business transactions with the company have continued under this commission. In pursuance of the authority thus vested in him the policy in suit had been applied for, received from the defendant, delivered to the plaintiff, premium paid by the assured, and received by Mr. Thorn prior to the fire, and the plaintiff alleges that such payment made to Mr. Thorn, under the circumstances of the transaction, was a valid payment to the company, and a verdict should be rendered in favor of the plaintiff for the sum insured, with interest from May 5, 1885.

"To charge a corporation upon the act of an officer or agent, it must be shown, directly or presumptively, either that the act was performed while in the discharge of his ordinary duty in the usual course of business, and was within the general scope and apparent sphere of such duty, or that it was expressly authorized, or that it was performed with the knowledge and implied assent of the directors or of the corporation, or its authorized officer, or was subsequently ratified by them. The questions of law involved have been presented to the court, with requests for instructions to the jury, which are read and answered. The plaintiff respectfully requests the court to instruct the jury as follows:

"*First.* If the jury find from the evidence that the act of the general assembly of Pennsylvania incorporating the Pennsylvania Insurance Company of Pittsburgh, the defendant company, provides "that all policies of insurance, notes, or other contracts that shall be made or entered into by said corporation may be either with or without the seal thereof, and shall be subscribed by the president, and attested by the secretary, and, being so signed, executed, and attested, shall be binding and obligatory upon said corporation, according to their true intent and meaning;" and if they shall further find, from the evidence, that the policy in suit is so signed, executed, and attested, is furthermore sealed with the common seal of the corporation,—the plaintiff is entitled to recover, in case of loss or damage by fire, if the jury furthermore find the facts as stated in the plaintiff's second point. (Affirmed.)

"*Second.* If the jury find from the evidence that there is nothing contained in the terms and conditions of the policy in suit making an actual payment of the premium to the said defendant company, its officers or agents, a condition precedent to the defendant's liability, or that a default in payment of the premium shall cause a forfeiture; and that it is agreed in said policy, under seal, that the defendant will indemnify the plaintiff against loss or damage by fire in the sum of one thousand dollars on the merchandise described in said policy, for the term of one year, to-wit, from the twenty-fourth of April, 1885, to the twenty-fourth day of April, 1886; and furthermore, that, without the prepayment of the premium, the defendant delivered said

policy to Thorn for the plaintiff's use, with that intent and understanding, and also that said merchandise was destroyed or damaged by fire within time specified, and that the defendant was served with due notice and tendered, the plaintiff is entitled to recover. (Affirmed.)

"*Third.* If the jury find from the evidence that the defendant gave policy in suit to Thorn with the understanding that he should cause it to be delivered to the plaintiff, and have the premium collected, and that Thorn entered the undertaking, and held himself responsible for the money, or some of the policy, Thorn thereby became the agent of defendant for that purpose. And if the jury further find that Thorn did deliver the policy to plaintiff by hand of his agent, Zeidler, who collected the premium, and on April 1905, sent Thorn a bank draft covering this premium, "thenceforth" Thorn was the depositee of the defendant company, and there could be no rescission of the contract without its consent, (together with the consent of plaintiff) for to all legal intents the contract of insurance was consummated, and premium belonged to the company as fully as though it were in its possession; therefore the plaintiff is entitled to recover. (Affirmed.)

"*Fourth.* If the jury find from the evidence that Thorn, through this insurance was placed in defendant company, transacted the business in the usual mode adopted by the company and him, and that the usual mode was that, when he procured policies in said company for or in favor of others, it was accustomed to regard or treat him as its debtor for the premium in such cases, and to periodically render to him statements or bills for same, in accordance with the understanding that he was the company's personal debtor therefor, then the actual payment of the premium to the company before a loss was dispensed with, and the obligation of Thorn to pay premium was in effect the payment of it by the insured, and the plaintiff is entitled to recover. (Affirmed.)"

"The defendant requests the court to charge the jury:

"*First.* That, under the terms of the policy, the premium is the consideration; and if the jury find, from the evidence, that the premium was not paid to the defendant company, the policy is void, and the plaintiff cannot recover. (Affirmed.)

"*Second.* That if the jury believe, from the evidence, that Jacob Zeidler and Robert Thorn were the agents of the plaintiff, and not of the defendant company, a payment to either of them would not be a payment to the defendant company, or bind them, under the policy. (Affirmed.)

"*Third.* That, if the premium was not paid or tendered to the defendant company before the loss by fire occurred, the policy would be inoperative and the plaintiff cannot recover. (This is affirmed.)

"*Fourth.* That, if D. B. Allewelt was not the authorized adjuster of the defendant company, his adjustment would be void. (Affirmed.)"

"These requests are based largely upon the views of the counsel, arising from their respective theories upon the facts in issue; and the jury will determine, from all the evidence admitted, on which side is the preponderance of evidence on the main fact, which is the payment or the non-payment of premium. You are instructed that the preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of the evidence is, you should take into consideration the opportunity of the several witnesses for knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts, and circumstances proved on the trial,—and from all those circumstances determine upon which side is the weight or preponderance of the evidence. There seems to be no middle ground in this case. If you find for the plaintiff, you find for

amount of his claim; if you find for the defendant, you simply return a verdict for the defendant."

*W. D. J. Martin and John Conrad*, for plaintiff in error.

*W. P. Jenks, C. Z. Gordon, and Edward A. Carmalt*, for defendant in error, cited, in support of plaintiff's second point: *Insurance Co. v. Barracliff*, 45 N. J. Law, 543; *Miller v. Insurance Co.*, 12 Wall. 304; *Insurance Co. v. Colt*, 20 Wall. 560. In support of the third point: *Riley's Ex'rs v. Insurance Co.*, 43 Leg. Int. 108, 1 Atl. Rep. 328; *Insurance Co. v. Block*, 43 Leg. Int. 46, 1 Atl. Rep. 523. In support of the fourth point: *Insurance Co. v. Hoover*, 113 Pa. St. 591, 8 Atl. Rep. 163; *Elkins v. Insurance Co.*, 113 Pa. St. 386, 6 Atl. Rep. 224; *Insurance Co. v. Ashcraft*, 18 Wkly. Notes Cas. 97, 3 Atl. Rep. 774; *Bang v. Insurance Co.*, 1 Hughes, 290; *Insurance Co. v. Erb*, 43 Leg. Int. 406, 4 Atl. Rep. 8.

PER CURIAM. As we can discover no flaw in the charge and rulings of the learned judge of the court below, and as the main principle involved in this case has been thoroughly settled by several recent decisions of this court, we must dismiss the exceptions, and concur in the judgment of the common pleas. Judgment affirmed.

#### AMERICAN CENT. INS. CO. v. HAWS.

(*Supreme Court of Pennsylvania.* October 13, 1887.)

##### 1. INSURANCE—ON STOCK "IN BARN"—ACCIDENT OUTSIDE OF BARN.

In an action on a policy of insurance on property contained in a "new two-story frame barn," the fact that the animal was not present in the barn at the moment of death by lightning does not impair the right to recover. *Haws v. Fire Ass'n*, 7 Atl. Rep. 159, followed.

##### 2. SAME—LIMITATION OF ACTION—ISSUANCE OF WRITS.

In an action on an insurance policy, which requires the action to be commenced within 12 months next after the loss occurred, and the evidence showed that the action was begun in time, but the writ was not served, and that an *alias* and *pluries* writs were issued before service was obtained, *held*, the *alias* and *pluries* writs were but a continuance of the original action; not the inception of a new one.<sup>1</sup>

##### 3. SAME—PROOF OF LOSS.

In an action on a policy of insurance on stock, the evidence showed that there was but a single subject of loss, and that notice of loss was immediately given. *Held*, that a further detailed proof of loss was not requisite to recovery.

##### 4. SAME—EXCUSE FOR DELAY IN MAKING PROOF OF LOSS.

Where immediate notice of the loss was given to an agent, but no proof of loss was made within the 30 days, as required by the policy, and plaintiff was permitted to introduce evidence to show that proof was not made within the time on account of the failure of the company to furnish him with blanks, and that no objection was made when the proof was filed, *held*, not prejudicial to defendant, since it was left to the jury to say whether the explanation of the delay was sufficient.

Error to court of common pleas, Mercer county.

A. J. Haws, the plaintiff, brought this suit in the court below, against the American Central Insurance Company, to recover \$133.33 for the loss of a black mare, "Fannie H.," mentioned in a policy of insurance, No. 158,403, which he obtained from the said company on March 1, 1884, wherein the company had insured him for one year to an amount not exceeding \$3,566.66 against loss or damage by fire to certain specified property only, and while located as described therein, and not elsewhere.

In the written portion of the policy, after designating the different animals insured, and the amount of insurance upon each animal, (\$133.33 being the

<sup>1</sup>In the case of *Johnson v. Mead*, (Mich.) 24 N. W. Rep. 665, where *alias* and *pluries* writs were issued, the court held that the interval between the successive writs so interrupted the continuity of the action that the running of the statute was not suspended.

amount upon the black mare, Fannie H.,) there appears the following clause: "*All contained in his new two-story frame barn situated in Hempfield township, Mercer county, Pa., about one mile east of Greenville. \$7,133.33 concurrent insurance.*" Next followed a printed clause wherein the company agreed to indemnify the assured for such loss or damage as should happen by fire to the property *so situated and specified*. And the second condition of the policy contained the following clause, *inter alia*: "This policy shall be void and of no effect if the property insured be removed to any other building or location than that described herein." Attached to the margin of the policy was a small piece of paper containing the lightning indemnity clause, bearing same date as the policy, and forming a part of the contract of insurance.

On June 9, 1884, the mare "Fannie H." was found dead in a field a distance of about 400 yards from the barn in which the animals were insured, and the plaintiff alleged the mare had been killed by lightning; but defendant claimed that he neglected to furnish proof of loss to the defendant company until September 5, 1884, although his contract required him to furnish said proof within 30 days from date of loss. The policy required that suit should be brought within 12 months next after the loss occurred, and the writ in this case was not issued until January 3, 1887, and was not served on the resident agent of the defendant company until January 15, 1887.

On March 30, 1887, defendant filed a special plea that the action was not commenced within 12 months next after the loss occurred, and that the lapse of time after the loss, and before suit was commenced, should be taken as conclusive evidence against the validity of plaintiff's claim, according to the terms of the policy. The said plea was overruled by the court, and at time of trial the defendant below contended that their liability under their policy did not extend to any loss of property not contained in the plaintiff's barn at the time of the loss; that the requirement of the policy "that proof of loss should be rendered to the company within thirty days thereafter" is a condition precedent to plaintiff's right to recover; that the lapse of time after loss before suit was commenced is conclusive evidence against the validity of plaintiff's claim. The court refused so to instruct, and the jury rendered a verdict against the company for \$152.53. The court refused a motion for a new trial, and judgment was entered on the verdict for \$152.53 and costs of suit, and this writ of error was purchased to test the correctness of the instructions of the court.

But plaintiff introduced evidence to show that the American Central Insurance Company was a corporation, located in the city of St. Louis, Missouri, and all its business in Mercer county was done through its agent, J. M. Pettit, residing in Greenville, Mercer county. On the first of March, 1884, A. J. Haws, the defendant in error, effected an insurance on certain property mentioned in the policy, among which was a valuable brood mare, Fannie H. Mr. Haws made that insurance through plaintiff's agent, Mr. Pettit, and knew no other person, either in effecting his insurance, or subsequent thereto. On the night of June 8, 1884, the mare Fannie H. was killed by lightning, and Mr. Haws being then absent at Johnstown, returned in a day or two, and immediately called on Mr. Pettit for the purpose of making out his proof of loss; the loss having been reported to Mr. Pettit by Mr. Haws' man immediately after its occurrence. Mr. Pettit testified that he reported the loss immediately to the company at St. Louis, and that the company had always furnished him blanks, but that he had none then on hand, and that he would immediately write for some, and Mr. Haws, depending on his doing so, did not then make out his proof of loss, but waited until Pettit would receive his blanks, and, as soon as the blanks were received, he called on Mr. Pettit, who then made out the proof of loss, and took charge of it to forward it to the company, which the company afterwards received, and retained without objection, and produced the same on the trial at the request of Mr. Haws' at-

torney. In this entire negotiation in effecting the insurance, and trying to adjust the loss, the insurance company had no other agent or adjuster in Mercer county except Mr. Pettit. He was the only representative of the company that Mr. Haws ever met or saw, though the other companies in which insurance had been taken did send out their adjusters to look after their interests.

This loss occurred on the night of June 8, 1884, and suit was brought on the twenty-third of May, 1885, and summons served on May 25, 1885, on Harry Meyer, residing at Williamsport, who had been, and was supposed still to be, the agent for the company in Pennsylvania. Then the company by its attorney, S. F. Thompson, came into court by petition and affidavit, stating that said Harry Meyer was not the agent for the company, but one A. D. Lundy, of Williamsport. The court then set aside the service on Meyer, and the plaintiff issued an *alias* summons directed to the sheriff of Lycoming county, to be served on said A. D. Lundy, which was returned by said sheriff, stating that the said A. D. Lundy's agency had then expired, and that Alexander W. Wister, of Philadelphia, was the duly-authorized agent for said company. The plaintiff then issued a *pluries* summons to the sheriff of Philadelphia county, which was duly served on said Alexander W. Wister.

The defendant asked for instructions upon the following points:

"(1) That the policy under which the plaintiff claims covered only such property as was contained in his 'new two-story frame barn,' and that defendants are not liable for any loss of property not contained in said building at the time of the loss. *Answer.* This point is refused. It is covered by the decision of the supreme court in the case of *Insurance Co. v. Hewes*, 5 Bin. 508.

"(2) That if the jury find that the mare was killed by lightning on or about June 9, 1884, and that the summons in this suit was not served on the resident agent of the defendant company until January 15, 1887, the plaintiff cannot recover. *A.* It seems by the record in this case that the summons was originally issued on the twenty-third day of May, 1885. This was less than a year after the time the loss occurred, and notwithstanding the provision in the policy requiring that suit shall be brought within a year, the plaintiff has complied with that provision of the policy in bringing his suit, in view of what followed the issuing of this summons. It appears that the summons was served upon some one who turned out not to be the agent of the company then, and that the company came in, and complained that service had not been made upon them, or upon their authorized agent, and suggested that one Mr. Lundy, of Williamsport, I believe, was their authorized agent. It seems from the record and return of the sheriff that this summons was sent to be served upon this Mr. Lundy, and that the sheriff returned that Mr. Lundy was not then the agent of the company, and suggested some other person who was, and finally service was had upon this person then suggested by the sheriff of Lycoming county. In view of this state of facts this request is refused.

"(3) If the jury find that the mare was killed by lightning during an electrical storm, the plaintiff cannot recover under this policy. *A.* If you find that this mare was killed by lightning, you need not inquire the kind of a storm that was taking place at the time. If it was killed by lightning, that is all that is required to fix the liability of the company, so far as the manner of death is concerned.

"(4) If the jury find that the mare was killed on or about June 9, 1884, and that proof of loss was not executed until August 14, 1884, and was not forwarded to the defendant until September 5, 1884, the plaintiff cannot recover. *A.* The policy upon which the plaintiff has declared requires that proof of loss shall be made within thirty days from the time of the loss. The plaintiff is bound to comply with that provision, unless he gives a reasonable explanation

for not doing so. This provision of the policy is made for the protection of the company, so that they may have all opportunity to examine the property when destroyed, and see whether or not the loss is a *bona fide* loss, or whether they have a just and proper excuse for not paying the amount that is claimed of them. In the case now before us the testimony is that Mr. Pettit was the agent who issued the policy, or through whom the policy was obtained,—the resident agent at Greenville. Mr. Pettit testifies that on the morning after the loss he was visited by some one from Mr. Haws' farm, and was informed of the loss of this property; that he did not then go out, but that he afterwards went out with one Mr. McCandles, who came there to adjust the loss for, perhaps, the American Fire Insurance Company; that Mr. Haws himself was not at home at this time, but he came home in the course of a few days and came into Mr. Pettit's office; that Mr. Pettit then did not have any blanks of the company. He says that the company usually sent him blanks for proof of loss; that he wrote to the company, and that he received the blanks; that Mr. Haws made out the proof of loss, and that it was sent to the company. Mr. Haws testifies that he went there for the purpose of getting the proof of loss made out, and that there were no blanks then in possession of the agent; that he (the agent) sent for proofs of loss, and in course of time they came, and that he made out the proof of loss as soon as the blanks were received. Now, gentlemen of the jury, if you find that this is a reasonable explanation for the delay beyond thirty days, the fact that this was delayed beyond thirty days would not defeat the plaintiff's right to recover. But, on the other hand, if you do not believe that this is a reasonable explanation of the delay, you should find in favor of the defendant, because it is one of the stipulations of the policy that it shall be made within thirty days. It is left to you, as a question of fact, to say how this was, with the further qualification that if you believe that the company received this proof of loss without objection, then you can say whether or not they waived any objection to the delay on account of the proof of loss. If you find that they waived that objection, then you should not defeat the plaintiff's right to recover upon the ground of this delay, if he is entitled upon the other essential matters to recover."

Verdict for plaintiff.

*S. F. Thompson* and *S. Redmond*, for plaintiff in error. *B. P. Gillespie* and *S. Griffith & Son*, for defendant in error.

GREEN, J. In the case of *Haws v. Fire Ass'n*, 18 Wkly. Notes Cas. 530, 7 Atl. Rep. 159, we decided the main question involved in the present case. We held that the fact that the animal was not present in the barn at the moment of death by lightning did not impair the right of recovery; and the learned court below, following our ruling in that case, refused the first point of the defendant, and in that there was no error.

It is quite clear that the defendant's special plea cannot be sustained. An action was commenced within 12 months next after the loss occurred, and, although the writ was not served, an *alias* and a *pluries* writ were issued, so that a proper service was finally obtained. We have always held that *alias* and *pluries* writs are a continuance of the original process, and not the inception of a fresh suit. *Lynn v. McMillen*, 3 Pen. & W. 170; *McClurg v. Fryer*, 15 Pa. St. 293.

As to the proof of loss, it must be borne in mind that the loss was total, there being but a single subject of insurance, which was entirely destroyed, and that immediate notice of the loss was given to the defendant. In such circumstances, we have repeatedly held that a further detailed proof of loss was not requisite to a right of recovery. *Insurance Co. v. Schollenberger*, 44 Pa. St. 259; *Insurance Co. v. Moyer*, 97 Pa. St. 441; *Insurance Co. v. Dougherty*, 102 Pa. St. 568; *Insurance Co. v. Cusick*, 109 Pa. St. 157.

The learned court below left to the jury the question whether there was a

reasonable explanation of the delay beyond 30 days, in consequence of certain facts which occurred in relation to making out the proofs of loss, and the jury found that there was, and this was quite as much as the defendant was entitled to ask for, in view of the character of the facts referred to. They constituted a *bona fide* effort on the part of the plaintiff, not only to give notice of the loss, which he did very promptly, but also to make out the full written proofs. When he applied to the agent for that purpose, the latter had none on hand, but sent to the company for them. When they were received a full proof was made out, and signed, and sent to the company, who received it without objection. We see no error in the action of the court upon this subject. Judgment affirmed.

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MCKINNEY v. MCCAIN.

(*Supreme Court of Pennsylvania. October 13, 1887.*)

NEGOTIABLE INSTRUMENTS—EXECUTION OF NOTE—ADOPTION OF SEAL.

In a controversy as to the execution of a note with a seal to one of the signatures, but with no seal to defendant's name, the court charged the jury that, "if you find that the defendant signed this note, it is his obligation, on which he would be liable, in this proceeding, for any balance that might be due upon it;" and "if he did so write his name to this note, and you find so from the evidence, your verdict should be for plaintiffs, although he may not have made the seal to the note, or adopted as his the seal that is above his name on the note." *Held*, that the question as to the execution of the note was fairly submitted to the jury.

Error to court of common pleas, Armstrong county.

Judgment was obtained by Nolf and McCain on a note purporting to be signed by Hudephol and McKinney, bearing a seal with the name of "Hudephol" only, and seizure was made of McKinney's boat and goods. McKinney thereupon petitioned the court of common pleas, setting forth that he had not signed the note, and was not indebted to Nolf and McCain in any sum, and obtained a writ staying execution, and a rule to show cause why the case should not be reopened. The rule was made absolute, the case reopened, and McKinney entered a plea of *non est factum*. The declaration alleged a writing obligatory. The plaintiff's testimony tended to show that the note had been signed by McKinney, and the note was offered in evidence. Objection was made to its introduction on the ground that there was no seal to the note to McKinney's name. The objection was overruled. In the charge to the jury the court said: "If you find, then, that the defendant signed this note, it is his obligation, on which he would be liable, in this proceeding, for any balance that might be due upon it;" and, further, "if he did so write his name to this note, and you find so from the evidence, your verdict should be for plaintiffs, although he may not have made the seal to the note, or adopted as his the seal that is above his name on the note." The jury returned a verdict against McKinney. In refusing a new trial, the court (HARRY WHITE, P. J.) delivered the following opinion:

"This case was that of a judgment opened on terms. A. W. McKinney, one of the defendants, whose name was found upon the note, and who was a joint defendant in the judgment with Hudephol, presented his petition, denying that he had ever signed this note at all; his contention being that his name to the note was really a forgery. The judgment was therefore opened, and the plea of *non est factum* directed to be entered, under which the defendant was allowed to give evidence "as to the fact of not signing the note, and the question as to its being a sealed instrument as to him." The real controversy on the trial, and to which all the testimony was directed, was whether McKinney had signed the paper. As to whether he had adopted the seal or not depended upon the intrinsic evidence on the face of the note itself. There was a seal opposite the name of Hudephol. The question was whether McKinney had adopted that seal. These questions, as to the genuineness of the

signature and the adoption of the seal, were left, we think fairly, to the jury. They must have found, of course, that McKinney's signature was genuine, and also, from the face of the paper, that he had adopted the seal above his name. While we did not say so on the trial, yet we think it would be a safe conclusion to adopt, that where an instrument has been decided by the court as it is their duty, after an inspection, to be a sealed instrument, that it must have such a seal attached as the law requires to make it a sealed instrument, but there is but one such legal seal to the instrument, and several persons signing it, that all will be presumed to have adopted the seal preceding their names. Such a rule, we think, would be safe to adopt as to notes or obligations for the payment of money. The necessity of some rule of that kind would seem to be proper, since the legislation allowing all parties in interest to call witnesses. Such a rule, however, was not adopted on the trial of this case. We are not convinced that the verdict was against the preponderance of the evidence. We think the evidence fully justified the jury in finding that McKinney had signed the note, and the intrinsic evidence of the paper itself would support the finding that he adopted the seal that was on the note above his name.

"On the trial we made some remarks about the statute of limitations, but probably, the case did not call for, as the statute of limitations was not pleaded. These remarks were the result of some soliloquy between the court and the counsel upon the trial. We were not aware, then, that the supreme court had decided that the statute of limitations would be available where judgment was opened generally, or that a judgment would be opened to let the plea of the statute of limitations. This case was tried in March, 1887, early in the month. The case of *Sossong v. Rosar*, 112 Pa. St. 197, 3 Atl. Rep. 768, had not been decided. The opinion in that case was not delivered until the fifth of April following. In anything we said in this respect about the statute of limitations, our mind had followed hastily the utterances in *Morris v. Hannick*, 10 Phila. 571; *Person v. Weston*, 1 Kulp, 387; *Person v. McClurg*, 1 Chester Co. Rep. 241. All these cases were quoted in *Brigley's Digest*, 3486. This not being the question on which the case turned, we think no harm was done to the defendant; for it is a rule that a case will be reversed for an error which did the parties complaining of it no harm. *Hoskinson v. Elliott*, 62 Pa. St. 404; *Knapp v. Hortung*, 103 Pa. St. 404; *Coke Co. v. Madison*, 2 Atl. Rep. 39. We repeat, then, that the question whether the defendant signed the note or not was the principal content of the case. The efforts of both parties were directed to this inquiry. We think the weight of the evidence was fairly with the plaintiff, and we therefore do not feel like disturbing the verdict. Motion for new trial is therefore overruled, and judgment will be entered for the plaintiff."

The defendant McKinney brings error.

**PER CURIAM.** The charge and rulings of the court below were quite favorable to the defendant as they ought to have been. The question of execution of the note by McKinney was fairly submitted to the jury, and the paper itself showed, if indeed that were of any moment, that the seal was that of both parties by whom it was signed. Judgment affirmed.

## WEIGAND v. WEIGAND.

(Court of Errors and Appeals of New Jersey. March Term, 1887.)

## 1. DIVORCE—DESERPTION BY WIFE—JUSTIFICATION.

Whenever a husband commits a matrimonial offense which entitles his wife to a divorce, he does that which justifies his wife in leaving him.

## 2. SAME—REFUSAL TO LIVE IN HOUSE WITH HUSBAND'S PARAMOUR.

A wife is not obliged to stay under her husband's roof with his prostitute; and if she leaves his house for that reason, and he refuses to support her, she is entitled to a decree against him, under the twentieth section of the New Jersey statute concerning divorces. Affirming 3 Atl. Rep. 699.

On appeal from a decree advised by VAN FLEET, Vice-Chancellor, whose opinion, now affirmed, is reported in *Weigand v. Weigand*, 41 N. J. Eq. 202, 8 Atl. Rep. 699.

*Theodore Ryerson*, for appellant. *M. T. Newbold*, for respondent.

PER CURIAM. This decree unanimously affirmed, for the reasons given by the vice-chancellor.

## WOODRUFF, Ex'r, v. LOUNSBERRY.

(Court of Errors and Appeals of New Jersey. March Term, 1887.)

## 1. EXECUTORS AND ADMINISTRATORS—LIABILITY OF ADMINISTRATOR—DEPRECIATION OF SECURITIES.

Where executors proceed to sell certain property, as empowered by the will, and take mortgages to secure the deferred payments on said property, they are not chargeable with any loss which may occur by the depreciation in value of the property, and the consequent loss of the money secured by mortgage thereon.

## 2. SAME—ADMINISTRATOR'S FEES—OUT OF WHAT FUND PAYABLE.

Where testator's widow was appointed one of the executors of an estate, and collected rents and profits, in which she had an estate for life, her co-executor is not entitled to commissions out of the estate for the collection of such rents, but should have been paid out of the income.

## 3. SAME—ADMINISTRATOR'S LIABILITY—UNAUTHORIZED INVESTMENT.

Executors who, contrary to the general law and to the directions of the will, invest the funds of an estate in certain city bonds, are liable for any loss occasioned thereby, and this, although the distributees of the will agree, in writing, not to charge them with any loss growing out of an exchange of such bonds for new ones to be issued by the city. Affirming 5 Atl. Rep. 89.

On appeal from a decree rendered by RUNYON, Ordinary, whose opinion, now affirmed, is reported in *Woodruff v. Lounsberry*, 40 N. J. Eq. 545, 5 Atl. Rep. 99.

*J. B. Vredenburg*, for appellant. *Gilbert Collins*, for respondent.

PER CURIAM. This decree unanimously affirmed, for the reasons given by the ordinary.

## CUBBERLY v. YAGER.

(Court of Chancery of New Jersey. October Term, 1886.)

## MORTGAGES—ASSUMPTION OF BY VENDEE—VENDOR MAY COMPEL PAYMENT IN EQUITY—MORTGAGEE NOT NECESSARY PARTY.

Where the grantee in a deed containing covenants of warranty assumes and agrees to pay as part of the purchase price mortgages upon the land conveyed, and goes into possession, he becomes, as between his grantor and himself, the principal debtor to the mortgagees; and the grantor may resort to equity to compel him to discharge the amount due on the mortgages, without making the mortgagees parties to the suit.

*A. S. Appleget*, for complainant. *Wm. Clark*, for defendant.

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BIRD, V. C. The complainant sold to defendant a tract of land for \$4,000. In the deed was this clause: "And the said Ira Yager doth assume two certain bonds and mortgages, held on said property, one held by Jacob Fisher for \$500, and one held by John F. Applegate for \$2,300, which sums the said Yager is to pay, and is deducted from the said purchase money." The deed contains covenants of warranty. The deed was executed and delivered in 1869. The defendant immediately took possession of the land, but neglected to pay the balance due the mortgagees. Yager became the principal debtor, and Cubberly the surety, in the judgment of law. In such case equity will compel the principal to discharge the obligation. *Irick v. Black*, 17 N. J. Eq. 189; *Marsh v. Pike*, 1 Sandf. Ch. 210, 10 Paige, 595. I think the complainant is entitled to the aid of the court in compelling the defendant to discharge this obligation. He must pay the whole balance due. I cannot determine the amount due, as the holders of the mortgages are not before the court, and they have a right to be heard. But it is the business of the defendant to know the amount due, and to pay it. There ought to be a decree in accordance with these views, with costs.

### STEVENS v. ROSS.

(Court of Chancery of New Jersey. November 1, 1887.)

#### CONTRACT—ABANDONMENT—BURDEN OF PROOF.

The agreement between complainant and defendant showed a joint purchase of a contract to purchase real estate in the city of New York. Defendant, after the date at which the land contract was to be carried out, sold the property at an advance, and took a mortgage in part payment, but refused to account to the complainant for his share of the profits, on the ground that he had abandoned his interest in the venture. Complainant obtained a preliminary injunction restraining defendant from parting with the mortgage. On motion to dissolve the injunction, held, that the burden was on defendant to prove, by a clear preponderance of testimony, that complainant had abandoned the agreement.

On bill for relief. On motion to dissolve preliminary injunction.

On April 2, 1886, John D. Crimmins and George L. Schofield entered into an agreement by which Crimmins agreed to sell to Schofield, and the latter agreed to buy, 10 lots of land situate in New York city, for \$46,000, the money to be paid on or about July 21, 1886. The complainant, John Stevens, a real-estate agent, procured the defendant, William O. Ross, also a real-estate agent, to join with him and purchase the above contract from Schofield, Ross advancing the money with which to purchase. Stevens, the complainant, says that it was agreed between him and Ross that they should jointly own the said contract, and should jointly share all profits that might arise from the possession thereof, and, to prove that such was the agreement, produced a letter from Ross, reading thus: "New York, May 3, 1886.

"*John Stevens, Esq.*—MY DEAR SIR: Referring to a certain assignment this day by Mr. George Schofield to me of a contract, dated the twenty-second April last, between John D. Crimmins and the said George Schofield, relating to ten lots, situate on the southerly side of 114th street, 100 feet east of 8th avenue, city, it is hereby distinctly understood and agreed that this purchase is a joint transaction—involving you equally with myself—that the \$2,000 I have already paid is the total sum I am to be held responsible for, and that the said purchase has been made solely in the expectation of your being able to sell, either directly or indirectly, the property aforesaid, prior to the expiration of the contract in question, which expires the twenty-first day of July, 1886, at an advance upon the present purchase price. It is further agreed between us that we are to share equally in any profit or loss resulting from this transaction, and that such a settlement shall be made, either when a sale is effected or when the present contract expires. That I am to be allowed interest upon the \$2,000 in case any profit results, and that we are to share and

share alike in all commissions you may receive, directly or indirectly, during our handling of this property while I control it.

"I remain yours, very truly,

W. O. Ross."

On June 10, 1886, Stevens sold the contract for an advance of \$1,500, but Ross refusing to consent to the sale, it fell through. Stevens considered the agreement as still existing, and made efforts to sell the same until June 2, 1887, when he learned that Ross had made sale of the lots, and delivered deeds to the purchaser, and that the advance made on the sale was about \$10,000, and the net profit coming to Stevens as his share amounted to \$2,282.22. This amount Stevens demanded, but Ross refused to pay him. As a part consideration of the purchase money Ross accepted a mortgage on the lots for \$7,611.44. Stevens asks the court to decree that he is entitled to the share above mentioned, as his part of the profits, and a preliminary injunction was granted pending the decision of the cause, enjoining Ross from parting with the mortgage mentioned, as the complainant asserted that he was not responsible financially. Ross admits all that Stevens claims about joint ownership, and mutually sharing of the profits, but says that it was only to continue until the date of the expiration of the agreement to sell, July 21, 1886; that after that time all arrangements ceased; that, to save his \$2,000, he was forced to take the property, which he did, and the title was conveyed to him; that Stevens never made any effort to sell the land after that date, July 21st; that he consented to the refusal to accept the \$1,500 advance made to him, Stevens; that the total profits in the whole transaction were not over \$2,550; that the preliminary injunction should be dissolved, as he is a responsible party financially; and that since July 21, 1886, he, Stevens, has really abandoned any claim to profits under the agreement.

C. & R. W. Parker, for complainant. James P. Northrop, for defendant.

VAN FLEET, V. C. There are several expressions in the defendant's letter of May 3, 1886, going to show that the purchase made by the defendant of Chofield was a joint venture, into which the complainant and defendant entered with the understanding that they were to share profits and bear losses equally. The first is: "It is hereby distinctly understood and agreed that this purchase is a joint transaction, *involving you equally with me*;" next the letter says: "It is further agreed between us that we are to share equally in any profit or loss resulting from this transaction;" and then it says that the defendant is to share in all the commissions which the complainant may receive, directly or indirectly, from handling the land *while the defendant has control of it*. The plain import of the letter is that the purchase of the contract was a joint venture, in which the complainant and defendant were to share benefit and burdens equally. There is nothing in it which shows clearly that it was the understanding that if the complainant failed to effect sale of the land, prior to the twenty-first of July, 1886, his rights in the venture were to cease; on the contrary, the conduct of the parties shows, I think, quite clearly, that such was not their understanding. If it had been, it is manifest that the complainant would have insisted that the offer of \$1,500, or the repurchase of the contract, should be accepted. I am of opinion that the venture was a joint one, and it follows, consequently, that the mortgage is joint property, unless it be true, as the defendant alleges, that the complainant, prior to July 21, 1886, relinquished or abandoned the venture. The claim on the part of the defendant that he did is new matter, which the defendant must establish, by a clear preponderance of proof, to be entitled to prevail. The burden of proof on this point is on him. Viewing the case in this aspect, it is clear that the equity upon which the complainant's right to the injunction rests is not denied in such manner as to entitle the defendant to a dissolution.

His motion to dissolve must be denied with costs.

## RHODES and others v. SHAW and others.

(Court of Chancery of New Jersey. November 9, 1887.)

**WILL—DEVISE VESTING SUBJECT TO EXECUTION OF POWER.**

A person by will left to his wife his real estate and personal property, "to manage and dispose of in her discretion for her own use, and in trust for my children during her life or during the period she may remain my widow." He provided in case of her death or marriage, for payments to be made to his son during his minority, and for payment of \$500 to each of his children on the coming of age of one of his sons. The fifth paragraph was "that all my property be equally divided among all my children." During the life-time of the widow one of the sons died, disposing of all his real estate and personal property by will. Held, that the deceased obtained a vested title immediately upon the death of his father, subject to the execution of the power of disposition by the widow under the will.

Bill for construction of will.

*Theodore Simonson*, for complainants. *Charles J. Roe*, for defendants.

**BIRD, V. C.** Albert Shaw died seized of real estate. He left a last will and testament. The second clause was in these words: "I do give and bequeath to my beloved wife, Polly Maria Shaw, the whole of my property, both real and personal, to manage and dispose of in her discretion for her own use, and in trust for my children, during her life, or during the period that she remains my widow." In the third paragraph he directed that in case his wife should die or marry before his son Charles became of age, that the sum of \$250 should be paid him annually, to enable him to obtain an education until he should become 21 years of age. In the fourth paragraph he directed that as soon as conveniently could be done after Charles became of the age of 21 years, the sum of \$500 should be paid each of his children or their living representatives. The fifth paragraph is in these words: "It is my will, and I hereby order, that all my property be equally divided among all my children, male and female, alike, except that, in case of the contingency happening before the majority of Charles Wensley, I desire that the full sum of \$250 annually, till his death, be allowed him, in addition to his equal share with the rest."

During the life-time of the widow, William Henry, one of the children of the above-named testator, died, leaving a will in and by which he disposes of all his real and personal estate. The question is whether or not he had such interest in the lands of his father at the time of his death, (the widow, being the life-tenant, then living,) that he could dispose of them by will, and whether the devisees therein named took any interest or not under the will of the said William Henry. In other words, considering the language of the will of Albert Shaw, the first testator, was the interest which he gave to his children, upon the death or marriage of his widow, vested or contingent?

It will be seen by reading the paragraph first above quoted that Polly Shaw had the right to manage and dispose of the real and personal estate, not only for her own use, but in trust for the children of the testator, and only during her life or so long as she should remain the testator's widow. Now, it seems to me that, though there be a power of disposition, it did not prevent the vesting of the title, subjected to be divested in case of the execution of the power, for the purpose expressed. It will be noted that the gift is for the benefit of the widow and of the testator's children. She is to manage and to dispose of the estate, in her discretion, for her own use and in trust for his children during the time named. Her interests are blended with theirs. She can take no step looking exclusively to her own benefit or advantage; but every step in the management and disposition of the estate must alike concern the testator's children. So far as the postponement of the possession is concerned, until the period named, the death of the wife or her marriage, it is somewhat analogous to the case of *Post v. Heibert's Ex'rs*, 27 N. J. Eq. 540.

in that case, it was insisted that the legacy did not vest; but the court decided that, where the postponement is made for the benefit of those concerned in the estate, it does not prevent the vesting. And it is perfectly manifest that the testator in this case did not intend to put the absolute disposition of his estate in the hands of his widow; for in the next paragraph he provides for the payment out of his estate of the sum of \$250 to his son Charles Wensley "every year until he arrives at the age of twenty-one." And it provides in the next paragraph for the payment of \$500 to each of his children, "as soon as conveniently can be after Charles Henry arrives at the age of twenty-one." And in the fifth paragraph above quoted he orders all the estate to be equally divided among his children. But it does not even say "all that may remain unused or undisposed of." In Hawk. Wills, 237, the author says: "In the construction of devises of real estate, it has long been an established rule for the guidance of the court that all estates are to be held to be vested, except estates in the devise of which a condition precedent to the devising is so clearly expressed that the courts cannot treat them as vested without deciding in direct opposition to the terms of the will, [referring to *Duffield v. Duffield*, 1 Dow. & C. 311.] To accomplish this (1) words of seeming condition are, if possible, held only to have the effect of postponing the right of possession; and (2) if the devise be clearly conditional, the condition will, if possible, be construed as a condition subsequent and not precedent, except to confer an immediately vested estate, subject to be divested on the happening of the contingency." On page 238, the same author, quoting from *Goodtitle v. Whitby*, 1 Burrows, 228, says: "Where an absolute property is given and a particular interest given in the mean time, as until the devisee shall come of age, etc., and when he shall come of age, etc., the rule is that that shall not operate as a condition precedent, but as a description of the time when the remainder-man is to take possession." From the authorities I therefore conclude that, where the devise of the intermediate estate is to a life-tenant or for any other uncertain period, for the benefit of such life-tenant and for those who take the remainder with a gift of the whole estate in remainder, the estate vests immediately upon the death of the testator.

Again, although there is a power of disposition, the gift to the widow is for life, not generally without any limitation as to time, and that out of such gift distinct legacies are given to children, to be paid during the life-estate, and that all of the estate is given over after the death of the life-tenant, which seems to bring the case within *Pratt v. Douglas*, 38 N. J. Eq. 516, and *Downey v. Borden*, 36 N. J. Law, 460.

My attention has been called to the case of *Annin's Ex'rs v. Vandoren*, 135, by the counsel of the defendants, who insist that if that case does control this, it must be clear that the fee does not vest until the death or marriage of Mrs. Shaw, the life-tenant. Plainly, to my mind, the latter part of the proposition is disposed of by the cases above referred to; nor can I see how the case of *Annin's Ex'rs v. Vandoren* can affect this. The language of the testator there was: "Should my daughters, Lenah and Mary, or either of them, die leaving no legal issue, the share or shares herein bequeathed to her or them (if not paid over by my executors, and, if paid over, then such part thereof as remains unexpended) I give and bequeath unto my surviving children and their heirs equally between them;" which language the learned Chancellor considered gave the absolute estate to Lenah and Mary; but in which there is no interest given in trust to any one else, as in the case now under consideration. In that case the gift was to Lenah and Mary. In the case under consideration the gift was to Polly, for herself and for the children of the testator, and only during her life or her widowhood, without the power of disposing of it or expending it solely for her own use, but controlled by the interest of the children of the testator. Another important distinction will not escape attention; that is, that in this case the legacy is not to Mrs. Rhodes

generally, but for life or during her widowhood, while in the *Annals Case* was general, no limitation as to time being imposed.

In my judgment a vested interest passed with the gift.

### COLLINS v. COLLEY and others.

(Court of Chancery of New Jersey. November 14, 1887.)

#### EQUITY—MULTIPLICITY OF SUITS—REPLEVIN.

Complainant held a chattel mortgage made by one of the defendants upon stock of goods, mortgages upon which were also given to two other persons. The goods were subsequently seized under an execution against the defendant mortgagor, and some other of the defendants then brought suit in replevin, and caused the coroner to demand possession from the sheriff of a portion of the goods in question. Complainant then filed a bill of foreclosure and asked for a sale of the goods. The landlord of the defendant mortgagor also claimed a lien for rent on the goods. An injunction having been granted and a receiver appointed, the replevin plaintiffs—defendants herein—insisted that possession of the goods should be delivered them, and that the question of title might be tried at law. *Held*, that a court of equity having jurisdiction of the cause would not surrender its jurisdiction, but avoid a multiplicity of suits would determine upon the rights of all parties concerned, and an application to allow the replevin suit to proceed was denied.

Bill to foreclose chattel mortgage. On motion to modify injunction.

*Carroll Robbins*, for complainant. *William D. Daly*, for defendants Harbison and Loder. *G. D. W. Vroom*, for Lockwood and others.

**BRED, V. C.** The complainant took a chattel mortgage from the defendant Colley for a large sum of money, covering a great variety of store goods. Two other persons also took chattel mortgages from her covering the same goods. Eight days afterwards, the defendants Lockwood and others obtained a judgment against her for \$1,700, and issued an execution, by virtue of which the sheriff levied upon all the said goods and claimed the possession of them thereunder. Soon after the sheriff had made this levy, the defendants Harbison and Loder commenced a suit in replevin, issued their writ, and had the coroner go to the sheriff, and demand under said writ the possession of the portion of the goods so levied upon which were included in the chattel mortgages above named. In this situation affairs were when the complainant filed her bill asking for a sale of the goods and chattels to pay to her the amount due upon her mortgage and for the appointment of a receiver. It should be added that, besides the foregoing claims, the landlord of Mrs. Colley claims a lien for rent on these goods.

An order to show cause was obtained, upon the return of which an injunction was ordered and a receiver appointed. The defendants Harbison and Loder ask that the injunction may be so modified as to allow the coroner to take possession of the goods claimed by them and to deliver them up to Harbison and Loder. No reason appears for their pressing this claim to the goods which are named in their writ. No grounds whatever are alleged, in answer to the petition or otherwise, before me upon which an issue can be framed respecting these particular goods. Counsel says that his clients have given bond, and claims that they are entitled to these goods, and insists that, having given bonds for their full value, it can make no difference to this court if the question of title to these goods is tried at law. He insists that if the complainant in the action in replevin prevail it will be because of their right, and, if they fail, that the complainant in this suit, or the defendants, who also have chattel mortgages or an execution, will have the bond of the plaintiffs in the action at law, which will be equivalent to the value of the goods.

Now, in the first place, as intimated, there is no allegation before me upon which I can proceed and determine that the defendants Harbison and Loder have any shadow of right to these goods. In vain have I searched for some

round upon which they rest their claim. In the second place, supposing that it should be made to appear *prima facie* that they had some title to these goods which was superior to the claim of either the complainant or any of the defendants, yet, in that case, I feel quite confident that, under the practice of this court, I would be justified in saying that this is the proper forum in which to hear and finally determine the rights of the parties. It is true that, between the plaintiffs in replevin and Mrs. Colley, the issue might be fully and fairly tried; but, to my mind, it is equally true that, since Mrs. Colley has most evidently less interest in the controversy now than either the complainants or the other defendants, it would be most natural that she should be quite inattentive to the result of that litigation, which inattention would put the rights of the complainant and the other defendants in great jeopardy. Certainly, it is not the duty of this court, when there is a conflict of interests of this nature, and when, from the very circumstances of the case, it is enabled by its order to look into the question of ownership, to surrender its jurisdiction. I think this may fairly be considered a representative case, in which, for the sake of avoiding a multiplicity of suits, the aid of this court is most frequently invoked. In this case there are three mortgagees, one judgment creditor, and the landlord, interested in the title to these goods. The judgment creditor might be enabled to make defense through the sheriff, who is the defendant in replevin, but not so the mortgagees or the landlord. The interest of the plaintiff in the execution is adverse, as well to the plaintiff in replevin as to the mortgagees in this suit. I must conclude, therefore, that the application for the modification of the injunction, in order that the corner may take possession of these goods, and that the suit in replevin may proceed, shall be denied. It seems to me that the principles laid down in *Smithurst v. Edmunds*, 14 N. J. Eq. 408, control this case, so far as it is now open before me.

BARNET and another, Surviving Ex'rs, etc., v. BARNET and others.

(Court of Chancery of New Jersey. November 12, 1887.)

ILL—CONDITIONAL GIFT—PERFORMANCE OF CONDITION.

The testator, who held land in fee-simple to secure the payment of money, directed by his will that if the money should be paid to him in his life-time, or to his executors after his death, his executors should pay to his wife during her life-time the interest on \$5,000; and gave directions regarding the application of the principal after her death. The land in question was reconveyed by the testator in his life-time, part of the money due being paid in cash, and the balance secured by mortgage. Held, that the condition upon which the appropriation of the \$5,000 depended had been performed.

On bill for construction of will, and direction as to distribution of assets. Hearing on bill and answer.

For the opinion of RUNYON, Ch., on the former report of this case, which is now reversed, see 3 Atl. Rep. 401.

C. E. Hill, for complainants. Frederick W. Stevens, for defendant Jane Hardie Wheeler.

MCGILL, Ch. This cause was heard by my predecessor in office, *ex parte*, on the allegations of the bill alone. After he had filed his opinion upon the case as presented, which is reported in 40 N. J. Eq. 380, 3 Atl. Rep. 401, under the title *Barnet v. Barnet*, the defendant Jane Hardie Wheeler was permitted to answer the allegations of the bill, so far as they relate to facts connected with the fifth paragraph of John Barnet's will. This paragraph is in the words following: "I hold two lots in Mechanic street belonging to William Compton, to secure the payment of certain moneys owing to me by the said Compton; and when the said Compton, or his legal representatives, shall pay to my executors the sum of money due me by the said

Compton, I do hereby authorize and empower my said executors to execute and deliver to the said Compton, or his legal representatives, a good and sufficient deed or deeds for the same. In case the said William Compton, or his legal representatives, shall pay me the said claim in my life-time, or shall pay the same after my decease to my executors, then, in either case, I direct my said executors to pay to my wife, Harriet Barnet, the interest of the sum of five thousand dollars during her natural life, the same to be paid to her semi-annually." In the sixth paragraph of his will the testator directed that, after the death of his wife, the moneys, of which she was to have the interest, should be divided mainly among the children of his sister Margaret Turnbull, of whom the defendant Jane Hardie Wheeler is one; and by the eighth paragraph of this will he provided that, if he should survive his wife, the moneys apportioned to her should be disposed of in the same manner as if she should survive him. The will was dated on the twelfth day of March, 1870, and the codicil to it on the twenty-fifth day of October, 1875. The testator died in November, 1876, and the will and codicil were admitted to probate in December of the same year.

The allegations of the bill, touching the matter treated in the fifth paragraph of the will, were as follows. "And your orators further show that the money mentioned in section five of said will, as owing to the testator by William Compton, was never paid to your orators, but that your orators found among the assets of the estate of said testator a mortgage of the said lots on Mechanic street, which mortgage they caused to be foreclosed, and the land to be sold according to the decree, and at the said sale of said land your orators bid off and bought the same for the benefit of the said estate; and have sold the said lots, and have turned the proceeds of said sale into the said estate."

Upon this part of the case, as presented by the will and the allegations of the bill, Chancellor RUNYON in one part of his opinion said: "Among his assets was real property which he held by way of mortgage as security for a debt due to him from William Compton. He contemplated the payment of that debt by the mortgage, either in his, the testator's, life or after his death, and provided (for his wife's benefit) that, in case of redemption, \$5,000 of the money should be put out at interest, and she have the interest for life." And in another place: "Whether the fund of \$5,000 and that of \$8,000 would ever be raised or not depended on contingencies. As to the former, it was dependent on the redemption of the Compton property." "Compton did not redeem." And in yet another place he said: "Speaking generally, and taking the will and codicil together, and restating the scheme, the testator intended to provide a fund for his wife's support, to be increased in certain contingencies, which never happened."

By the answer of Mrs. Wheeler, filed since the delivery of the opinion, and by a deed and mortgage offered and admitted, it appears that the two Compton lots were conveyed to the testator in fee, one on April 9, 1845, and the other on May 16, 1853; that the testator and Compton were on terms of intimate friendship while they lived; that Compton was an undertaker and livery-stable keeper, with but little capital; that the testator was a man of considerable means; that at different times the testator aided Compton in his business by lending him sums of money which Compton repaid as he was able; that the testator bought the lots in question, and built upon them for Compton's benefit, and allowed Compton to use the property, and verbally agreed with him that when he should pay, or secure to be paid, to the testator, the moneys paid for the lots and the improvements thereon, with interest, he would convey them to him; that this verbal understanding was the only claim Compton had upon the lots at the time the testator's will was made; that after the will was made—that is, on the fifteenth day of March, 1873,—the testator conveyed the lots to Compton for the consideration of \$21,000,

which the deed recites was in hand well and truly paid to the testator, and took from him a mortgage on the same property for \$18,000, which recited that it was given to secure a part of the purchase money for the lots; that all the cash paid to the testator by Compton at the time of said conveyance was \$3,000; that the \$21,000 consideration mentioned in the deed was the amount the testator had paid for the lots, and the improvements on them, with interest; that Compton paid the testator more than \$2,000 interest on the mortgage; that the mortgage was foreclosed after the death of the testator, and the mortgaged premises sold; and that the executors realized through the mortgage, for the estate, \$16,500.

Mrs. Wheeler insists that when the testator conveyed to Compton, and took from him \$3,000 in cash, and a bond and mortgage for \$18,000, the contingency upon which the appropriation of the \$5,000 depended, happened; and that, in consequence, the testator's wife being dead, she is now entitled to a share of \$5,000. It is evident that Chancellor RUNYON understood that when the testator in his will spoke of holding two lots belonging to William Compton, to secure the payment of certain moneys, etc., he referred to the mortgage spoken of in the bill, which had never been satisfied by Compton, and was foreclosed by the executors after the testator's death. The answer introduces new facts, which require the reconsideration of the question whether the contingency, upon the happening of which the \$5,000 was to be appropriated, did occur. When the fifth paragraph of the will was drawn, the testator held the title to the two lots by deeds absolute on their face. The only right Compton had in the land was the moral obligation of the testator to convey it to him when he should repay to the testator the moneys expended for them and on them. Recognizing this moral right, the testator sought, by his will, to secure it to Compton by making provision that when the moneys should be paid, after his death, the lots should be conveyed. After making this provision for the security of Compton, the testator made further provision for his wife dependent upon the realization from Compton. He had held one of the lots 17 and the other 25 years, and had, many years previous to the making of the will, erected buildings on them. It does not appear that he has any claim upon Compton, for the moneys he thus expended, that was enforceable either in law or in equity. Compton might or might not take the lots, and repay the money expended. If he did repay, the testator could well afford, in justice to others who had claims upon his bounty, to give his wife the income of the additional \$5,000. While he and Compton lived, they adjusted their vague, unsettled, and unenforceable claims upon each other. The testator conveyed the lots to Compton, and in his conveyance acknowledged that he had received \$21,000 in consideration for the conveyance; and Compton, in turn, discharged the testator's claim upon him by giving him \$3,000 in cash, and his bond, secured by mortgage upon the conveyed lots, for the balance of \$21,000. Was this such a payment as is necessary, under the will, to the happening of the contingency, which will give to \$5,000 the direction insisted upon by the answering defendant? I think it is.

It is obvious that the testator intended that the contingency should happen whenever he or his executors should receive value for the claim he had upon Compton. He directed his executors to convey the lots to Compton when Compton should pay for them the sum due, and subsequently practically illustrated what he meant, in this direction, by himself making the conveyance, when his claim was satisfied by the \$3,000 cash, and a new, formal and enforceable obligation for the payment of \$18,000. The bond and mortgage were not money, but they were of value; and that value, with the \$3,000 in money, satisfied and discharged the old claim, and, in the sense the testator intended, paid it.

## FAY v. FAY.

(Court of Chancery of New Jersey. November 9, 1887.)

## EQUITY—SUBROGATION—VOLUNTARY PAYMENT OF ANOTHER'S DEBT.

In an action to enforce a claim against the estate of a decedent, the evidence showed that plaintiff voluntarily paid the undertaker's bill for the burial of decedent, and took no assignment or anything to show that the payment was intended otherwise than as an absolute discharge of the debt. Afterwards he sought to be subrogated to the rights of the undertaker. *Held*, that having voluntarily paid the debt of another, he was not entitled to the relief asked.<sup>1</sup>

## Petition for subrogation.

*J. J. Crandall*, for petitioner. *Thos. B. Harned*, for defendant.

**BIRD, V. C.** Kate F. Fay died at the age of 11 years, without personal estate, but the owner of an undivided interest in lands which have since been sold on proceedings for partition in the court of chancery. The interest of Kate has been ordered to be paid into this court, upon application by persons who claim to be her creditors and to have an interest in the lands. Middleton, an undertaker, buried Kate, November 28, 1884, at a cost of \$100. This bill has since been paid him by T. M. Fay, one of the administrators of the estate of C. J. Fay, deceased, who was the grandfather of said Kate, and from whose lands the said lands descended to her. T. W. Fay, having discharged the obligation by paying the undertaker, desires to have so much of the money as is necessary therefor applied to the payment of that obligation. Middleton claiming that he stands in the right of the undertaker and can, as it is alleged, enforce this claim against the estate of said Kate. This end he has been appointed administrator of the said infant, Kate F.

The payment of this bill is opposed by the heirs at law of Kate, on the ground that the payment by T. W. Fay, as one of the administrators of the estate of her father's estate, was voluntary, and being voluntary, he does not stand in the place of the undertaker. I find myself obliged to conclude that this seems to be the true attitude in which the petitioner stands. He was not obliged to pay this claim to the undertaker, as one of the administrators of his father's estate, the relation of debtor and creditor not existing there in any sense whatever. Nor was he under any obligations in any other respect to pay the bill to the undertaker. His act was simply the payment of a debt due from one person to another, not at the request of that other, or of his representative, and he took, without taking an assignment of the debt or claim, or any writing whatsoever, to show that it was meant to be something else than an absolute discharge of a debt. In other words, he took nothing to show an intention to preserve the vitality of the claim as it existed in the hands of the undertaker. The undertaker, beyond doubt, had a claim which he could have enforced if he had so wished. It may have been the intention—perhaps was—of Mr. Fay to preserve the claim, but the qualities of that claim against the estate of Kate; but whatever his intention was, there is nothing in the case to show that he did it.

The rule seems to be very well settled, so clearly so that it would be to contend otherwise, that a volunteer never can claim the benefit of the doctrine of subrogation. See *Construction Co.'s Case*, 33 N. J. Eq. 433; *Upper Green*, 40 N. J. Eq. 340.

In advising a decree, it is most plainly my duty to follow the law so clearly pointed out. The petition should be dismissed, with costs.

<sup>1</sup> Where one, as a mere volunteer, having no interest to protect, pays the debt of another, the payment operates as an extinguishment of the claim, and the doctrine of subrogation does not apply. *McNeill v. Miller*, (W. Va.) 2 S. E. Rep. 335; *Binford v. Adams*, (Ind.) 3 N. E. Rep. 753, and note.

## PFLUGAR v. PULTZ and others.

*(Court of Chancery of New Jersey. November 14, 1887.)*

**OBJECTION—TO RESTRAIN BREACH OF PAROL AGREEMENT TO DEVISE REALTY.**  
 Plaintiff and defendant entered into a parol agreement by which defendant agreed to devise to plaintiff certain property, and upon the performance of which agreement defendant honestly and faithfully entered and continued for several years. Afterwards defendant sold and conveyed the property to another, and the plaintiff brought an action to enjoin such conveyance. *Held*, that the agreement is binding upon defendant, and plaintiff was entitled to the relief asked.

for permanent injunction.

*A. Baacke and J. J. Crandall*, for complainant. *A. Stephany*, for defendants.

**OPINION, V. C.** This bill is filed to enjoin the defendant Pultz from conveying property which he had agreed with the complainant to devise to her by his last will and testament in case, as is alleged, she should enter into his service and take care of him and nurse him during the remainder of his life. It is admitted that in June, 1883, Mr. Pultz agreed with Mrs. Pflugar, the complainant, that if she would go into his service, and do his housework, and take care of him in his sickness, during the remainder of his life, he would make and execute a last will and testament, and would therein and by his will devise to her the house and lot in which he then lived; and it was agreed that she accepted the offer, and entered into his service, and undertook the performance of the duties required by the agreement, and consented to do so in a satisfactory manner to Mr. Pultz until about the month of July, 1885; and it is also admitted that, at the last-named period, some difficulties arose between them, which were settled by Mr. Pultz taking his last will and testament, which he had previously executed, to a mutual friend, who explained its provisions to Mrs. Pflugar, and satisfied her that it was according to the promises of Mr. Pultz, as had been expressed in their agreement; and also that she was secure in her rights, under the said will, as it was drawn; and it is also admitted that thereafter she continued in the same service, without any great amount of dissatisfaction on the part of Mr. Pultz, until the month of June, 1886, when difficulties arose between them, and he left the house in which they were living, and the one which they contemplated should be devised to Mrs. Pflugar, and went to board with a friend and Mrs. M.; and that afterwards, on the twenty-sixth of July, he made and delivered a deed of conveyance of the said house and lot to the said Mrs. Pflugar, taking from her a bond conditioned that she should provide for him during the remainder of his natural life; and from that time he continued to board with the said Mrs. M., but slept in the house so conveyed to her, which house was all the time occupied by Mrs. Pflugar, the complainant.

The defense is that Mrs. Pflugar is not entitled to any relief, because she has not made the contract under which she claims, and also because she gave no notice to Mr. Pultz that she intended to leave his service; which notice, it is alleged, he acted upon, and made provisions accordingly for his own wants and comfort. The allegation respecting such notice rests upon the testimony of Mrs. Pflugar alone. Mrs. Pflugar swears that she gave no such notice, but only admits that she said to him that there were two other places where she could find employment, and that was all she ever said upon the subject. This is all the proof, and Mr. Pultz has nothing else to support his attempt to rid of his obligation. He admitted that he went at once to Mrs. M., and that Mrs. Pflugar remained in possession of the house, and continued there until he made the deed to Mrs. M., and has remained there ever since. He produces no other proof that she ever signified her intention to abandon the contract. But it is said, however, that she did not faithfully perform the

contract; that she did not always provide for him, and attend to his wants and necessities, as she should have done. While there may be some slight evidence in support of this, Mrs. Pflugar is very emphatic to the contrary, and she is supported by the unequivocal admissions of Mr. Pultz made to others, and by the clear and distinct statement from others of what they saw when they had opportunity to make observations respecting her householding, and her treatment of the defendant. I must therefore conclude that the defense, in these particulars, fails.

The only question remaining is whether or not the complainant can obtain relief, under the circumstances. Is such an agreement, resting in parole, binding, when the promisee has honestly and faithfully entered upon the performance of it, and for years abided by its provisions? I conclude that the meaning and spirit of the authorities sustain such an agreement. *Updike v. Ten Broeck*, 32 N. J. Law, 105; *Kent v. Kent*, 62 N. Y. 560; *Peters v. Van Brough*, 19 Pick. 364; *Ridely v. Ridely*, 34 Beav. 478; *Bell v. Hewitt*, 24 280. It is yet to be considered whether such an agreement, independent of the question whether it must be in writing or not, can be enforced. I conclude that all of the authorities in this country hold the affirmative. *Vison v. Davison*, 13 N. J. Eq. 246; *Johnson v. Hubbell*, 10 N. J. Eq. 370; *Van Dyne v. Vreeland*, 11 N. J. Eq. 370, 12 N. J. Eq. 142; *Parsell v. Strickland*, 41 N. Y. 480; *Jenkins v. Stetson*, 9 Allen, 128.

The complainant is entitled to the relief prayed for.

#### *In re LEE, Ex'r, etc.*

(*Prerogative Court of New Jersey. November 15, 1887.*)

#### **EXECUTORS AND ADMINISTRATORS—ACTION ON BOND—POWER OF ORDINARY TO STAY**

On the hearing of a motion to vacate an order staying a suit, which had commenced on the bond of an executor by direction of the ordinary, it was claimed that the ordinary had power to direct the commencement of such suits, but had no power to stay such suits after commencement. The orphans' court act (Rev. Stat. N. J. p. 788, § 164) provides that, when an administrator's bond shall become forfeited, "the ordinary may cause the same to be prosecuted in any court of record and shall cause the money recovered to be applied as he shall direct. Held, that the intent of the statute plainly is that the commencement and prosecution of an action, upon a bond, is to be left to the sound discretion of the ordinary.

On application to vacate an order staying a suit which was commenced upon an executor's bond by direction of the ordinary.

*Theodore Runyon and James M. C. Morrow*, for the motion. *Walton Edwards*, *contra*.

**MCGILL, Ordinary.** This motion presents the single question whether the ordinary has power to stay a suit, upon an executor's bond, which was commenced in pursuance of an order regularly made by him. It is claimed, for the motion, that the ordinary has power to direct the commencement of an action upon such a bond, but that he has no control or authority in the suit which shall be commenced in pursuance of his order until after the entry of judgment therein. The bond in this case was given in pursuance of the provisions supplementary to the orphans' court act, approved March 3, 1880, (P. L. 1880, c. 96,) which provides that non-resident executors shall give bond for the faithful administration of the estate of the testator, and that, in case the bond becomes forfeited, it may be prosecuted in the same manner that bonds by administrators may be prosecuted. By the orphans' court act (Rev. Stat. N. J. p. 788, § 164) it is provided that, when an administrator's bond shall become forfeited, "the ordinary may cause the same to be prosecuted in any court of record;" and that the moneys recovered upon such prosecution shall be applied to the damages occasioned by the breach of the condition of the bond, "in the manner as the ordinary shall by his sentence and decree direct." This

nce, the provision of the act of March 2, 1795, (Pat. Laws, p. 186, § 12.) passed through the Revision of 1846, and to the Revision of 1874, und. The Revision of 1874 changes the language of the old statute from rds, "it shall and may be lawful for the ordinary or surrogate general e the same to be prosecuted in any court of record," to the words, "the y may cause the same to be prosecuted in any court of record."

plainly the intent of the statute, evinced by its language,—“may cause me to be prosecuted,” etc.,—that not only the commencement of an upon the bond, but also the pursuit of that action, is left to the sound ion of the ordinary. The ordinary does not assign the bond to the ggrieved, but becomes himself plaintiff in a suit for the recovery of nt moneys, not only to pay the damages which the breach of the bond easoned the party at whose instance he conducts the prosecution, but e damages of all others who suffer by that breach. To this end the ent is in his favor for the penalty of the bond. Not only the language statute, but its entire scope, places the whole prosecution of the bond his discretion; and I think that when it shall be made to appear to at such prosecution is oppressive, vexatious, or to little purpose, or or other sufficient reasons, it shall not be proper or expedient to con- t, at the instance of the defendants he has the power to stay or discon- the suit. I find that this view with reference to the position of the ry, when the suit is upon an administration bond, has been uniformly d by the judges of this state. *In re Webster*, 4 N. J. Eq. 558; *In re 5 N. J. Eq. 97*; *In re Green*, 8 N. J. Eq. 554; *In re Honnass*, 14 N. J. 8; *Ordinary v. Poulson*, 43 N. J. Law, 33. I deny the motion, but without costs.

### *In re Bond of LEE, Ex'r, etc.*

(*Prerogative Court of New Jersey*. November 15, 1887.)

ORS AND ADMINISTRATORS—FAILURE TO ACCOUNT—ACTION ON BOND—STAY.  
n action was commenced upon an executor's bond, by order of the ordinary, n a showing that the executor had failed to account to the orphans' court in time required by law, and had failed to answer a citation to appear and ac- nt, and that the failure to appear had been contumacious. On the hearing of otion to stay such action, it appeared that the failure of the executor to account ue to an action in the courts of New York to determine some of his obliga- as such executor, which had not been decided, and that he did appear in an- r to the citation, and conferred with the judges as to what he ought to do, but t his appearance was not recorded. It also appeared that the bondsmen were sible, and that a judgment lien against them would be oppressive. Held t, under these facts, the suit would be stayed, and time given the executor to his account.

May 4, 1870, the will of Isabella Lee was admitted to probate by the sur- of the county of New York. In and by this will the testatrix bequeathed rd of her residuary estate to Gideon Lee and William C. Lee, in trust, est the same, and pay the net income to David Williamson Lee during y, and at his death to pay the principal to such person or persons as Da- Williamson Lee should by his will direct. December 9, 1876, David Will- a Lee made his will, by which he directed that the principal of the trust above mentioned should be paid to his wife, Virginia Van Rensselaer Gideon Lee alone took upon himself the trust under the will of Isabella nd he also afterwards became executor of the will of David Williamson He proved the will of David Williamson Lee on January 18, 1886, be- e surrogate of Essex county, in this state, and, being a non-resident, in nce of our statute, (P. L. 1880, p. 96,) gave bond to the ordinary. On 16, 1886, he filed an inventory of the estate of David Williamson Lee

in the office of the surrogate of Essex county, and included therein the interest in the estate of Isabella Lee, which he held as trustee, appraised at the sum of \$28,350, subject to deductions for the incidental expenses of the trust. He failed to account within the time required by law and the condition of his bond, and, when cited by the orphans' court to do so, failed to obey the citation. In behalf of Virginia Van Renselaer Lee, application was made to the ordinary to cause the executor's bond to be prosecuted, upon the grounds that the executor had not accounted within the time required by law, and failed to obey the citation to account. Upon this presentation of facts, the desired order was made.

It is now made to appear that the competency of David Williamson Lee to make the will by which he gave the principal of the trust fund to his wife is questioned, and that the executor, Gideon Lee, in his capacity as trustee under the will of Isabella Lee, has applied to the supreme court of the state of New York, for direction as to whether he shall pay over the trust moneys in accordance with the direction and the will of David Williamson Lee, and that in the proceedings before the supreme court of New York, Virginia Van Renselaer Lee is a party and has answered. By the admission of counsel it also appears that the executor, Gideon Lee, personally responded to the citation of the Essex county orphans' court, and conferred with the judges of that court upon the subject of filing his account, but that no record of such appearance was made. And it also appears that the executor's bondsmen are responsible, and that they are not seeking to divest themselves of their property. It is also suggested that if judgment shall be entered for the penalty of the bond, \$40,000, that the lien of the judgment upon the property of the bondsmen will be vexatious and oppressive to them. Motion is now made to stay the suit upon the executor's bond.

*Hamilton Wallis*, for motion. *Theodore Runyon* and *James M. C. Morrour*, contra.

**MCGILL, Ordinary.** While it is lawful for the ordinary, in his discretion at the instance of a party aggrieved, to direct the prosecution of an executor's bond, in case the executor has not accounted within 12 calendar months as required by law, because such failure is a breach of the condition of the bond, it is not usual for him to do so, unless it shall appear that the delay has been contumacious, or so continued as to work injury, and that some substantial good may be accomplished by the prosecution. In this case the failure to account within the time required by law seemed to be contumacious because of the apparent disregard of the citation of the orphans' court. It now, however, appears that the executor responded in person to the citation, and advised with the court as to the propriety of filing his account before he should be instructed by the supreme court of New York as to his duty as trustee with reference to the trust moneys. And it has also been made to appear that no substantial end will be served by the entry of judgment upon the bond at this time, but on the contrary, that such judgment will oppress and vex the bondsmen.

In *Re Webster*, 5 N. J. Eq. 97, Chancellor HALSTED, sitting as ordinary, and speaking of the prosecution of an administration bond for failure to account within one year, says: "On the application of a proper person, an order for the prosecution of an administration bond may be made on this ground though the ordinary might not feel constrained in all cases to make it on that ground alone. Few estates are or can be settled within the year, and though the administrator might or ought to state an account within the year as far as he has gone, (see 1 Salk. 316,) yet the omission to do this is not so serious dereliction of duty as would constrain the ordinary in all cases to order prosecution of the bond for that cause alone. In applications founded on that ground alone, the ordinary exercises his discretion. That execution and

expense might be produced to little purpose by a prosecution for that cause alone."

In *Re Honnass*, 14 N. J. Eq. 498, Chancellor GREEN says that it is the duty of the ordinary to see that the bond is not prosecuted for the purposes of vexation and oppression.

In *Ordinary v. Poulson*, 48 N. J. Law, 33, Chief Justice BEASLEY speaks of the power to order the prosecution of the bond being within the discretion of the ordinary, and of circumstances which will control the exercise of that discretion so that the prosecution will not be ordered for mere technical breach of the condition of the bond unaccompanied by substantial dereliction of duty.

Upon the entry of judgment in the suit upon the bond, the judgment will be for the penalty, and the ordinary will then ascertain the damages. In doing this he will order the settlement of the executor's account in the orphans' court, (*Ordinary v. Hart*, 10 N. J. Law, 65; *Ordinary v. Barcalow*, 36 N. J. Law, 15;) and, except in case of maladministration and consequent loss of assets, will not order the money to be brought in by the bondsmen, (*Ordinary v. Poulson*, 48 N. J. Law, 33.)

In this case I think it would be vexatious and oppressive to the bondsmen to burden their properties with the lien of a judgment for \$40,000, pending an accounting by the executor in the orphans' court, and I will therefore, if the executor's account shall be filed with the surrogate of Essex county within three days, order that the prosecution of the bond be stayed. If the executor shall not proceed with his accounting with proper expedition and in a satisfactory manner, or if it shall be made to appear that the bondsmen are becoming irresponsible, I will allow the prosecution of the bond to continue to judgment.

## STATE v. THE AMERICAN FORCITE POWDER MANUF'G CO.

(*Supreme Court of New Jersey. November 8, 1887.*)

### 1. FISHERIES—UNLAWFUL KILLING WITH ACID—INDICTMENT.

In an indictment under the act of March 22, 1886, relating to game fish, it is sufficient to describe the interdicted material alleged to have been unlawfully put in the lake as "acid," in the language of the statute, without specifying what particular "acid" it was.<sup>1</sup>

### 2. SAME.

The first two counts of the indictment are defective in this case, because there is no averment that the acid was discharged into the water in such quantity as would prove fatal to the fish therein, nor that any of said fish had perished in consequence of the defendant's act.

### 3. STATUTES—AMENDMENT—SETTING OUT ORIGINAL STATUTE.

It is not necessary in legislation amending statutes, to set forth the amended statute, and also the statute as it was before amendment. The mischief to be remedied by the constitutional amendment does not require it, nor does the language of the constitution. It is sufficient to set forth the amended act in full.

(*Syllabus by the Court.*)

On indictment removed from Morris county sessions. On motion to quash indictment.

<sup>1</sup> An indictment is sufficient if it charges the offense in the language of the statute creating or defining it, *State v. Ah Sam*, (Or.) 13 Pac. Rep. 303, and note; *Hodges v. State*, (Tex.) 3 S. W. Rep. 739; *State v. Tisdale*, (La.) 2 South. Rep. 406; *Cundiff v. Com.*, (Ky.) 5 S. W. Rep. 486; or in words of an equivalent meaning, *State v. McGaffin*, (Kan.) 13 Pac. Rep. 560; *U. S. v. Wilson*, 29 Fed. Rep. 286; *Franklin v. State*, (Ind.) 8 N. E. Rep. 695; *Graeter v. State*, (Ind.) 4 N. E. Rep. 461; *People v. Edson*, (Cal.) 10 Pac. Rep. 192. The language of the statute must be sufficient to apprise the accused with reasonable certainty of the accusation against him. *U. S. v. Britton*, 2 Sup. Ct. Rep. 512; *U. S. v. Wilson*, 29 Fed. Rep. 286; *Cohen v. People*, (Colo.) 3 Pac. Rep. 385; *Harland v. Territory*, (Wash. T.) 13 Pac. Rep. 453; *Finch v. State*, (Miss.) 1 South. Rep. 630; *Scoles v. State*, (Ark.) 1 S. W. Rep. 769; *People v. West*, (N. Y.) 12 N. E. Rep. 610.

The statute upon which the indictment was based is as follows: "A further supplement to the act entitled 'An act to amend and consolidate the several acts relating to game and game fish,' approved March 27, 1874. (1) Be it enacted by the senate and general assembly of the state of New Jersey that the nineteenth section of the act to which this is a supplement be amended so as read as follows: 19. And be it enacted that no person, persons, or corporation shall place in any fresh-water stream, lake, or pond, any lime or other deleterious substance, or any drug or medicated bait, with intent thereby to injure, poison, or catch fish, nor place in or allow to flow or be discharged into any pond, lake, or stream stocked with or inhabited by trout, bass, pickerel, pike, sunfish, or perch, any drug, acid, gas, tar, or any deleterious substance whatever, which will kill or destroy said fish. Any person or persons or corporation violating the provisions of this act shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by imprisonment for a period of not more than two years, or by a fine of not more than two thousand dollars, or by both such fine and imprisonment, at the discretion of the court before which such conviction shall be had. (2) And be it enacted that this act shall take effect immediately." Approved March 22, 1886. Pamph. Laws N. J. 1886, p. 118.

The indictment was as follows:

**"MORRIS OYER AND TERMINER AND GENERAL JAIL DELIVERY.**

**"October Term, 1886.**

*"Morris County, to-wit:* The grand inquest for the state of New Jersey, in and for the body of the county of Morris, upon their oath present that the American Forcite Powder Manufacturing Company, a corporation, on the twenty-first day of April, in the year of our Lord, 1886, at the township of Roxbury, in the county of Morris, aforesaid, and within the jurisdiction of this court, unlawfully and willfully did allow to flow and be discharged into the waters of a certain pond and lake then and there situate, known as 'Lake Hopatcong,' said pond and lake then and there being stocked with and inhabited by bass, pickerel, and sunfish, certain acid which will kill and destroy said fish, contrary to the form of the statute in such case made and provided, and against the peace of this state, the government and dignity of the same. And the grand inquest aforesaid, upon their oath aforesaid, do further present that the American Forcite Powder Manufacturing Company, a corporation, on the twenty-first day of April, in the year of our Lord, 1886, and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at the township of Roxbury, in the county of Morris aforesaid, and within the jurisdiction of this court, unlawfully did allow to flow and be discharged into a certain lake of this state, then and there situate, known as 'Lake Hopatcong,' inhabited by pickerel, bass, sunfish, and perch, certain acid and deleterious substances which will kill said fish, contrary to the form of the statute in such case made and provided, and against the peace of this state, the government and dignity of the same. And the grand inquest aforesaid, upon their oath aforesaid, do further present the American Forcite Powder Manufacturing Company, on the twenty-first day of April, in the year of our Lord, 1886, and on divers other days and times between that day and the day of the taking this inquisition, with force and arms, at the township of Roxbury, in the county of Morris aforesaid, and within the jurisdiction of this court, unlawfully and willfully did place in, and allow to flow and be discharged into, a certain stream of fresh water, then and there situate, which said stream of water empties into a certain lake of this state known as 'Lake Hopatcong,' certain acid and deleterious substance which will kill and destroy fish, to-wit, a large quantity of sulphuric acid, whereby the bass, pickerel, sunfish, and perch inhabiting the aforesaid Lake Hopatcong were then and there, by means of the said sulphuric acid being so placed

and allowed to flow and be discharged into the said stream, and by said dam carried into said lake as aforesaid, killed and destroyed, contrary to the intent of the statute in such case made and provided, and against the peace of the state, the government and dignity of the same.

"WILLARD W. CUTLER, Prosecutor."

V. W. Cutler, for the State. Mahlon Pitney, for defendant.

VAN SYCKEL, J. This is a motion to quash an indictment which has been removed from the Morris quarter sessions into this court. A copy of the indictment, and of the act of the legislature under which it is framed, is hereto annexed. The said act makes it a misdemeanor to place in, or allow to flow or be discharged into, any pond, lake, or stream stocked with or inhabited by cut, bass, pickerel, pike, sunfish, or perch, any drug, acid, gas, tar, or any other noxious substance whatever, which will kill or destroy said fish. The first count of the indictment charges that the defendant unlawfully and willfully allowed to flow and be discharged into the waters of Lake Hopatcong, said lake being stocked with and inhabited by bass, pickerel, and sunfish, certain acid which will kill and destroy said fish.

The first objection taken to the validity of the indictment is that it does not state what kind of acid was discharged into the lake. It is the rule in this state that, in indictments for misdemeanors created by statute, it is sufficient to charge the offense in the words of the statute, subject to the qualification that the crime must be set forth with such certainty as will apprise the accused of the offense imputed to him. *State v. Stimson*, 24 N. J. Law, 385; *State v. Thatcher*, 35 N. J. Law, 445; *State v. Halsted*, 39 N. J. Law, 423; *State v. Startup*, Id. 423.

*State v. Fox*, 16 N. J. Law, 152, is relied upon by the defendant to support his position. That was an indictment under the statute making it indictable to sell "any wine, gin, whisky, cider, spirits, brandy, or other ardent spirits," and charging the defendant with selling, "one-half gill of ardent spirits." The supreme court held that it was necessary to specify the kind of ardent spirits alleged to have been sold. The difficulty of enforcing the law under this strict rule led the legislature to pass an act in 1838, making it sufficient to describe the liquor sold "as ardent spirits." See *Townley v. State*, 18 N. J. Law, 311.

It is clearly unwise to go further in the direction of strict pleading than was done in 16 N. J. Law. From that case this I think may be distinguished. The fish statute makes it unlawful to discharge into the lake any drug or acid without specifying any drug or any acid. The crime is committed when any drug or any acid, which in the sense of the statute will kill or destroy the fish therein, is so discharged. It is immaterial what particular drug or acid it may be, it is within the interdicted class of materials or substances if of a destructive character. The offense therefore at which the statute is aimed is sufficiently charged by describing the substance as "acid" in the language of the act.

In *State v. Wheeler*, 44 N. J. Law, 89, the statute prohibited the throwing into a reservoir of water for public use any carcass of any dead animal, or any other offensive matter whatever, calculated to render said water impure. In that case the indictment in the language of the statute, without specifying the kind of offal or offensive matter, was held sufficient.

In *Com. v. Odlin*, 23 Pick. 275, Chief Justice SHAW sustained an indictment, which charged that the defendant sold without license one pint of spirituous liquor. This rule has been adhered to in Massachusetts. *Com. v. Bryant*, 6 Gray, 482; *Com. v. Ryan*, 9 Gray, 137.

The Indiana statute forbids the sale without license of any spirituous liquor in less quantity than one quart. The courts of that state held that the indictment need not show the kind of spirituous liquor sold. *State v. Graeter*,

6 Blackf. 105; *Fetterer v. State*, 18 Ind. 388; *Downey v. State*, 20 Ind. 82. These authorities are in line with the English case reported in 3 Camp. 73.

The second objection applies to the first and second counts. The allegation in these counts is that the defendant discharged into the lake inhabited by bass, pickerel, and sunfish, certain acid, which will kill and destroy said fish. There is no averment that the acid was discharged into the lake in such quantity as would prove fatal to fish, nor that any of said fish perished in consequence of the defendant's act. What is the meaning of the words of the statute, "which will kill or destroy said fish?" The reasonable construction of this language is that it must be acid of such character and quantity as will destroy the fish in the lake at the time and under the circumstances existing when the acid is introduced. There may be an acid or deleterious substance which, if administered directly to fish, would be fatal to them, yet, when discharged into the water in the same quantity, would be harmless. There is in this respect an absence of such averments as are necessary to show that the defendant has contravened the statute. There are two different acts made indictable by this statute. The first is where any person places in any fresh-water stream, lake, or pond any lime, or other deleterious substance, or any drug or medicated bait, with intent thereby to injure, poison, or catch fish. Under this branch of the act, it is immaterial what quantity of the interdicted material is put into the water, or whether it is sufficient to kill the fish. If it is placed there with the intent to injure, poison, or catch the fish, the offense is committed. The other branch of the act is the one under which the pleader has attempted to frame this indictment. As to that, intent is immaterial, but it must be shown that the quantity introduced will produce the destruction which the law-maker intended to prevent.

The third count is not subject to the objection which is fatal to the prior counts. That count charges that a large quantity of sulphuric acid was discharged into a fresh-water stream which empties into the lake, and that by means of the said sulphuric acid being so placed in and allowed to flow and be discharged into the said stream, and by the said stream carried into said lake, the bass, pickerel, sunfish, and perch in said lake were killed and destroyed. The court will presume that the stream of fresh water is a natural stream, and that it flowed into the lake when the noxious substance was emptied into it by the defendant.

If there is anything in the objection that the defendant is not alleged to be a corporation, the indictment is amendable under the statute. This is no more a material part of the indictment than the name of the defendant, which may always be corrected.

The only remaining objection relied upon by the defendant is the radical one that the act is unconstitutional, under article 4, § 7, par. 4, of the state constitution, which provides "that no law shall be revived or amended by reference to its title only, but the act revived, or the section or sections amended, shall be inserted at length." This statute is the full text of the law as amended. This form of legislation is approved in *Van Riper v. Parsons*, 40 N. J. Law, 123, and in *Colwell v. Chamberlin*, 43 N. J. Law, 387. I think the law is correctly stated in those cases. The same view has been taken in other states where a like provision in the fundamental law exists. *Cooley*, Const. Lim. § 152; *People v. Pritchard*, 21 Mich. 236; *State v. Draper*, 47 Mo. 29.

It is not necessary, in legislation amending statutes, to set forth the amended statute, and also the statute as it was before amendment. The mischief to be remedied by the constitutional provision does not require it, nor does the language of the constitution. In *Boernham v. Hulit*, 45 N. J. Law, 53, no dissent is expressed from this view. So far as it has any bearing on the question, it is in accord with the previous cases. The contention there was that the change in the law could not be made without re-enacting a sec-

of the act of 1876, and incorporating in it the provisions of the act of 1882. No reference was made to the previous decisions, and there was no intimation by the general expression used to cast any doubt upon them.

In my opinion the third count of the indictment is good, and the motion to quash should be denied. This is an important statute, intended for the preservation of rights valuable to the public and to private individuals. While the defendant should be accorded all of his substantial rights, the courts should not resort to finely-drawn legal quibbles for the purpose of defeating the enforcement of the law.

STATE (HOLZWORTH, Prosecutor) v. BOARD OF HEALTH OF THE CITY OF NEWARK.

(Supreme Court of New Jersey. November 8, 1887.)

APPEAL—FROM POLICE JUSTICE TO COMMON PLEAS—VIOLATION OF HEALTH ORDINANCE. The Essex pleas has no jurisdiction to hear an appeal from the judgment of a police justice in a suit for a penalty for violating an ordinance of the board of health.

(*Syllabus by the Court.*)

On *certiorari* from common pleas, Essex county; KIRKPATRICK, JOHNSON, and LEDWITH, Judges.

John R. Hardin, for defendant. W. H. Conover and Saml. J. McDonald, plaintiffs.

VAN SYCKEL, J. This action was brought before a police justice of the city of Newark, to recover a penalty for the violation of an ordinance of the board of health under act of 1886, p. 289, § 23. The conviction before the police justice was taken by appeal to the Essex pleas, and there affirmed. The case is certified to this court for review of these proceedings. Will an appeal in such case to the Essex pleas? The proceedings authorized by the twenty-third section of the act of 1886 are summary. There is no appeal from the judgment of a police justice to the common pleas, unless it is granted by statute. The fiftieth section of the Newark Charter gives police justices jurisdiction in civil cases only where action is for recovery of a penalty for violating a city ordinance. Section 56 provides that there may in such case be an appeal as in case of civil suits before justices of the peace. This right of appeal is thus restricted to suits for violation of city ordinances. Does the grant of jurisdiction to police justices, to try in a summary way a violation of an ordinance of the board of health, carry with it by implication the right of appeal to the common pleas? I cannot see how it does. The power exercised by the police justice being a special statutory power, is circumscribed within the limits defined by the legislative act. What is not granted thereby is withheld. The words in the twenty-third section, "unless an appeal be granted," may lead to the inference that the draughtsman of the law supposed there might be an appeal by some proceeding, but they do not give the right of appeal to the pleas, if it did not exist without them. There is no other language in the act relating to an appeal. The Essex pleas, therefore, was without jurisdiction to hear the case on appeal.

The judgment of the Essex pleas should be set aside, and the case remitted there, and the appeal dismissed in that court.

STATE (EDWARD BLOOM, Prosecutor) v. STENNER.

(Supreme Court of New Jersey. November 8, 1887.)

JUSTICE OF THE PEACE—JURISDICTION—ACTION FOR CUTTING TREES.

A justice of the peace has jurisdiction of an action for cutting or destroying growing trees, where the plaintiff can prove actual possession of the premises.

## 2. SAME—PROOF OF POSSESSION.

In such case, upon proof of the cutting and of possession, the plaintiff is entitled to recover the value of the trees.

## 3. SAME—TITLE INVOLVED—DISMISSAL.

If the defendant produces evidence that the plaintiff is entitled only to a temporary possession, and that the fee is in another, a question of title is presented in case, and therefore the justice must dismiss the suit, because he has not jurisdiction to try it.

(*Syllabus by the Court.*)

On *certiorari* from common pleas, Hunterdon county; SANDERSON, DUHAM, and CULLEM, Judges.

*Paul A. Queen and R. S. Kuhl, for plaintiff. J. N. Voorhees, for defendant.*

VAN SYCKEL, J. This was an action of trespass on the case, instituted in a justice's court, charging the defendant with carelessly burning brush, and so negligently guarding it that the fire was communicated to lands of the plaintiff, and his rails, growing trees, and blackberry bushes were destroyed. On the trial of the appeal before the Hunterdon pleas, the court refused to allow the plaintiff to prove the damage to the growing trees, on the ground that a justice of the peace had no jurisdiction to try a case involving such injury.

In *Edgar v. Anness*, 47 N. J. Law, 465, 2 Atl. Rep. 246, Mr. Justice REED says that "in actions for trespass upon land, if the plaintiff rests his case upon proof of possession in fact, which was invaded, no question of title within the meaning of justices' act arises." A justice of the peace has jurisdiction of an action of trespass for cutting down grass and growing trees, and digging and removing soil; and in such action possession only, and the alleged trespass, need be proved to support the action. *Gregory v. Kanouse*, 11 N. J. Law, 62; *Winter v. Peterson*, 24 N. J. Law, 524. In the latter case the only damage charged was the cutting of a single tree; and a judgment for substantial damage was affirmed. The plaintiff may prove actual possession, but cannot establish a constructive possession by production of documentary or other evidence of his title. *Osborne v. Butcher*, 26 N. J. Law, 308; *Campfield v. Johnson*, 21 N. J. Law, 83; *Hill v. Carter*, 16 N. J. Law, 87; *Dickerson v. Wadsworth*, 33 N. J. Law, 357. It is the necessity of producing title, other than mere possession, to establish the right of the plaintiff to sue, that is the test by which to determine whether any particular case is within the jurisdiction of the justice's court, is the language used by Mr. Justice DEPUÉ in *Dickerson v. Wadsworth*.

There is no doubt that the action of trespass *quare clausum fregit* is cognizable in a justice's court, and that it can be maintained by one who can show himself to be in actual possession. There is no distinction in point of jurisdiction arising from the extent or character of the injury sought to be redressed, and no test of that character has been applied in the adjudicated cases. The jurisdiction does not exist only when the injury is transient, as the tearing down of grass and herbage, and fail when it is permanent, as the cutting of growing trees, or subverting and carrying away the soil. The plaintiff is not allowed in the former instance to rest on proof of mere possession, and is bound in the latter to add some proof of title. In either case, proof of title is unnecessary in any court, unless made essential by evidence produced and offered on the part of the defense. If, in a justice's court, the defendant has a right superior to the plaintiff's right of possession, he must plead title. Hence, in respect to jurisdiction, no distinction grows out of the extent of the injury committed. This is the clear expression of the adjudications which have been made in this court. *Gregory v. Kanouse*, 11 N. J. Law, 62; *Winter v. Peterson*, 24 N. J. Law, 524; *Dickerson v. Wadsworth*, 33 N. J. Law, 357.

In *Gregory v. Kanouse*, the state of demand in the justice's court charged the defendant with breaking and entering his close, and cutting down and destroying 50 trees and 50 saplings there growing. Judgment was recovered by the plaintiff below, and the case was certified into this court. The contention here was that the cause of action was not within the jurisdiction of a justice of the peace, being in trespass for breaking and entering upon lands, and the *gravamen* in part being a permanent injury. Chief Justice EWING delivered the opinion of this court, affirming the judgment below. He reviews the previous adjudications on the subject, and says that, as to the question of jurisdiction, there is no necessary distinction growing out of the extent of the injuries which furnish the respective causes of action, and that the right of action is not denied in a justice's court when the injury is permanent, as the cutting down of growing trees.

In *Dickerson v. Wadsworth*, where the action had been brought in the circuit court for cutting trees on uninclosed woodland, of which the plaintiff had not actual possession, but to which he had title, the question certified to this court was whether the plaintiff was entitled to costs, he having recovered less than \$100 damages. Mr. Justice DEPUE, in delivering the opinion of the court, cites the case of *Gregory v. Kanouse*, and expressly puts the right of Dickerson to costs in the circuit upon the clear distinction that Dickerson's possession was not actual, but constructive, and could be proved only by proving title. No allusion was made to the fact that the injury was of a permanent character. It seems to have been conceded in that case that, if actual possession could be shown, a justice of the peace would have jurisdiction.

*Vantyl v. Marsh*, 5 N. J. Law, 507, and *Dixon v. Scott*, 18 N. J. Law, 430, are not in conflict with the cases before referred to. The former case was a suit in a justice's court for erecting and keeping up a mill-dam on the river Rahway, by means whereof the waters of the river were flowed back upon the lands whereof the plaintiff had a tenancy in fee-simple, so that his grass, wood, and standing timber were destroyed. The latter was an action on the case in the circuit court for maintaining and keeping up a dam, by which the plaintiff's meadows were overflowed. In one count of the declaration the plaintiff claims that he is lawfully seized and possessed of the injured close. The jury rendered a verdict for the plaintiff for five dollars. The only question in this court was whether the plaintiff was entitled to costs. That these cases were properly decided I think there can be no doubt whatever. In both cases the plaintiff set up in his declaration title to the freehold, and the right of the defendant to erect and maintain his dam as it was at the time of the alleged injury, necessarily raised a question of title, which is without the jurisdiction of a justice of the peace. Chief Justice MORN-BLOWER said that, wherever the plaintiff must necessarily show title to recover the damages claimed, the justice has no jurisdiction.

Assuming this to be the test, was it necessary to prove title in the principal case? This point is put entirely at rest by the case of *Todd v. Jackson*, (in the court of errors and appeals,) 26 N. J. Law, 525. That was not a case in a justice's court; but Chancellor WILLIAMSON, who delivered the opinion, discusses very fully what proof must be made by the plaintiff in an action of trespass *quare clausum fregit* to entitle him to recover for the full injury committed by the trespasser. He says, on page 537, that the injury done by the trespass was to the permanent injury of the freehold, and that the judge at the circuit seemed to think that, in order to entitle the plaintiffs to recover the full extent of the injury done, it was necessary for them to show title, and the supreme court adopted the same view. But he further says "that, in order to establish the materiality of the deed as evidence, you must maintain the broad proposition that, in an action of trespass *quare clausum fregit*, it is necessary, in order to entitle the plaintiff to recover the full extent of damages done to the freehold, that he should prove his title to the inheritance. If

the proposition be true, then if A. bring an action against B. for cutting down timber trees upon his land, or pulling down a house, A. cannot recover the value of the building, or of the trees cut, unless he shows his title in the land, in addition to his possession. I think it may be affirmed with great confidence that such a principle cannot be found laid down by any elementary writer, and that no respectable authority can be found for it. The action of trespass, both as to real and personal property, is a possessory action. A party in possession is *prima facie* the owner, and that possession will entitle him to recover to the extent of the injury done, unless the defendant show something in mitigation of the damages. If, then, the defendants could avail themselves of the principle laid down by the judge, that, 'if the plaintiffs had no interest there beyond a naked possession, the amount of their recovery should be graduated by one scale.' It was incumbent on them, in order to entitle themselves to have the damages graduated by that scale, to prove that the plaintiffs had no interest beyond a naked possession, or to qualify the possession in some way. The defendants raised no such issue before the jury. They offered no evidence to qualify the possession of the plaintiff. They did not rebut the *prima facie* case, which resulted from the fact of possession, that the plaintiffs were entitled to the full extent of the injury." This clear and unmistakable exposition of the law on this subject by so eminent a judge, concurred in by a full court, including Chief Justice GREEN, leaves no room for controversy. It is applicable alike in all courts where the action of trespass *quare clausum* may be tried.

When the plaintiff proved his possession in the trial court below, he was entitled to be regarded *prima facie* as the owner, and that possession, in the language of Chancellor WILLIAMSON, entitled him to recover to the extent of the injury done, unless the defendant showed something in mitigation of the damages. If the plaintiff recovered to the extent of the injury done, that recovery would be a bar to any future suit by him as owner of the fee for the same injury. But if the plaintiff was in possession under another, and not the owner of the fee, how would the defendant protect himself from a suit by the remainder, and from being coerced to pay twice for the same injury? The defendant had a right, as Chancellor WILLIAMSON says, to set up, in mitigation of damages, that the title to the land was in a third person, to whom he would be responsible for the injury done to the reversionary interest, and not until then would a question of title arise in the case.

What will be the defendant's remedy in a justice's court in such a juncture, where it is not competent to try title to lands? This question is clearly answered by three recent cases in this court. If the defendant in a justice's court offers to prove title to lands either in himself, or another under whom he justifies, the justice should refuse the offer. The remedy is to plead title. But if the offer is to prove absence of title merely in the plaintiff, and such evidence is relevant, the justice should dismiss the action for want of jurisdiction. *Messler v. Fleming*, 41 N. J. Law, 108; *Jeffrey v. Owen*, Id. 260; *Edgar v. Anness*, 47 N. J. Law, 465, 2 Atl. Rep. 246. The first of these cases was a suit for rent, in a justice's court. The defendant offered a deed in evidence to prove that the title to the demised premises had passed out of the plaintiff, and that another person, his grantee, was entitled to recover the rent sued for. The justice refused to entertain this offer of defense, and proceeded to judgment against the defendant. This court held that it was the duty of the justice to dismiss the case for want of jurisdiction. This rule was approved in *Jeffrey v. Owen*, and again applied in the more recent case of *Edgar v. Anness*.

It was competent, therefore, for the plaintiff, upon proof of his possession, in the case under review, to show the full extent of the damages done, and to recover to that extent in the absence of mitigating evidence. If the fact was that the plaintiff was not the owner of the lands trespassed upon, or if the de-

fendant could offer evidence to establish that fact, his proper course was to do so in reduction of damages. That would have legally introduced into the case a question of title, which the justice could not have tried, and it would therefore have been his duty to dismiss the suit for want of jurisdiction.

If it appears that the plaintiff is entitled only to temporary possession, and is not the owner of the fee, it has been the settled law since the case of *Panton v. Isham*, 3 Levinz, 359, that the plaintiff can recover merely for the injury to his possession, and the right to recover the substantial damages inheres in the reversioner. *Pantam v. Isham*, 1 Salk. 19; *Evans v. Evans*, 2 Camp. 491; *Blackett v. Lowes*, 2 Maule & S. 499; 1 Add. Torts, 371, § 362; 2 Tayl. Landl. & Ten. § 771. Hence it is competent for the defendant in trespass *quare clausum* to set up that the freehold is in another, and that involves a question of title not triable by the inferior tribunal. If the plaintiff wishes to avoid a dismissal of his suit, he must ask for damages to the possession merely, admitting that he has no title.

The evidence offered by the plaintiff, on the trial below, was competent and admissible, and should not have been rejected. The judgment should be reversed.

STATE (BRAY and others, Prosecutors) v. BOARD OF CHOSEN FREEHOLDERS OF COUNTY OF HUDSON.

(*Supreme Court of New Jersey*. November 8, 1887.)

CONSTITUTIONAL LAW—SPECIAL LEGISLATION—IMPROVEMENT OF PUBLIC ROADS.

The act of May 28, 1886, p. 369, entitled "An act to authorize the boards of chosen freeholders in the respective counties in this state to lay out, open, and improve a public road in each of the counties in this state," is unconstitutional, because one county is excepted from its operation.

(*Syllabus by the Court*.)

On certiorari.

Geo. Van Horn, for plaintiff. John A. McGrath, for defendant.

VAN SYCKEL, J. The writ in this case is prosecuted to determine whether the board of chosen freeholders of the county of Hudson have authority to lay out and improve a certain public road, by virtue of the act entitled "An act to authorize the boards of chosen freeholders in the respective counties in this state to lay out, open, and improve a public road in each of the counties of this state," approved May 28, 1886, (page 369.) The first section of the act authorizes the boards of freeholders in the respective counties of this state, except such counties as have county road-boards, to lay out and improve a road, if a majority of persons entitled to vote for members of assembly shall vote to lay it out. This it is admitted is special and local legislation, under the case of *Closson v. Trenton*, 48 N. J. Law, 438, 5 Atl. Rep. 323. But the defendant says that by section 2 of the act, when a majority of the persons voting authorize the laying out, the freeholders of any county shall have power to lay out the road, and that, this being the last declaration of legislative will, prevails over the first section, and makes the act applicable to all counties, excepting none. This construction of the second section cannot be adopted. The second section provides that due notice shall be given by such boards of chosen freeholders of the time and place of holding the election provided in the first section. The only boards of freeholders, therefore, which can give such notice, are the boards named in the first section, which are boards in counties having no road-board. An election cannot be held without the required notice, and therefore the only counties in which elections can be held are counties having no road-boards. The county of Essex has a road-board, and to that county the act of 1886 cannot apply. In my opinion the act under which the work in question is promoted, is unconstitutional. The certified proceedings should be set aside, with costs.

## MILLER v. TERNANE.

(Supreme Court of New Jersey. November 7, 1887.)

## EVIDENCE—DECLARATIONS—ADVERSE POSSESSION.

A person in possession of land declared that "it was hers as long as she lived, but after her death it was Mr. Miller's." Held, that this declaration was competent evidence against those claiming under the possessor, and that it tended to prove that the possession was not adverse to Mr. Miller's title to the property after the death of the declarant.

(Syllabus by the Court.)

In ejectment. On case certified from Mercer county circuit court by Chief Justice BEASLEY.

Geo. D. Scudder, for plaintiff. C. H. Beasley, for defendant.

DIXON, J. John Miller and Henry Heintz, being the owners of adjoining houses and lots in Trenton, entered into a written agreement, dated December 30, 1852, which provided that, "so long as said Heintz owns said house and lot conveyed to him, he shall and may occupy and enjoy that part of the lot in the rear of said Miller's house as it now stands fenced off, until such times as he shall sell and dispose of the same to any other person." Henry Heintz entered into possession under said contract, and died in possession before 1863. At his death he devised his said house and lot to his wife, Bridget, for life, and she thereupon took possession of the same, and also of said part of the Miller lot, which she retained until her death, in 1885. During her life-time she leased the premises to the defendant, who is still in possession. The plaintiff is the devisee of John Miller, who died a short time ago. Some time between 1863 and 1875 Bridget Heintz, while in possession of the property, declared that "the piece of land (meaning the rear portion of the Miller lot) was hers as long as she lived, but at her death it was Mr. Miller's." Between 1875 and 1880 she declared that that strip of land did not belong to her. In 1886 the plaintiff brought in the Mercer circuit an action of ejectment for the rear portion of the Miller lot, and the defendant insisted that Bridget Heintz had acquired a good title against the plaintiff by adverse possession. The cause was certified to this court for its advisory opinion on the questions (1) whether the original entry of Bridget Heintz upon the strip of land in controversy was hostile, or by permission of the owner, John Miller; (2) whether or not the possession of said strip of land by Bridget Heintz, and the tenants holding under her, was adverse, and so continued for the statutory period of time.

In order that the possession of land may be adverse, it must be in denial of the title of the true owner, or with an intention to make title against him. *Foulke v. Bond*, 41 N. J. Law, 527. If, therefore, the possession be in recognition of and submission to the title of the true owner, in whole or in part, it will to the same extent not be adverse. Whether the possession is adverse, or is in recognition of and submission to the title of the true owner, may be legally shown by the declarations of the possessor during his possession, according to either of two well-settled rules of law. One is that, when the acts of persons are evidence, their contemporaneous declarations, giving character to those acts, are also evidence as part of the *res gestæ*. *Luse v. Jones*, 39 N. J. Law, 707. The other is that the declarations of a person, in possession of land, which tend to limit his title, are competent evidence against those claiming under him. *Townsend v. Johnson*, 3 N. J. Law, 706; *Horner v. Stillwell*, 35 N. J. Law, 307; *Doe v. Langfeld*, 16 Mees. & W. 497; 1 Phil. Ev. 313.

In the present case, the declaration of Bridget Heintz, made during her possession, and while John Miller was the legal owner, to the effect that the land in controversy was hers as long as she lived, but at her death was Mr.

Miller's, was competent evidence against the defendant, and tended to prove that the original entry of Mrs. Heintz had not been hostile to the title of John Miller in the reversion at her death, and that her possession was in recognition of and submission to such a title, and not adverse thereto. There being no evidence to the contrary, the circuit court should be advised that the entry of Bridget Heintz was not hostile to, and her possession was not adverse to, the title which the present plaintiff sets up.

STATE (BOWYER and others, Prosecutors) v. CITY COUNCIL OF CAMDEN.

STATE (REED and others, Prosecutors) v. SAME.

(*Supreme Court of New Jersey.* November 8, 1887.)

1. MUNICIPAL CORPORATIONS—STATUTE APPLICABLE TO—CONSTRUCTION.

An act of the legislature which in terms applies to all cities must be construed to apply to all, and to repeal all inconsistent legislation. If any city is excepted from its operation, either by expression or by implication, it would be a special law, and therefore unconstitutional. The implication in such case will not be made that an exception is intended. The interpretation which validates the law will be adopted. Therefore the act of March 25, 1881, applies to Camden.

2. SAME—TAXATION—POWER OF RECEIVER TO SELL LAND.

Under the provisions of the city charter of Camden, the receiver of taxes must collect all taxes which are not made by the sale of lands. He has no authority to sell lands for taxes, and no duty to perform with respect to assessments for street and sewer improvements.

3. SAME—TAXES PAYABLE TO TREASURER—ACTIONS IN NAME OF.

The city treasurer is the officer to whom payment of assessments must be made, and in whose name suit must be brought to compel payment if necessary so to do.

4. SAME.

Under the fourth section of the Martin act, the city treasurer is the officer whose duty it is to collect the readjusted taxes, assessments, and water rents, and sell lands for the non-payment thereof.

5. SAME—POWER OF COUNCIL—SALE BY SOLICITOR.

The seventeenth section of the city charter applies both to taxes and assessments, and authorized the city council to pass the resolution directing the city solicitor to proceed and sell lands to enforce payment of any taxes or assessments which may be a lien thereon.

6. SAME—PROVISIONS OF CHARTER.

In the case specified by section 13 of the Martin act, the city council may elect to proceed under the city charters, and in that event the provisions of the city charter must regulate the proceedings.

7. SAME—ORDINANCES—IMPOSING DUTIES OF RECEIVER UPON SOLICITOR.

So far as the ordinances of the city council impose upon the city solicitor the duties which are required to be performed by the receiver of taxes, they are unauthorized and illegal.

(*Syllabus by the Court.*)

On *certiorari*, reviewing city ordinances and a resolution of common council.

*Herbert A. Drake, James E. Hays, Joseph Coult, and Saml. H. Grey*, for prosecutors. *J. Willard Morgan, David J. Pancoast, and Peter L. Voorhees*, for defendants.

VAN SYCKEL, J. These cases, which were argued together, bring up for review an ordinance revising the ordinances of the city of Camden, passed December 30, 1886, and also the following resolution of the common council of said city, passed March 31, 1887: "Resolved, that the city solicitor be and he is hereby authorized and directed to proceed and sell, according to law, all lands, tenements, and real estate, to enforce the payment of any taxes or assessments which may be a lien thereon, according to law." The cases may be disposed of by considering—*First*, whether the revised ordinances certified have been published according to law; *second*, whether sections 7, 29, 31,

64, 88, 89, and 143 of the revised ordinances, or any of them, are in any respect illegal; *third*, whether the common council could lawfully authorize the city solicitor to sell lands for unpaid taxes and assessments.

The twenty-ninth section of the city charter prescribes the manner of publishing ordinances, with the proviso that, whenever the city council shall cause a revision of the city ordinances to be made, and shall direct the same to be published in a printed volume, it shall not be necessary to publish such revised ordinances in a newspaper. The ordinance under review was published as directed by this proviso. The *certiorari* commands the city council to return the proof of the publication of the certified ordinance. The only publication that affirmatively appears by the return to have been made is the publication in the printed volume. The presumption under this return must be that no other publication was made. *State v. Trenton*, 36 N. J. Law, 499.

By an act entitled "An act concerning the publication of ordinances, financial statements, and other public notices," approved March 25, 1881, it is provided that "in all cities of this state the ordinances passed shall be published in at least one newspaper of the city for at least two insertions before said ordinance shall become binding and operative." Laws 1881, p. 295. The said act further provides that all acts or parts of acts in conflict with it are repealed. It is contended that this general law does not repeal the special provisions of the city charter. *Sheridan v. Stevenson*, 44 N. J. Law, 371, is relied upon to support this view. It will be observed that the statute which was claimed in that case to have the repealing effect did not in terms relate to cities, but was a general tax law. The court there held that it was a question of intention, and that the repealing clause must be so expressed as to manifest the legislative intention to include all acts, whether special or local or otherwise, inconsistent with the provisions of the act. The rule is correctly stated by Chancellor GREEN in *School-District v. Whitehead*, 13 N. J. Eq. 290. "Every statute is by implication a repeal of all prior statutes, so far as it is repugnant thereto. And if the subsequent statute be not repugnant in all its provisions to a prior one, yet if it was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the original act." This case was cited, and the rule therein adopted was approved in this court in *State v. Commissioners*, 37 N. J. Law, 228.

The act of 1881 provides that in all the cities of this state the ordinances shall be published as in said act provided. No city is excepted from its operation, and it provides the only rule that is to govern the subject. Every city is declared to be subject to that rule, and therefore necessarily all special laws in city charters repugnant thereto are swept away by the repealing clause. Aside from these cases, it being a question of legislative intent, there can be no doubt whatever that it was intended to apply to the city of Camden. The act of 1881 was placed upon the statute book by the legislature in the form of a law, and it must be presumed that the legislature intended that it should have the force and sanction of a law. Giving it effect in all cities according to the clear and express language in which it is enacted, it is a valid and constitutional law; but if the city of Camden is excepted from its operation, then it is a special local law, and inoperative because in contravention of the constitutional provision with respect to special legislation. *State v. Trenton*, 36 N. J. Law, 499. That the legislature intended it to be the law on this subject there can be no doubt; and inasmuch as it cannot be the law without applying to the city of Camden, the intention to apply it to that and every other city must have led to its passage. The legislature could not make a valid law excepting some cities or one city, save in those instances where such law will bring about uniformity, and it cannot do by implication what it could not do by expression. Nor can the courts effect by construction what the legislature cannot do by express words. If, by indicating a purpose to exempt certain counties from its operation, the legislature can legally pass an

act which shall apply to only one or more counties, and not to all, the constitutional provision in question will afford the most slender barrier against special legislation. The guide to interpretation is legislative intent. The supreme folly of intending to pass a special and therefore nugatory act will not be imputed to the law-maker, when the language used is broad enough to embrace all cities or counties, thereby making the enactment general in form. *Field v. Silo*, 44 N. J. Law, 355, and *Burns v. Yost*, 47 N. J. Law, 222, are not in conflict with the view now taken. In the former case the decision is put upon the express ground that the legislation created uniformity, and prevented diversity, and thereby promoted the object for which the provision against special legislation was devised. In the latter case the only question was whether the act of 1884 applied to the district courts of the city of Newark. It was properly held that it did not, because by its terms it embraced only the courts created by the act to which it is a supplement.

Under the general law of 1881 the ordinances certified are of no force until published in the manner thereby prescribed. So far, therefore, as the proceedings certified rest upon this ordinance they are of no force. But it is not necessary nor proper to set aside the ordinances, if the power existed to pass them. No time is prescribed within which the publication shall be made. The ordinances, so far as legally passed, will take effect when due publication shall be made.

The main questions in this case are the remaining two, which may be discussed together. They involve the consideration, in the first place, of the power and duty of the receiver of taxes under the provisions of the city charter. Section 49 of the city charter provides that the receiver of taxes shall have his office in the city hall, and shall sit at such times and places as the city council shall direct, and that it shall be his special duty to receive all taxes that may be paid. Section 50 requires him to enter his receipts in books kept for the purpose, with the name of the person making payment, and twice a week to furnish a detailed statement of such sums to the city treasurer, and pay over to the treasurer the sums collected by him. Section 66 provides that, after taxes are returned for non-payment, they shall bear interest at the rate of 12 per cent., and that it shall be the duty of the receiver of taxes to collect this interest in addition to the tax, which sums are to be paid over by him to the city treasurer. By the sixty-eighth section in case of non-payment the tax warrant is issued to the receiver of taxes. This legislation unquestionably makes the receiver of taxes the sole officer for the collection of personal taxes. The seventy-fourth section as clearly makes the receiver of taxes the officer whose duty it is to receive taxes which are a lien on real estate. By the same section the duty is cast upon the receiver to keep a record showing the taxes upon city lots, paid and unpaid. These references clearly show that the city charter has cast upon the receiver of taxes the duty to collect all city taxes. But he has no power to sell lands for the satisfaction of taxes, which become a lien thereon.

The charter of Camden was passed in 1871. The forty-seventh section provides that the receiver of taxes shall possess the power and perform the duties of collectors of the several townships, so far as such powers and duties shall be consistent with the provisions of said charter. By the act of April 11, 1866, (Revision, 1159, § 87,) it was provided that the tax warrant for delinquent taxes should be issued to and executed by the collectors of the townships. It was not until the act of March 14, 1879, (Laws 1879, p. 340,) went into effect that the town committee was authorized to issue the tax warrant to sell lands for taxes, directed to the collector, and to be executed by him. Supp. to Revision, 990, § 51. The power thus given by the charter of 1871 to the receiver of taxes in Camden was such power as the township collector then had, which did not extend to the sale of lands for taxes. The township collector now has no power to sell lands for taxes, until the township com-

mittee issue to him the tax warrant for that purpose. There is no legislation which authorizes the issuing of such warrant to the receiver of taxes in the city of Camden. The sixty-fourth and seventieth sections of the city charter clearly lodge that power elsewhere. Nor has the receiver of taxes any authority whatever with respect to assessments for improvements. The language in the sixty-fourth section in reference to "taxes and assessments which shall be made a lien upon real estate," applies only to annual taxes, as the words immediately following show, viz.: "Whether the same may be state, county, city, or school tax." This can have no relation to street improvements. It is the word "taxes" used in the fifty-third section of the city charter to include assessments for street improvements. By the fifty-second section of the city charter is expressly made to signify only the annual taxes for the various purposes specified.

Section 76 authorizes the paving and grading of streets, and section 77 provides the mode in which the cost and expenses of the same shall be assessed and collected. The course of proceeding prescribed is that the owner of the land may execute the work along his premises in compliance with the ordinance, and if he fails to do so, the city council shall cause it to be done and pay for it out of any money in the hands of the city treasurer. A particular statement of the cost of the work is to be filed with the city clerk, and the cost thereof is to remain a lien upon the said land until it is paid and satisfied. The same section gives the city council the option to sue for the amount due the city in the name of the city treasurer, or to cause the land upon which it is a lien to be sold to pay the same. By the ninetieth section of the city charter sewer assessments are to be collected in the same way.

This mode of proceeding is preserved by the ninth section of the act of March 19, 1872. Who, then, under the seventy-seventh section of the city charter, is the officer authorized to receive payment of these assessments uniformly made before legal proceedings are taken to enforce payment? It cannot be the city council. To which of the council would such payment be made, and how would the account be kept, and by whom? Such an idea is not to be seriously entertained. The city solicitor has no authority to receive payment. His duty with respect to this matter does not commence until legal proceedings are instituted, and then the suit must be in the name of the city treasurer, and whatever part the solicitor takes in the transaction is as the attorney of that officer. The city treasurer is the suitor. He has to pay the money out for the work in the first instance, and he is entitled to be reimbursed, and he is the city officer who must keep the account, and report to the city. Section 46 of the city charter clearly defines his duty in this particular. The city solicitor, under the seventieth section of the charter, is the representative of the city council, whose duty it is to cause sales to be made, and when sale is made, the declaration of sale must be made by the city council under the city seal, and the proceeds of sale paid to the city treasurer. Charter, §§ 64, 77. My conclusion from this legislation is that the receiver of taxes must collect all taxes which are not made by sale of lands; that he has no authority to sell lands for taxes, and no duty to perform with respect to assessments. The city treasurer is the officer to whom payment of assessments must be made, and in whose name suit must be brought to compel payment, if necessary to do so.

The seventieth section of the charter provides "that on or before the first day of March in each year the city council shall direct and authorize the city solicitor to proceed and sell according to law all lands, tenements, and estate to enforce payment of any taxes or assessments which may be due thereon by virtue of this act." This section applies both to taxes and assessments, and authorized the city council to pass the resolution of March 1887. Whenever it is necessary to resort to suit to collect assessments, it is incompetent for the city council to empower the city solicitor to conduct a

its on behalf of the city treasurer. But, in so far as the ordinances certified impose upon the city solicitor the duties which are required to be performed by the receiver of taxes, they are unauthorized, and in conflict with the city charter.

The effect of the Martin act, (Laws 1886, p. 149,) which has been adopted by the city of Camden, remains to be considered. By the title of this act it concerns the settlement and collection of arrearages of unpaid taxes, assessments, and water rates or water rents in cities of this state. Each one of the words, "taxes, assessments, and water rents," as used in this act, has a finite and well-understood meaning. They are not used as synonymous, but each word represents a distinct class of burdens. It is important to bear in mind that it had been so held in the highest court of this state before the Martin act was passed. *State v. Newark*, 34 N. J. Law, 301. These words are used in the first three sections of this act to describe the different classes of arrearages. The fourth section provides "that, upon the confirmation of the said report, a certified copy of the same shall be transmitted to the comptroller of the city or other officer for collecting assessments, to be by him filed in his office, and thereupon the amount of said tax, assessment, and lien so ordered and certified in respect of each and every lot or parcel of land included therein shall immediately become due and payable, and shall be collected by the said comptroller or said other officer without interest, if the same be paid within sixty days after filing of such certified copy of the report with him, and, if not so paid, then with interest from the date of such filing at the rate of six per centum per annum, and, if not paid within six months from such filing, with interest at the rate of seven per cent." After the expiration of six months, the said comptroller or other said officer is empowered to sell the lands as therein directed.

The question to be solved is, who, under this legislation, is authorized to collect the readjusted taxes, assessments, and water rents in Camden? The comptroller of the city of Camden is merely an auditor, without authority to collect either taxes or assessments, and he therefore is not the officer referred to in the fourth section of the Martin act. It is not the officer of the city of Camden, whose duty it is to collect taxes, that must collect these readjusted arrearages; therefore the receiver of taxes has no authority under this act. The act distinctly says that the officer who collects assessments shall collect the readjusted taxes and assessments, and the same officer to whom they are voluntarily paid shall be the officer whose duty it shall be to enforce payment on the sale of lands. As has been shown, the officer whose duty it is under the city charter to collect assessments is the city treasurer. Under the Martin act, therefore, it will be the duty of the city treasurer to collect the readjusted taxes, assessments, and water rents, and to sell lands for the same when necessary. This does not deprive the city council of the power, under the seventh section of the city charter, to give the city treasurer the advantage of the city solicitor's aid in conducting such sales. In the principal cities of this state, the great bulk of arrearages consists of unpaid assessments. It is reasonable to presume that it was intended by this legislation, after readjustment, to impose the duty of collecting upon the officer whose province it was to collect assessments, and not upon the officer who receives taxes only. The language of the enactment is express that the officer designated is the one who collects assessments, and if this is not interpreted to mean the city treasurer, the city of Camden is without any officer to perform so important a duty.

Attention has been called to the fact that the thirteenth section of the supplement of 1872 to the city charter gives the city council power to make an agreement with a contractor who does the work of street improvements that he shall collect in his own name from the land-owners the cost of the work. This circumstance cannot affect the construction of the legislation in question. Such contractor is not an officer of the city, and cannot be within the

meaning of the fourth section of the Martin act. The thirteenth section of the Martin act provides that taxes levied after the passage thereof, where the rate does not exceed 3 per centum, and assessments thereafter levied and assessed on lands, which shall remain unpaid for the space of three years from and after the time when due and payable, may, in the discretion and upon the direction of the board or body having charge or control of the finance of the city, be sold as in said section is directed. This leaves it discretionary with the common council in such cases to pursue the mode of collecting and as provided by the Camden city charter, or that prescribed by the thirteenth section of the Martin act. If the latter course is adopted, then there must be a delay of three years as therein provided. If the former method is elected, then the provisions of the charter, as hereinbefore construed, including the seventeenth section, apply and must regulate the proceedings.

In my judgment no infirmity appears in the resolution certified. Costs will not be allowed in either case.

### DICKERSON v. BOWERS and others.

(Court of Chancery of New Jersey. October Term, 1886.)

#### VENDOR AND VENDEE—NOTICE OF UNRECORDED DEED—NOTICE TO ATTORNEY.

Notice to an attorney of a claim of title under an unrecorded deed is notice to his client; and as against that client, claiming relief as a *bona fide* creditor of the grantee without notice, the uncontradicted testimony of a single unimpeached witness that the attorney had such notice is sufficient to impute notice to the client, although the client in his answer under oath denies all notice.

Bill for injunction.

*J. M. Robeson*, for complainant. *W. H. Morrow*, for defendants.

**BIRD, V. C.** In 1879 the complainant joined with her husband in conveying the title to certain lands to her father, and the father at once conveyed them back to the complainant. In 1883 the complainant's husband and his brother, as partners, became indebted to the defendants Greer and Larison, who recovered judgments, issued executions, and levied upon the land included in the above conveyances, as the land of the complainant's husband. They threaten to sell the same. This bill is filed to restrain such sale.

The defendants insist that if there was any such conveyance, the deeds were not recorded, and that they had no notice of them, and that therefore the conveyances are no bar.

The complainant says that, the same day that the deeds were executed and delivered, she caused them to be mailed to the clerk of common pleas of the county, with a request to record the same, and to inform her of the necessary charges therefor, and also promised to remit the amount of such charges on the receipt of such information. She also says that the defendants had actual notice. The deeds reached the clerk's office. They were received by him. He neither recorded them, nor indorsed them in any manner. He says they were "pigeon-holed." He says it was his custom to receive and record all deeds from persons whom he knew to be responsible, whether the fees for recording were paid or not; but, if he did not know the party who deposited the deed for record, he would not record it until the fees had been paid, but would "pigeon-hole it."

I am not satisfied that the deeds were "lodged" with the clerk for record within the true meaning of the act; and yet there are very good grounds for holding that they were so lodged, and that the clerk had no right, without more, to put them in a private place. It is the duty of the clerk to record the deeds lodged with him for that purpose, and it is the duty of the grantee to pay him therefor the fees allowed by law. I do not discover, by the act, that the clerk can refuse to record until the fees are paid. The obligation of the

pective parties is not fixed in order of time by the law. But it would seem reasonable to require the payment of the fees in the first instance, since the statute imposes a penalty on the clerk for any neglect, and subjects him to a liability for all damages which any party may sustain for the non-performance of any duty.

But I think the defendants are barred because they had actual or direct notice through their attorney or agent, Mr. Fisher. Mr. Dickerson, Mr. Fisher, and others were talking together, respecting the liabilities and assets of Dickerson & Co., and Dickerson said to Warren, in the presence of Fisher, that they held the premises in question under lease from his wife; that the place belonged to his wife, and he supposed she would rent it. This was before the judgments were docketed. These statements, thus sworn to by Dickerson, are not questioned in any manner. They are entitled to all the force of an uncontradicted statement by an unimpeached witness.

The answers of the defendants deny all notice in the most positive manner. Although sworn to, this is not enough. The broad rule, giving so much weight to an answer under oath, is not quite universal. I think this case comes within the exception. Where it is the duty of a defendant to know of the existence of a fact, he is charged with knowledge, whether he knows it or not. The court will not allow a defendant to make the defense of ignorance when it was only necessary for him to open his eyes that he might see and be informed. The counsel or attorney of the defendant, Mr. Fisher, was informed, and information to him was knowledge to the defendants. This being apparent to the court, the court seems to be obliged to follow the exception to the general rule. Were it not so, in every case, in order to avoid the effect of notice, the party has only to put forward his agent. In every such case, in order to have all the advantages of an answer under oath, it is only necessary that the principal direct his agent to learn everything, but communicate to his principal nothing, so that he may swear that he is without any notice. The doctrine which should control in such cases is announced in *Smallwood v. Lewin*, 15 N. J. Eq. 60.

I think the injunction should prevail, and will so advise.

#### STATE *ex rel.* STILES v. BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF UNION and another.

(*Supreme Court of New Jersey.* November 8, 1887.)

##### COUNTIES—CREATION AND POWERS—STATUTE CONSTRUED.

The general clause of reference in the act to create the county of Union, (March 19, 1857, Laws 244,) to "all the jurisdiction, powers, rights, etc., which any other county in this state doth or may enjoy," includes and incorporates those general powers and provisions which belong to other counties as a class, and not such as are exclusive and exceptional.

##### SAME—BOARD OF CHOSEN FREEHOLDERS—CUSTODY OF JAILS.

It does not include the special provisions in the act of February 27, 1857, which give the custody of the jails and prisoners in the counties of Essex and Hudson to the board of chosen freeholders.

*Daubman v. Smith*, 47 N. J. Law, 200, cited and followed.

(*Abated by the Court.*)

Application for writ of *quo warranto*. On demurrer to information.

On *quo warranto* information it is shown that the relator was elected sheriff of the county of Union the fourth day of November, 1884, to serve for three years, and has since continued in said office; that as such officer he is entitled to the custody, rule, keeping, and charge of the jail of said county and of the prisoners therein, and that it is his duty so to act; that he has endeavored to discharge such duty, but has been hindered and prevented by the board of chosen freeholders of the county, and Sylvester Cahill, Jr., who, upon his elec-

tion to the office of sheriff, he found in possession of the jail, and who has, on demand, refused to deliver it up to the relator, claiming the right to hold under the appointment and direction of the board of freeholders of the county; that he now holds and exercises the office of jailer, or keeper of said jail, refuses to surrender, and claims the right to hold under resolutions of the board of freeholders adopted the eleventh day of March, 1862, as follows: "Resolved by the board, that the act entitled, 'An act to transfer the charge and keeping of the jail and the custody of the prisoners in the counties of Essex and Hudson from the sheriffs to the board of chosen freeholders, and for the employment of the prisoners, and to regulate the term of service therein;' approved February 27, 1857, be extended to the county of Union under the provisions of the ninth section of said act. Resolved, that this resolution take effect from and after the first of April next;" that the statutes and resolutions are insufficient in law to enable them to hold and execute this office, and the attorney general requires them, in the name of the state, to answer by what warrant they claim the office, and exercise the duties thereof, etc. To this information the board of freeholders filed a demurrer, and issue is formed by a joinder.

*Alward & Parrott*, for relators. *C. D. Ward* and *R. V. Lindabury*, for respondents.

SCUDDER, J., (*after stating the facts as above.*) The question raised by these pleadings is whether the sheriff of the county of Union, or the board of chosen freeholders of that county, is entitled to the custody of the jail. The chosen freeholders cannot hold it under the ninth section of the act of February 27, 1857, relating to the jails and prisoners in the counties of Essex and Hudson, which extended the provisions of that act to the board of freeholders of the several counties of this state. That section was declared to be unconstitutional in *Daubman v. Smith*, 47 N. J. Law, 200, in its attempted application to Camden county, because the object of the extension of its provisions to all the counties of the state was not expressed in the title. Const. art. 4, § 7, par. 4. This decision restricted its operation to the counties of Essex and Hudson, as they only were named in the title of the act, thereby excluding all others. If this section be the only authority under which they have kept the custody of the jail since the resolution of March 11, 1862, they are in no better position than the freeholders of Camden county.

At the time the act of February 27, 1857, was passed the territory now included in the county of Union was a part of the county of Essex. By the act entitled "An act to create the county of Union," approved March 19, 1857, (Laws, 244,) which took effect on the second Monday of April after its passage, this territory was constituted a distinct political division of the state, and set off from the county of Essex. Its powers and privileges are derived from the act which gave it a legal existence. After defining its boundaries in the first section, and declaring that within those boundaries it was thereby erected into a separate county, in the second section, its distinct corporate authority is thus described: It "shall have and enjoy all the jurisdiction, powers, rights, privileges, liberties, and immunities, which any other county in this state doth or may enjoy," etc. The obvious purpose of this declaration is that this county shall be politically equal with the other counties of the state. The word "any" has several meanings according to the subject which it qualifies. In synonyms it is distinguished from "some." Thus, it is said "some" applies to one particular part in distinction from the rest; "any" to every individual part without distinction. The former is altogether restrictive in its sense, the latter is altogether universal and indefinite. Crabb's English Synonyms. This is more noticeable when it is joined with another word, as "anything," "anywise." Webster says, "although the word 'any' is formed from 'one,' it often refers to many." The true interpretation,

there is a general clause of reference to other statutory powers, will be in *Reo v. Justices of Surrey*, 2 Term R. 504, "that all the general powers and provisions given and made in acts *in pari materia* shall be fully incorporated in this, but that such provisions as are always contained in special provisions shall not." Potter's Dwar. St. 218.

Among the general powers given by statute is this, "that the sheriff of every county in this state shall have the custody, keeping, and charge of the jail or jails within such county, and of all prisoners in such jail or jails," etc. Rev. Stat. 1101, § 14. The enactment "that in the counties of Essex and Hudson the custody, rule, keeping, and charge of the jails in such counties, and the prisoners in such jails, shall not be in the respective sheriffs of said counties, but in each of said counties, shall be in the board of chosen freeholders of that county, and such jailer as they shall appoint for that purpose," etc., is excepted, and a special provision applicable to these counties. The general clause of reference in the act to create the county of Union, to all the jurisdiction, powers, rights, etc., which any other county in this state doth or may enjoy, includes and incorporates those general powers and provisions which belong to other counties as a class, and not such as are exclusive and exceptional. A reading of the other sections of the act will make it more apparent that the intention of the legislature was to place the county of Union among the counties having general powers and privileges under conditions that are common to all, and not with those having peculiar provisions which were supposed at the time to be better fitted for their need where large cities and a greater population made a different control of the jails of the county advisable or necessary.

Recent legislation has authorized the board of chosen freeholders in the several counties of this state to assume and exercise such control over the county jails, but this will not affect the result of this information, as by the eighth section of this statute "no appointment of any jail warden as aforesaid shall affect in any county during the term of office of any sheriff now in office in said county." Laws 1887, p. 42. The relator, being in office when the statute was approved, will not be affected by such appointment, if any such appointment should be made.

The judgment will be for the relator on the demurrer to this information, with costs of prosecution.

#### OEHME v. RUCKLEHAUS.

(Supreme Court of New Jersey. November 8, 1887.)

**QUESTION—POWER OF COURT TO APPOINT RECEIVER PENDING.**

This court has no power, under section 286 of the practice act, to appoint a receiver to take charge of the rents of the premises pending an action of ejectment. (Held by the Court.)

**EJECTMENT.** On application for a receiver.

*Joseph Coult*, for defendant. *Cortlandt Parker*, for plaintiff.

**MR. JUSTICE SYCKEL, J.** The question in this case arises upon an application to the court to appoint a receiver to take charge of the rents of lands pending an action of ejectment. The motion is based upon the 286th section of the practice act, (Revision, 893,) which provides that in any action in which the title to real estate, or to goods and chattels, is in controversy, the court, or judge thereof, may make an order for the protection of the property in controversy from waste, destruction, or removal beyond the jurisdiction of the court, upon satisfactory proof being made of the necessity for such order, and may enforce such order by an attachment for contempt.

The words of this statute which apply to real estate are those which authorize protection from waste or destruction. The words "removal beyond the jurisdiction" are not applicable to real estate. *v. 11A. NO. 2—10*

jurisdiction of the court" cannot apply to land. No authority has been cited and none is known to the court, which holds that the appropriation of the rent of real estate is within the meaning of the words "waste or destruction of real estate." The law courts exercised the right to prohibit waste in ejectment suits, before the passage of this statute, but the right of a law court to take charge of the real estate in controversy, though the intervention of a receiver has never been recognized in our practice. It would of necessity imply the right to exercise equitable powers, which do not inhere in the common-law courts, and which, in my judgment, the legislation referred to has not bestowed.

The motion must be denied, but without costs.

### WARNE v. OBERLY.

(*Supreme Court of New Jersey. November 9, 1887.*)

#### ANIMALS—TRESPASSING—DAMAGES—APPRAISEMENT.

The damages which may be appraised and certified under section 2 of the "Act concerning trespasses by swine" (Revision, 20) are only such as have been occasioned by the swine at the time of the trespass for which they were distrained and impounded, and such as are visible to the appraisers, and can be determined without the intervention of proof by witnesses, etc.

(*Syllabus by the Court.*)

On *certiorari* from appraisement of freeholders for damages done by swine. *Martin Wyckoff*, for prosecutor. *M. B. Taylor*, for defendant.

MAGIE, J. The *certiorari* allowed to prosecutor has brought before the court a certificate and appraisement of damages made by two freeholders of Warren county, chosen by John T. Oberly, the defendant, to appraise damages done to him by swine owned by the prosecutor. Prosecutor has assigned many reasons against the validity of this certificate. Two of them having on consideration, been deemed to be fatal to its validity, the remainder has not been considered.

The proceeding purports to have been conducted under the provisions of section 2 of the "Act concerning trespasses by swine," of March 15, 1793 (Revision, 20.) That section provides that, if any person shall find swine trespassing on lands for which he pays taxes, he may put them in a yard or inclosure, and give notice to the owner, if easily to be found, who shall pay double damages to the person injured, to be appraised and certified in writing by two reputable freeholders. \* \* \* These provisions seem designed to regulate and make more effectual the common-law rights of distress *damnum feasant* when the trespass is done by swine. But a distraint *damnum feasant* could only be justified for the injury done during the trespass when the distraint was made. Previous trespasses, though by the same animals, could not be taken into account, nor could the animals be held therefor. Bradburn v. Distresses, 140. The act in question does not at all extend the common-law right in this respect, and is plainly to be construed as justifying the distraint only for the damages occasioned at the time when the seizure was effected.

The case shows that these swine had previously trespassed upon Oberly's land, and had not been distrained, but had returned to their owner. The appraisers included the damages resulting from these previous trespasses in their certificate before us, with the damages resulting from the trespass on the occasion of their being impounded. In so doing they proceeded on erroneous principles, and their certificate cannot be sustained.

The particular injury which Oberly claimed had been done him by the swine resulted from their devouring the apples which had dropped from the trees in his orchard in which they had trespassed. The appraisers provided for this act are not authorized to summon, swear, or examine witnesses. It

perfectly obvious that the intent was to limit their adjudication of damages to those which were visible, and could be seen and determined by them without the intervention of proof. But it is clear that in the case before us the appraisers did not limit their adjudication to the injuries which were visible, but took the statements of Oberly, the person who claimed to have been injured, (and that without oath,) and thereon adjudged damages for injuries not visible to them, and which they could only ascertain to have resulted by relying on those statements. They erred in thus proceeding.

For these reasons the certificate and appraisal must be vacated and set aside, with costs.

STATE (MOUNT PLEASANT CEMETERY CO., Prosecutor) v. MAYOR, ETC.,  
OF NEWARK.

(*Supreme Court of New Jersey. November 8, 1887.*)

1. TAXATION—EXEMPTION OF CEMETERY PROPERTY—POWER TO REPEAL.

The charter of the relator provides "that the premises, burial lots, vaults, monuments, and other erections and fixtures of said cemetery, shall not be subject to any assessments, taxes, or fines, unless otherwise ordered by the board of chosen freeholders of the county of Essex." *Held*, that this provision has none of the characteristics of a contract with the state. That, at most, it is an attempted delegation by the legislature to a subordinate public body of the power to tax the cemetery; and, if it is not void as a delegation of power, it is unquestionably repealable.

2. SAME—REPEAL OF EXEMPTION.

The act of April 4, 1873, p. 629, operates as a repealer of any exemption which might exist.

3. SAME—ERRONEOUS ASSESSMENT—CORRECTION.

An assessment laid upon an erroneous principle will be corrected under the act of March 23, 1881.

(*Syllabus by the Court.*)

On *certiorari* from report of commissioners.

*Guild & Lum*, for plaintiff. *Joseph Coult*, for defendant.

VAN SYCKEL, J. The legality of the assessment against prosecutor for widening and opening Belleville avenue is controverted in this case. The prosecutor claims immunity under the provisions of its charter. The sixth section of the original charter, approved January 24, 1884, enacts "that the premises, burial lots, vaults, monuments, and other erections and fixtures of said cemetery, shall not be subject to any assessments, taxes, or fines, unless otherwise ordered by the board of chosen freeholders of the county of Essex." To the foregoing act a supplement was passed, February 9, 1861, which recites and provides: "Whereas, by the said act, it was enacted that the premises, burial lots, vaults, monuments, and other erections and fixtures of said cemetery, should not be subject to any assessments, taxes, or fines, unless otherwise ordered by the board of chosen freeholders of Essex; and whereas, the said cemetery company are endeavoring to create a fund from the surplus proceeds of the sale of the lots of said cemetery to provide means to preserve and maintain its inclosures and buildings, and to pay the expenses for a proper care of the same; and whereas, doubts have arisen whether by said act such surplus proceeds are exempt from taxes and assessments; therefore, to remove such doubts, be it enacted that the property, assets, and effects of the said cemetery company, which have accrued or may accrue or be derived from the sale of lots in said cemetery, are hereby exempted from all taxes and assessments, and that the said surplus proceeds shall be held and used for the purposes above mentioned."

These legislative acts have been accepted by the corporators, and are claimed by them to have the force of irrevocable contracts. If this contention pre-

valls, the assessment was unauthorized. The words "taxes" and "assessments" are not synonymous; they exempt property from assessments for benefits as well as from taxes for general revenue for public use. *State v. Newark*, 86 N. J. Law, 478.

The extraordinary character of contracts by which the state disables itself, *pro tanto*, to exercise its sovereign power, has constrained the courts to hold that the legislature will not be presumed to have irrevocably surrendered the right of taxation, unless no other rational conclusion can be reached. The decided tendency of our own courts in this direction is illustrated in the cases following: *State v. Parker*, 32 N. J. Law, 426; *Little v. Bowers*, 46 N. J. Law, 300.

In 1833 the legislature of Pennsylvania enacted that "the real property, including ground rents, now belonging and payable to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes." In 1851 the legislature passed an act repealing this exemption, and subjecting the hospital property to taxation. The supreme court of Pennsylvania upheld this legislation, and that judgment was affirmed on appeal to the supreme court of the United States. The view was taken that the legislative concession was spontaneous, requiring no service, duty, or other remunerative condition, and therefore the essential element of a contract was absent. *Christ Church v. Philadelphia*, 24 How. 300.

While it has been authoritatively determined that the charter of a private corporation is to be regarded as a contract between the corporation on the one hand, and the state on the other, and that whatever stipulations are contained therein, which are intended for the benefit of the corporators, and operate as an inducement to them to accept the charter, are promises by the state based on valid and sufficient consideration, and not subject to recall, yet the distinction seems to be well recognized that an exemption granted from motives of state policy merely, and where the state and its citizens do not meet on a basis of bargain and consideration, may be terminated at the legislative will. *Cooley*, Tax'n, 69; *Brainard v. Town of Colchester*, 31 Conn. 407; *Tucker v. Ferguson*, 22 Wall. 527; *West Wisconsin Road v. Supervisors*, 93 U. S. 595. Judge Cooley, in his work on Taxation, p. 53, refers to these cases with approval.

In *State v. Parker*, (before cited,) it was deemed of controlling importance that the elements of a contract were absent, that the grant was exclusively for the benefit of stockholders, no consideration having been reserved to the state, nor benefit conferred upon it, and no duty to the public imposed upon the company, or assumed by it.

The grant in the case certified is marked by the lack of all the qualities of a contract which distinguished the cases referred to. The scheme created by the act of 1844 is a private one, empowering the corporators to purchase and hold real estate, to lay it out and divide it into sublots, and to sell and dispose of it, and take the proceeds of sale to their own proper use and behoof. Laws 1844, p. 19. No duty to the public is enjoined on the corporate body, and no public benefit conferred by the exercise of the franchise. It is not necessary, however, to put the decision on this ground. There is a feature in this case which, in my judgment, deprives it of all claim to be treated as a contract with the state. The sixth section of the act of 1844 does not create a perpetual exemption, or one at the will of the company, but provides that the burden of taxation or assessment shall not be imposed unless ordered by the board of freeholders of Essex. The board of freeholders is one of the public corporations of the state, exercising certain powers of government. It is wholly without the control of the relator, and, in respect to taxation, is antagonistic in interest to it. In the most favorable view that can be taken of this language on behalf of the company, it is a delegation by the legislature to a sub-

-ordinate public body of the power to tax the prosecutor. It has none of the characteristics of an agreement or compact with the corporation, and, as a delegation of the taxing power, it is, if not void, unquestionably repealable. The supplement to the prosecutor's charter, passed in 1861, exonerating surplus proceeds, is subject to the power retained by the general corporation act of 1846, § 6, to alter or repeal the charter of any corporation thereafter granted.

Has the relator been deprived of any immunity which may have existed, by subsequent legislation? An act approved April 4, 1873, (P. L. 629,) provides, "that all the land and appurtenances in the city of Newark, owned or held by, or vested in, or which may hereafter be owned or held by or vested in, any society or corporation now existing in said city, under whatever charter or act the same is owned or held or vested, shall be and be deemed to be subject to and liable for any and all assessments for street openings, and all other local improvements in said city of Newark, as fully and the same as property owned by individuals in the said city, any exemption or provision contained in the charter of said society or corporation, or in any supplement thereto, to the contrary notwithstanding." This language is very comprehensive and clear, and leaves no doubt whatever of the legislative intent to sweep away the immunity claimed. The ordinance for widening was passed June 8, 1872. The first reassessment was made after April 4, 1873. This assessment was set aside, and the assessment now complained of was made in July, 1886. It is not, therefore, necessary to determine whether the act of 1873 shall have a retroactive effect. The only remaining question is whether the assessment has been imposed upon a correct legal rule. The assessment was made upon all the lands of the cemetery fronting on Belleville avenue, to the depth of 100 feet. The assessed portion, excepting 11 lots 26 feet by 13 feet each, had, previously to the assessment, been sold for burial lots, and in most of them interments had been made. The charter provides for the conveyance of burial lots to the purchaser in fee. Under the authority of *Cemetery Co. v. Buckmaster*, 49 N. J. Law, 449, 9 Atl. Rep. 591, the fee with the right to possession as against the cemetery company passes by such conveyance to the purchaser.

The assessment in this case was made upon the entire strip of 100 feet, without regard to the fact that the larger part of it had been conveyed away; and the burden was imposed to the same extent as if the lands were appropriated to residence or business purposes. In this respect I think the commissioners in making this assessment applied an incorrect legal principle. The only authority which the cemetery company could exercise over the portion conveyed was the right to enter upon it for the purpose of keeping the grounds in repair. It had no other beneficial interest in it. As to that portion the widening of the avenue could confer upon the relator no appreciable benefit. As to the balance of the assessed portion, the company having the unrestrained power to sell and dispose of it for their own advantage, the fact that it is assessed at the same rate as other lands does not show that any legal rule has been misapplied. In respect to the portion of the assessed strip which had been conveyed for burial lots, the assessment is erroneous and illegal, and therefore the assessment must be corrected in that particular. Application may be made under the existing law for that purpose. *City of Elizabeth v. Meeker*, 45 N. J. Law, 157.

BROWN, Sheriff, v. DUNN and others.

(*Supreme Court of New Jersey*. November 9, 1887.)

ASSIGNMENT—EQUITABLE—OF PART OF JUDGMENT—ENFORCEMENT.

An equitable assignment of a definite part of the moneys to be raised on an execution upon a judgment at law will be protected and given effect to by the court out of which the execution issued, and if the sheriff who has raised the money on

such execution refuses to pay the same into court, upon due notice on behalf of such assignees, the court may compel him to do so, to enable the court to protect and secure the rights of the assignees.

(Syllabus by the Court.)

*Certiorari*, bringing up orders made in the Essex county circuit court. *Mr. Hutchinson*, for prosecutor. *Mr. Kernan*, for defendants.

MAGIE, J. On January 14, 1887, the circuit court of Essex granted a rule requiring the sheriff of that county to show cause on January 22, 1887, why he should not be ordered to pay into court \$701.64, with interest from August 20, 1886, and gave liberty to the parties to take affidavits to be used on the hearing of the rule. On January 22, 1887, the rule was brought to hearing, and was made absolute, and Brown, the sheriff, was ordered to pay to the clerk of the court \$701.64, with interest from August 20, 1886. On April 22, 1887, the same court granted a rule requiring the same sheriff to show cause on May 7th following why he should not be attached for contempt in not obeying the last above described rule. A *certiorari* was thereafter allowed, which has brought before this court the above-stated rules; and the right of the circuit court to make the same is now contested here on behalf of the sheriff. The rule to show cause was allowed, and afterwards made absolute, upon the record and affidavits, whereby the following facts appeared:

On April 27, 1886, there was an action pending in the supreme court wherein Frances C. Dunn was plaintiff, and John E. Dunn and others, claimed to be surviving members of the firm known as William Dunn, were defendants. In that action Edward H. Murphy was the plaintiff's attorney, and John V. Kernan was the attorney of the defendants. The latter was also the attorney of certain creditors of the said firm of William Dunn, (of which John E. Dunn was in fact the surviving partner,) and of John E. Dunn; that an agreement was made between said attorneys to the effect that John E. Dunn should confess judgment to Frances C. Dunn for \$4,500; that the latter should discontinue the action then pending in the supreme court, and should release from all claims the defendants therein other than said John E. Dunn; and that Frances C. Dunn should accept \$2,500 in full for her claim against him, and whatever was realized on the confessed judgment above that sum, the creditors of John E. Dunn, represented by Kernan, were to have the benefit of. Thereupon John E. Dunn executed a bond and warrant to confess judgment to Frances C. Dunn for \$4,500, which were delivered to Murphy, her attorney, who at the same time delivered to Kernan a written stipulation, headed "*Dunn v. Dunn*," signed by Frances C. Dunn, and witnessed by Murphy, whereby she agreed to accept \$2,500 in full for her claim, and to renounce the benefit of the balance of the money which might come to her by reason of the confessed judgment in favor of the persons named, who were represented by Kernan, to whom she agreed to pay or cause to be paid the excess received over \$2,500.

Judgment was entered upon the bond and warrant on the day of this agreement, April 27, 1886, and an execution was issued thereon, and delivered to Brown, the sheriff of Essex. Under that writ there has come to Brown's hands \$3,201.64. Before the sheriff had paid over that sum, Kernan, in behalf of the creditors of John E. Dunn whom he represented, gave notice to the sheriff not to pay to Frances C. Dunn or her attorney any money except \$2,500, but requiring him to pay what had been raised above that sum into court. There was \$701.64 raised over the \$2,500, and it came to the hands of the sheriff; but he, being indemnified, refused to pay the same into court, but did pay it to Murphy, the attorney of Frances C. Dunn.

If the notice thus given to the sheriff emanated from persons who had an interest in the proceeds raised on the execution, which the court would take notice of and protect, the payment of the money, not into court, but to the

plaintiff, was made at the peril of the sheriff, and at the risk of being compelled to pay that sum into court. *Wandling v. Thompson*, 41 N. J. Law, 142. The persons who gave the notice claimed to have an interest in all the proceeds of the execution above the sum of \$2,500, by virtue of the stipulation before mentioned. If they did thereby acquire an interest which the court below ought to have recognized and preserved, then the sheriff was at fault in refusing to place the proceeds within the possession of the court.

It is obvious that the stipulations did not confer on the claimants any right which could be enforced by an action at law. The contention is that it operated as an equitable assignment of so much of the proceeds to be raised on the execution as exceeded \$2,500. In my judgment that is the effect to be accorded to that instrument. By its terms the plaintiff renounced the benefit of all the balance of the proceeds in favor of the claimants, and stipulated to cause to be paid to them all moneys received over and above the sum of \$2,500 which she agreed to receive in full for her claim. This was a plain appropriation, out of a specific fund afterwards to come into existence, of an amount then capable of being ascertained, to the claimants, and constituted an assignment of an interest therein which will be recognized and protected in any court dealing with the subject-matter on equitable principles. *Superintendent v. Heath*, 15 N. J. Eq. 22; *Bower v. Blue Stone Co.*, 30 N. J. Eq. 171, 340; *Shannon v. Hoboken*, 37 N. J. Eq. 128, 318; *Kirtland v. Moore*, 40 N. J. Eq. 106. 2 Atl. Rep. 269.

Courts of law, by virtue of their control over their own proceedings, judgments, and process, determine all conflicting claims to the management of suits, the control of judgments, and the disposition of proceeds raised thereunder. In making such determinations it is well settled that they administer equity, and deal with such contests on equitable principles. Equitable assignments are therefore properly recognized and protected as a court of equity would do. *Stebbins v. Walker*, 14 N. J. Law, 90; *Cox v. Marlatt*, 36 N. J. Law, 389; *Belton v. Gibbon*, 12 N. J. Law, 77; *Sloan v. Sommers*, 14 N. J. Law, 509; *Terney v. Wilson*, 45 N. J. Law, 282.

The court below correctly construed the stipulation, and, having found an equitable interest in the proceeds of the execution to be in the claimants, properly proceeded to make order to compel the sheriff to place so much of the proceeds as was affected thereby where the court could give effect to the claim. The orders brought up should be affirmed, with costs.

#### STATE *ex rel.* SALMON v. HAYNES, Mayor.

(*Supreme Court of New Jersey.* November 9, 1887.)

##### 1. MUNICIPAL CORPORATIONS—COUNCIL—ELECTION—CONTEST.

The common council of Newark, being the sole judges of the election of its members, may, upon a contest respecting the election of one of its members, appoint a committee to take testimony, and to report the facts and the evidence to the council.

##### 2. SAME—CONTEST—EVIDENCE—EMPLOYMENT OF STENOGRAPHER.

It may also authorize the committee to employ a stenographer for the purpose of taking such testimony; and if the committee employ the stenographer before the resolution giving such authority becomes effective, the common council may subsequently ratify such employment.

##### 3. SAME—RESOLUTION OVER VETO—DUTY OF MAYOR TO SIGN—MANDAMUS.

When the common council pass, over the veto of the mayor, a resolution appropriating money to pay a person so employed, it is the duty of the mayor to countersign the warrant drawn for such appropriation, and that duty will, on his refusal to perform it, be enforced by *mandamus*.

(*Syllabus by the Court.*)

On motion for *mandamus*.

Mr. Cowitt, for relator. S. J. McDonald, for the Mayor

MAGIE, J. Relator seeks a *mandamus* requiring the mayor of Newark to affix his signature to a warrant drawn by the proper officers of the city upon the city treasury in favor of relator for \$73.50. By the agreement of counsel it appears that this warrant was drawn upon the authority of the following resolution of the common council, viz.: "Resolved, that the sum of seventy-three dollars and fifty cents be and the same is hereby appropriated to A. B. C. Salmon, in payment of bill for services in the Seventh ward contested election matter,"—which resolution was originally passed March 4, 1887, was vetoed by the mayor on March 18, 1887, and on the next regular meeting was unanimously passed by the council over the veto; that the warrant was afterwards presented to the mayor, and his signature thereto duly requested, which he refused.

In *Ahrens v. Fiedler*, 43 N. J. Law, 400, the charter and ordinances of Newark were examined, and it was determined that whenever an appropriation of money from the city treasury had been duly made, the duty of the mayor in signing a warrant to draw the money was a ministerial one which would, in any proper case, be enforced by *mandamus*. It was also determined that when the common council had, by resolution, appropriated money for a lawful purpose and within the authority accorded by the charter, and their resolution had been vetoed by the mayor and afterwards so passed over the veto as to become effective, the mayor could not nullify it by refusing to sign the warrant required to draw the appropriation from the treasury.

The contention on behalf of the mayor in this case is that the resolution appropriating money to relator was without authority of law.

The following facts material to the question involved are disclosed by the agreement of counsel: The common council had received from William E. O'Connor a petition and protest, whereby he claimed to have been elected as a member of that body from the Seventh ward, and contested the election of Michael McLaughlin, who had been admitted as a member upon the face of the returns. On January 4, 1887, the petition and protest were referred to a special committee. On January 7, 1887, that committee reported that they had not completed the examination of the case, and asked the passage of a resolution authorizing them, among other things, to take the testimony of witnesses, and report the facts as found by them and the testimony taken by them in detail, and to expend not over \$100 for stenographer, copyist, etc. This resolution was passed and sent to the mayor. It was neither signed by him nor was it vetoed. It was filed by him after the expiration of 10 days, and so, by the provisions of the charter, became a valid resolution on January 19, 1887. Relator had been previously employed by the committee and rendered the services for which he seeks payment before January 14, 1887, when the committee reported the facts found, the contestant abandoned his contest, and the sitting member was thereupon declared entitled to his seat. Relator's bill was presented to the finance committee, who reported it to the common council, recommending the adoption of the resolution first above set forth appropriating the sum demanded.

The mayor first contends that the common council had no authority to appoint the committee or to empower them to do the act comprised in the resolution which authorized them to expend money for a stenographer. The common council, by the charter, is made the sole judge of the election, returns, and qualifications of its own members. They were thus required to adjudicate upon the contest raised by O'Connor's petition. The duty of making that adjudication could not be delegated to any committee. But that is not what the common council did in this case. The duty imposed on the committee was simply to take testimony and to report the facts they found with the testimony taken. This is the well-known course of proceeding in every body having power to judge of the election of its own members, in case an election is contested. No other course seems practicable, and no injury is thereby

done to the contestants, for the adjudication is made upon the facts and testimony presented by the whole body. In my judgment, the authority to appoint the committee and to direct it to do the acts required by the resolution was clear.

It is next urged that the committee had acquired no authority to employ relator when his services were rendered, because the resolution had not then become law. To this contention relator's counsel replies by insisting that the resolution in question, being designed to aid the common council in the performance of a duty as judges of the right to office of one of their number, —a duty in which the mayor had no part,—was not required to be sent to the mayor for approval, but became effective as soon as passed. It is to be noted that the resolution does not give authority to employ a stenographer, but only to expend money for that purpose. Whatever may be said in favor of the council's right to take such steps as are necessary for the performance of their judicial duty without seeking the mayor's concurrence, yet every appropriation of money is required to be by resolution or ordinance, and neither can take effect until it has been presented to the mayor and approved by him, or vetoed and passed over his veto, or filed without either approval or veto. But it is unnecessary to decide whether the mayor's approval of this resolution was required. The common council had ample authority to employ a stenographer by resolution duly adopted. What it had authority thus to do, it could in like manner ratify. This the case shows the council did, by appropriating money to pay for the services of the person employed, and by passing the resolution of appropriation over the mayor's veto.

Moreover, the services of relator were actually rendered and received by the city. The common council have recognized the obligation of the city, and duly appropriated money to discharge it. The resistance of the mayor, evidenced by his veto, has been overcome in the mode fixed by the charter, so that the appropriation has been made by the city. Nothing remains but to draw the money from the treasury. The case therefore is identical with that disposed of in *Ahrens v. Fiedler*, *ubi supra*.

For these reasons, a *mandamus* should issue as prayed for, and since all the facts are before the court by the agreement of counsel, the writ should be a peremptory one.

### SCHULLING v. LINTNER.

(Court of Chancery of New Jersey. November 5, 1887.)

#### 1. EQUITY—SURPRISE—RELIEF AGAINST FORECLOSURE SALE.

Defendant's property was sold under an execution regularly issued upon a decree of foreclosure. Defendant filed her petition in chancery, asking to have the sale set aside on the ground of surprise. The facts were that defendant was a German woman, understanding little English; that she lived upon the property, and did not understand the nature of the proceedings against her; that she thought if the house was to be sold that a notice of the sale would be posted on the house; that she knew nothing of the decree or sale until the property had been sold; that she then tendered to the sheriff the amount of the execution, with costs, and stood ready to pay the same at any time. *Held*, that upon these facts a court of equity would grant relief.

#### 2. MORTGAGES—FORECLOSURE—FAILURE TO SELL IN PARCELS—SETTING ASIDE.

In a petition in chancery to set aside a sheriff's sale, it was alleged that the land was not sold in parcels, according to law and the practice in such cases, and this was admitted by the purchaser. *Held* that, under such circumstances, the sale would not be confirmed.

Bill to foreclose. On petition to set aside sale.

*John F. Harned*, for petitioner. *Alfred Hugg*, for defendant.

**BIRD, V. C.** The petition was filed in a foreclosure suit. In that suit the sheriff made sale upon an execution regularly issued upon a decree directing

such sale. Mrs. Lintner now comes in by her petition and asks that that sale be set aside. Her ground for this is surprise. She is a German woman, and understands but very little of the English language. She lived upon the property which was covered by the mortgage. Process of subpoena was served upon her regularly. She made some inquiry respecting it, but gave the matter no further attention until after the sale, not knowing that a decree had gone against her or that her property was advertised. Learning of the fact immediately after the sale, she made inquiries and ascertained the situation. The property sold for \$1,380, when from her statement, and from the rents and profits which she receives, it is worth \$2,000. She has raised the amount due upon the execution, together with costs, and tendered it to the sheriff, and stands ready to pay the same. Is she entitled to relief? I think she is. It has been urged that the sale was open and fair, and that if the property did not bring the full price it brought a fair price. It is also urged that sales of this character should not be interfered with by discouraging bidders by depriving them of the benefit of bids which they have fairly obtained. These considerations are always taken into account, and are conceded to be of great importance. But the rights of property under such circumstances are equally important. It is very difficult for a court of equity to make up its mind, under such circumstances, to deprive an individual of her estate, when by refusing to do so it takes nothing from another except the right which that other has acquired by a bid at auction. This is not mere sentiment; it is clear justice and equity. Mrs. L. is at the age of 72 years, and swears that she expected the notice of sale would be posted on her house, and for this she waited. I think the case is controlled by the case of *Kloeping v. Stellmacher*, 21 N. J. Eq. 328. As between the parties before me, the merits are with Mrs. Lintner.

Besides this important question, another is presented which raises an insurmountable difficulty in the way of confirming this report. The petitioner insists that it was the duty of the sheriff to sell the land in parcels. The force of this is not resisted by the counsel of the purchaser. I must conclude, from what was admitted before me, that this was a serious mistake upon the part of the officer, and that under the practice and the decisions heretofore rendered, upon this ground, if no other, the sale cannot be confirmed. *Cox v. Halsted*, 2 N. J. Eq. 311; *Merwin v. Smith*, Id. 182; *Johnson v. Garrett*, 16 N. J. Eq. 31.

I will advise that the sale be set aside, and that the property be again advertised and sold in parcels, unless the amount due, including principal, interest, and costs on the complainant's decree, be paid within five days after the signing of this order. Such order will be without costs.

#### STATE (METROPOLITAN LIFE INS. CO., Prosecutor) v. SCHAFFER.

(Supreme Court of New Jersey. November 8, 1887.)

##### 1. INSURANCE—LIFE—PAYMENT TO PERSON PRODUCING POLICY.

Suit on a policy of life insurance, under the system known as "Industrial Insurance." Schaffer, the plaintiff below, is the beneficiary named in the written application, which was made part of the policy. The fifth condition of the policy provided that "the production by the company of this policy, and a receipt for the sum assured, signed by any person furnishing proof satisfactory to the company that he or she is the beneficiary, or an executor or administrator, husband or wife, or relative by blood, or connection by marriage, of the assured, shall be conclusive evidence that such sum has been paid and received by the person or persons lawfully entitled to the same, and that all claims and demands upon said company under this policy have been fully satisfied." *Held*, that payment to the daughter of the insured, who produced the policy and the premium receipt book, and her receipt, constituted a complete defense to the company against any claim of the beneficiary named in the application.

**2. SAME—APPOINTMENT OF PERSON TO RECEIVE PAYMENT.**

If the beneficiary had a vested interest in the policy, the fifth condition operated as an appointment by the parties to the contract of insurance of various persons, any of whom were authorized to receive payment of the sum agreed to be paid on the death of the insured.

(*Syllabus by the Court.*)

On *certiorari* from common pleas, Essex county; KIRKPATRICK, JOHNSON, and LEDWITH, Judges, affirming judgment of Second district court of Newark, HENRY, Judge.

J. A. Beecher and Thos. N. McCarter, for plaintiff. Theo. L. Currie, for defendant.

VAN SYCKEL, J. This action is brought upon a policy of life insurance issued under a system known as "Industrial Insurance." The policy was issued in pursuance of a written application by the insured. The plaintiff below is the person named in answer to question 9 in said application. "Question. Name and relation of person to whom benefit is to be paid? Answer. [Name] Frederick Schaffer; [relation] son."

The policy refers to the said application, and makes it part of the contract, and recites that in consideration of the payment of the premium agreed upon, and of a like weekly premium to be paid on every subsequent Monday during the life of the insured, the said company doth agree to pay to the person or persons designated in condition 5 of said policy, upon receipt of proofs satisfactory to said company of the death of said insured, the sum of money stipulated to be paid; and that said policy is issued and accepted upon the following conditions therein set forth, the fifth of which is as follows: "The production by the company of this policy, and of a receipt for the sum assured, signed by any person furnishing proof satisfactory to the company that he or she is the beneficiary, or an executor or administrator, husband or wife, or relative by blood, or connection by marriage, of the assured, shall be conclusive evidence that such sum has been paid to and received by the person or persons lawfully entitled to the same, and that all claims and demands upon said company under this policy have been fully satisfied." The fourth condition provides that the policy and receipt-book must be surrendered to the company before any payment can be claimed.

The insured died on the fourteenth of August, 1885. On the twenty-fourth of August, 1885, Annie Hageman, the daughter of the assured, produced to the company the policy, and the premium receipt-book, and the company paid her the amount of the insurance, (\$93,) and thereupon she signed a receipt releasing and discharging the company, and at the same time surrendered the policy and receipt-book. It does not appear that the plaintiff ever had possession either of the policy or the premium receipt-book, or that he ever knew of the existence of the policy, until after the death of the assured. The company, in its defense below, produced the policy, the premium receipt-book, and the receipt of Annie Hageman, and made proof of the facts set forth.

The authorities are conflicting, but there are a number of well-considered cases which hold that where a person who has obtained an insurance upon his life, for the benefit of children or others, keeps the instrument himself, and alone pays the premiums, the beneficiary has no vested rights in the policy, and the insurer has the right to surrender it, and take out a new policy payable to other beneficiaries. In some cases the distinction is taken that where, after the policy is taken out, it is delivered to the beneficiary, or to some one in trust for him, the right to it thereby becomes vested in the beneficiary. This was the condition in *Fortescue v. Barnett*, 3 Mylne & K. 36. See *Garner v. Insurance Co.*, 32 Alb. Law J. 91; *Insurance Co. v. Stevens*, 19 Fed. Rep. 671; *Barton v. Insurance Co.*, 3 Atl. Rep. 627.

In *Landrum v. Knowles*, 22 N. J. Eq. 594, the insurance was stated in the policy to be for the sole use of the children of the policy-holder; and it was held by the chief justice, in delivering the opinion of the court of appeals, that, after the death of the insured, this was as complete a transfer as that to the trustees in *Fortescue v. Barnett*, *supra*. But here it will be seen that there is no such condition or provision in the policy, and it does not appear how the beneficiary named in the application could have any equity to require the insured to keep the policy alive, or to control it in any way during the life of the insured.

All the cases agree that the contract in the policy must govern. There is no contract or agreement to pay to the beneficiary named in the application. The contract in the policy expressly is to pay to the person or persons named in condition 5 of the policy before recited, and in the manner therein specified. Conceding that the beneficiary named in the application has a vested interest in the policy, he holds it in accordance with and subject to the conditions of the contract contained in the policy. Condition 5 of the policy must in that view operate as an appointment, both by the assured and the beneficiary, of persons, any of whom are authorized to receive payment of the sum agreed to be paid. The company has paid in strict accordance with that condition, and is thereby discharged, under its express terms, from further liability. The purpose and object of this kind of insurance seem to require the payment to be made in that way, and it should, in good policy, be upheld.

Unlike the ordinary life insurance, small sums are provided by these industrial policies, to be paid at once on proof of death and surrender of policy. Suit may be brought on it in ten days thereafter, and must be brought within six months from the date of the death of the assured. The terms and manner of the insurance contemplate speedy payment to the family of the assured, immediately after his death, to provide a burial fund, or to meet the expenses which in such an emergency must be incurred.

In my opinion the judgment below should be reversed, with costs.

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#### MCCARTIN v. ADMINISTRATOR OF TRAPHAGEN, Deceased, and others.

(Court of Chancery of New Jersey. November 16, 1887.)

##### 1. EXECUTORS AND ADMINISTRATORS—ACTION AGAINST—HEIR PROPER PARTY.

An heir at law is a proper, though not a necessary, party to a suit against the legal representative of his ancestor, to recover loss sustained by a breach of trust of the ancestor as executor.

##### 2. WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENT.

In a suit in equity against the legal representative of a decedent, a person who is made a defendant, but whose rights and interests are the same as those of the complainant, and who is a complainant in fact, though not in form, is not competent as a witness to give testimony as to transactions with the decedent, or statements made by him.

##### 3. SAME—ADVERSE PARTY AS WITNESS.

A complainant has a right to call a defendant, who is in fact an adverse party to him, as his witness.

##### 4. TRUSTS—BREACH—ORDER OF LIABILITY OF TRUSTEES.

Where two trustees have been guilty of a breach of trust, the court may determine the order in which they shall stand answerable for the loss, by making one primarily liable, and the other secondarily.

##### 5. EQUITY—LACHES.

Laches is a good defense in equity.

##### 6. SAME.

He who delays asserting his rights until the proofs respecting the transaction out of which he claims his rights arose are so indeterminate and obscure that it is impossible for the court to see whether what seems to be justice to him is not injustice to his adversary, has no right to relief.

(Syllabus by the Court.)

On final hearing on bill, answers, and proofs taken in open court.

*Gilbert Collins*, for complainant. *John N. Voorhees*, for administrator of Henry M. Traphagen, deceased. *A. O. Garretson*, for Phebe A. Watson. *John Linn*, for William C. Traphagen.

**VAN FLEET, V. C.** The complainant is the youngest child of Myles McCartin, deceased. Mr. McCartin died testate in November, 1859. He left a widow and five children. By his will he directed that the one-third part of his estate, both real and personal, should be set apart for the use of his widow during life, and that the *corpus* of this part of his estate, on her death, should be divided equally among his five children. The other two-thirds of his estate he gave to his five children, and directed that the share of each child should be made over as he or she attained to 21 years of age. He appointed his widow, Mary Ann McCartin, and Cornelius Van Vorst and Henry M. Traphagen, the executors of his will. They all proved the will. Mr. Traphagen died intestate in May, 1884. This suit was brought in July, 1886. The persons made defendants are the surviving executrix and executor, (Mrs. McCartin and Mr. Van Vorst,) the administrator of Henry M. Traphagen, deceased, and also his heirs at law, namely, Phebe A. Watson, William C. Traphagen, and Henry Traphagen; and four of the testator's children, namely, Mary E. McCartin, Elizabeth C. McCartin, Isabella T. McCartin, and Myles F. McCartin. The suit has two objects: *First*, to procure a settlement of the estate of Myles McCartin, deceased, and a division of his property, under his will, among his beneficiaries; and, *second*, to compel his surviving executrix and executor, and the legal representative of his deceased executor, to make good to his estate the losses which, it is alleged, the estate has sustained in consequence of misconduct by the executors.

Several questions, growing out of objections made to the suit in respect to parties, and also to the competency of witnesses, must be decided before the questions arising on the merits can be considered.

1. As to parties. It is objected that the heirs at law of Henry M. Traphagen, deceased, are not proper parties. No relief is sought against them, except it is prayed that they, together with the administrator of Henry M. Traphagen, deceased, and the two surviving executors, may be decreed to account for the execution of the trusts of the will of Myles McCartin, deceased, and also for the administration of his estate in this court, instead of rendering their accounts in the orphans' court of the county of Hudson, where his will was admitted to probate. Heirs at law are answerable, to the extent of the value of the lands descended, for the debts of their ancestor, and also for damages arising from the breach of a covenant made by their ancestor, (*Insurance Co. v. Meeker*, 37 N. J. Law, 282;) and it is also well settled that an action may be maintained against the legal representative of a decedent, whether he died testate or intestate, to recover damages arising from a violation of the decedent's legal duty or a breach of trust. *Tichenor v. Hayes*, 41 N. J. Law, 193; *Dodd v. Wilkinson*, 41 N. J. Eq. 581, 7 Atl. Rep. 337. And it would seem to follow, as a necessary deduction from the right of action thus established, that any claim which may be made the basis of a recovery against the legal representative of a decedent will also be sufficient, as a ground of action, to support a recovery against his heir at law. But I know of no rule of law which imposes upon an heir the duty of rendering accounts, for his ancestor, in courts exercising probate jurisdiction. It is obvious that in the majority of cases no such duty can rest upon him, for he is without the means of performing it. On the death of a trustee, where the subject of the trust is personalty, the trust property, as well as the books and papers relating to its administration, pass to his legal representative, and not to his heir at law. And so, too, where the subject of the trust is realty, the books and papers showing the administration of trust pass, at least in the first instance, to the legal

representative of the dead trustee, and not to his heir. I think, therefore, it is quite clear that the duty which the complainant seeks to have imposed upon the heirs at law in this case does not exist.

But the more important question is, have not the heirs at law of Henry M. Traphagen, deceased, such an interest in the subject-matter of this suit as renders them proper, though not necessary, parties? The bill alleges that Mr. Traphagen left a large amount of real and personal estate, which, to a considerable extent, has already been divided and distributed among his children. The proofs show that \$10,000 of his personal estate has been distributed to each of his children, and that a comparatively small amount remains in the hands of his administrator. Personal estate is the primary fund out of which the debts and liabilities of a decedent must be discharged. The rule is settled that a legatee, who has received his legacy, is always bound, at the instance of creditors, to refund his legacy, if there is a deficiency of assets to pay debts, whether the deficiency arises from an original want of assets, or the waste of the executor. This liability flows from the superior right of creditors, and does not at all rest upon contract. The legatee is liable whether he has given a refunding bond or not. It is an obvious rule of justice that neither a legatee, nor one of the next of kin, shall be entitled to anything until the obligations and liabilities of the person through whom they derive their rights have been paid. *Executor of Bilderback v. Rowe*, Spen. 684; 1 Story, Eq. Jur. 92, 503; Fonbl. Eq. bk. 4, pt. 1, c. 2, § 5, note p; *Lupton v. Lupton*, 2 Johns. Ch. 626.

While it is undoubtedly true that no active relief can be given against the heirs at law, by the decree which may be made on this hearing, yet I think it is quite apparent that, if a decree should be made against the administrator of their ancestor, such decree might, in a subsequent proceeding, be made the proper foundation of relief against them. Even if they were not parties to this suit, I think they would be concluded by such decree, as to the amount for which their ancestor was liable, unless they could show that the decree was the product of fraud. Under this view it is quite plain that they have a vital interest in the result of this suit. There can be no doubt that they are proper parties under the rule adopted by Chancellor ZABRISKIE in *Dorshimer v. Korbach*, 23 N. J. Eq. 46.

2. As to the competency of certain witnesses. The complainant called his mother and his three sisters to testify to transactions with Henry M. Traphagen, deceased, and statements made by him. Their evidence on these subjects was objected to, and the question is, were they competent to give the evidence objected to? And, first, as to the three Miss McCartins. Their position on the record is that of defendants, though their interest in the litigation is that of complainants. In respect to the whole subject-matter of the litigation, they have the same interest exactly that their brother, the complainant, has. The only possible difference which exists between them is that they are older than he is, and have consequently, if there has been laches, been guilty of greater laches than he has. In all other respects their positions are identical. This suit was brought as much for their benefit as it was for the benefit of the complainant. The bill so declares. It first alleges that the executors have wasted the estate of their testator, and that the complainant and the other beneficiaries under the will are therefore entitled to indemnity from the executors therefor, and then prays that such indemnity may be decreed to them. There can be no doubt that if the three Miss McCartins had taken their true position in the litigation; if they had placed themselves where their interests and their feelings place them; where they are in everything except the barest form,—they would have been incompetent to give the evidence objected to. Though they are defendants in form, they are complainants in fact. If a decree goes in favor of the complainant, it must, *ex necessitate*, give the same measure of relief to each of these defendants that it does to the com-

plainant, unless some special defense, peculiar to the defendants, and which exists against them alone, and not against the complainant, has been shown. The position of parties, having the same rights, in a suit of this kind, is a pure matter of arrangement, over which they have supreme control. The three Miss McCartins were necessary parties to this suit, but they were at liberty to choose their position. They could be either complainants or defendants, just as they saw fit. I have no doubt that they were made defendants, not because they did not want the suit brought, nor because they were unwilling to appear as complainants, nor because it was supposed there was any conflict between their interests and those of the complainant, nor because it was suspected that they might desire to make defense against the complainants' action, but because it was thought possible that, by making them defendants, they might be rendered competent to testify to declarations made by Mr Traphagen, and thus increase their chances, and those of their brothers, of being able to fasten a liability on Mr. Traphagen's estate.

The decision of the question under consideration must, of course, be controlled by the statute of 1880. The main design of that statute is, so far as it prescribes a rule of exclusion, to prevent a person who seeks, by judicial action, to fasten a claim on the estate of a decedent, from putting in proof, by his own mouth, in support of his claim, anything the decedent may have said or done tending to show that the claim is valid. The purposes which the legislature had in view in enacting the statute are, I think, quite apparent. They were—*First*, to guard against the injustice which might arise from a want of mutuality in the exercise of the right to testify; and, *second*, to prevent the danger which would almost unavoidably arise from perjury, or the suppression of material facts, if the living party to a transaction, where one was dead, was allowed to testify as to what the deceased party had said or done, respecting the transaction, in a suit by or against his legal representative. The nominal position of the person whose competency is challenged, as a party on the record in the particular suit, is, in my judgment, of no importance; but the test in such cases is, does he stand in a position of antagonism to the estate of the intestate or testator represented in the suit or proceeding in which he is called as a witness, so that, if he should testify upon the prohibited subjects, he would give his testimony under a temptation to forget what he should remember, or to commit perjury? If he does, he is incompetent. This I understand to be the test which the court of errors and appeals adopted in *Smith v. Burnet*, 35 N. J. Eq. 314. There exceptions were filed to the account of an executor, alleging that he had not charged himself with the whole of the estate of his testator. The executor, on the trial of the exceptions, attempted to defeat the claim of the exceptants by showing, by his own oath, that the testator, in his life-time, had made a gift to him of the property with which the exceptants sought to have him charged. But the court held that he was incompetent to give such evidence, and this ruling was put distinctly on the ground that, although the executor appeared in the proceeding as the ostensible representative of the testator, yet that he was not so in fact, but that his real character was that of a hostile suitor, who was not trying to defend the estate, but to deplete it. The court, therefore, dealt with him not in his nominal, but in his real, character; and so, I think, the three Miss McCartins must be dealt with in this suit.

The competency of the Miss McCartins to give the evidence objected to, is, however, attempted to be vindicated on another ground. After they gave that part of their evidence, which, it is insisted, they were incompetent to give, the administrator of Henry M. Traphagen, deceased, was called as a witness in his own behalf, and gave evidence. This, it is contended, rendered the Miss McCartins competent to give the evidence objected to. And it is also insisted that, although they were not re-examined after they were thus rendered competent, yet the court should, in the control which it may exercise over such

matters, either direct that the evidence which they have already given shall stand as part of the proofs in the case, or otherwise order that they may be re-examined. The court undoubtedly has the power, if the Miss McCartins were rendered competent by an act done by the party objecting to their evidence, subsequent to the time when he interposed his objection, to give them the benefit of the right which his act conferred. As was said by the court of errors and appeals in a case where a similar question was presented for decision: "It is the province of the court so to control the conduct of a cause, and regulate its practice, that no unfair advantage is taken by either side in presenting the merits of the cause for decision." *Walker v. Hill's Ex'rs*, 22 N. J. Eq. 513.

The argument in favor of the contention that the Miss McCartins were rendered competent by the act of the administrator is based on that provision of the statute concerning evidence, which declares that if a party to a suit in a representative capacity is called as a witness in his own behalf, and admitted, the opposite may, in like manner, be admitted as a witness. Revision 378, § 4. This provision, in my opinion, was supplanted by the statute of 1880. The regulation in force upon this subject prior to the passage of the statute of 1880 was this: Where either of the parties to a civil suit sued or was sued in a representative capacity, the opposite party was prohibited from calling himself as a witness in his own behalf, unless his adversary called himself as a witness in his own behalf, and was admitted. If he did, then the opposite party thereby became a competent witness in the cause, and could testify generally upon every subject upon which he could give legal evidence. By the statute of 1880 this restriction was removed, and entirely new regulations established. By the new act any party to a civil suit is made competent as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity. Both parties are given full capacity, the opposite party as well as the representative party. The representative party was competent before, but he could not avail himself of his capacity without conferring like capacity on his adversary. If he chose to remain silent, the opposite must also remain silent. Now, however, the right of the opposite party to speak does not at all depend upon the will of the representative party. He has a right now to speak, within a certain range, whether the representative party speaks or not. His competency now is in no respect to be measured or controlled by the will or conduct of his adversary. His right to testify now stands wholly emancipated from the control of his adversary, and is just what the statute of 1880 gives him; no more and no less. He is a witness with full capacity to testify upon every issue involved in the suit, except he cannot give testimony as to any transaction with or statement made by any testator or intestate represented in the particular action. There is no hint in the statute of 1880 that his capacity to testify upon the prohibited subjects is to be in the slightest degree enlarged, or otherwise affected, by the fact that his adversary offers himself as a witness in his own behalf, and is admitted. It is plain that the two statutes are repugnant in a vital point. Under the old, the opposite party could in no event be a witness in his own behalf, unless the representative party was first admitted; while under the new, he stands entirely free from the restriction imposed by the old, and may call himself without regard to the course pursued by the representative party, and when on the stand may testify fully, except on certain subjects.

But it is said that, although a repugnancy exists, it is only partial, and not complete; and that, inasmuch as the statute of 1880 contains no express repealer of any part of the prior statutes, the court must, if possible, give effect to so much of the previous statutes as does not stand in clear conflict with the later. Under this view it is contended that, notwithstanding the prohibitory words of the statute of 1880, it is the right of the opposite party, whenever the representative party goes upon the stand, to give testimony in

respect to the matters which, by that statute, it is declared he shall be incompetent to give. This contention, as it seems to me, has nothing whatever on which it can stand. The two statutes, as I read them, stand in direct and irreconcilable conflict throughout. If this were not so, the intention of the legislature that the last should supersede the first is so conspicuous that the court is bound to declare the first as no longer in force. When two acts are not in express terms repugnant, yet if the later act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of the first. *U. S. v. Tynen*, 11 Wall. 88. "This rule," says Mr. Justice VAN SYCKEL, "does not rest strictly upon the ground of repeal by implication, but upon the principle that, when the legislature makes a revision of a particular statute, and frames a new statute upon a subject-matter, and from the frame-work of the act it is apparent that the legislature designed a complete scheme for the matter, it is a legislative declaration that whatever is embraced in the new statute shall prevail, and whatever is excluded is discarded. It is decisive evidence of an intention to prescribe the provisions mentioned in the later act as the only ones on that subject which shall be obligatory." *Roche v. Jersey City*, 40 N. J. Law, 257.

The Miss McCartins were incompetent, in my judgment, to give the evidence objected to.

3. As to the competency of Mrs. McCartin to give the evidence objected to. She is a defendant in her individual capacity, and also in her representative capacity. Her true position in the litigation is that of a defendant. In view of the object of the suit, it was not possible, according to any principle of procedure, to make her a party otherwise than as a defendant. The complainant seeks to compel her, as one of the executors of his father's will, to perform her duty; and also to make good to him, and the other beneficiaries, the loss they have sustained by her misconduct in office. His right of action against her is grounded on her failure to discharge duties which were incumbent on her in her representative capacity, and she is therefore properly a defendant in that character, and, in my judgment, only in that character. Nothing has been gained by bringing her into court in a dual capacity; for I think it is undeniable that if she had been sued in her representative capacity only, and it had been shown that she had been guilty of such misconduct in office as to render her personally liable for its consequences, the court might, after so decreeing, have enforced the decree against her individual property. The position of Mrs. McCartin as a party to this suit is free from the least doubt. She is a defendant, standing in a position adverse to that of the complainant. He called her as his witness. She did not testify on her own call, but on the call of the complainant. The law gives him the right to make her his witness. The statute declares that, in all civil actions in any court of record in this state, the parties thereto shall be admitted to be sworn, and give evidence therein, when called as witnesses by the adverse party in such action. Revision, 378, § 2. There is nothing in the statute of 1880 which either destroys or impairs this right. It stands today in all its original vigor. Either of the defendants had an undoubted right to call the complainant to show—if such was the fact—that, by a transaction between Henry M. Traphagen and himself, he had lost all right of action against Mr. Traphagen or his estate. And the complainant had a like right to examine either of the defendants, who stood in a position of actual hostility to him, for the purpose of eliciting evidence which would enable him to maintain his action. Mrs. McCartin was, in my opinion, a competent witness to give the evidence objected to.

The remaining questions arise on the merits. Several claims are made by the bill which were either abandoned on the hearing, or rejected by the court at the close of the argument. They will not be discussed now. Two, how-

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ever, remain to be considered. The first grows out of a misappropriation. In August, 1870, the executors invested \$9,500 of the moneys of the estate in the purchase of a house and lot in Jersey City. Prior to the purchase by the executors the title was held by Mrs. McCartin and her nephew, Myles Tierney. She and he conveyed to herself as executrix, and to Mr. Van Vorst and Mr. Traphagen as executors. Six thousand five hundred dollars of the purchase money was paid on the delivery of the deed, with funds of the estate then in the exclusive custody of Mrs. McCartin. The house and lot were conveyed subject to a mortgage of \$3,000, which Mrs. McCartin subsequently paid with funds of the estate. The \$6,500, paid on the delivery of the deed, was divided almost simultaneously with its payment between Mrs. McCartin and Mr. Tierney; Mrs. McCartin retaining \$5,100, and giving Mr. Tierney the balance. This division was made to carry out the terms of a settlement of some ventures, in which Mrs. McCartin and Mr. Tierney had been jointly interested, and which settlement they agreed upon and concluded on the day the deed was delivered and the \$6,500 paid. The use thus made of the moneys of the estate was wholly unauthorized. The executors had no authority, under the will, or otherwise, to purchase land, and their appropriation of the moneys of the estate for that purpose was a willful misappropriation. The proof is clear, by the mouth of Myles Tierney, that Henry M. Traphagen participated actively in the purchase. He would, therefore, if alive, be answerable for the loss which may result from it. His liability in this respect belongs to the class which can, as has already been shown, be enforced against his legal representative. He, however, derived no benefit of any kind from the purchase, but Mrs. McCartin did. The purchase was manifestly made in her interest and for her advantage. She received \$5,100 of the purchase money. The principal part of the sum misappropriated went into her pocket. There can, therefore, be no doubt about her liability.

The evidence against Mr. Van Vorst is not sufficient to justify a judgment that he is liable. Mrs. McCartin testifies that he knew that the purchase was contemplated, and consented that it should be made, while he swears that he knew nothing about it. In this condition of the evidence, it is clear that there is not sufficient proof to support a decree against him. The house and lot are still held as an asset of the estate. No change has been made in the title since they were conveyed to the executors. They must be sold under the direction of the court. If the sale shall not produce a sum sufficient to make good to the estate the loss resulting from the misappropriation, Mrs. McCartin and the administrator of Henry M. Traphagen, deceased, must pay the deficiency.

The only question which remains for consideration, on this branch of the case, is whether any discrimination should be made between Mrs. McCartin and the administrator, as to the order in which they shall stand liable for the deficiency? Difference in the degree of liability, owing to difference in the extent of the culpability, has been recognized by the courts, in cases of the class to which this case belongs, ever since the decision in *Charitable Corporation v. Sutton*, 2 Atk. 400. Mr. Lewin states the rule now in force on this subject, as follows: "Though, as respects the remedy of the *cestui que trust*, each trustee is individually responsible for the whole amount of the loss, whether he was principal in the breach of trust, or was merely a consenting party, yet, as between the trustees themselves, the loss may be thrown upon the party on whom, as the recipient of the money or otherwise, the responsibility ought in equity to fall, or, if he be dead, upon his estate." Lewin, *Trusts*, 776. It requires no argument to show that, in view of the facts of this case, Mrs. McCartin must be decreed to be primarily liable. And the court may, in order to compel her to bear the full measure of her responsibility, sequester that part of the estate to which she is entitled under the will, and apply it in discharge of her liability.

The remaining claim rests on a charge that the executors, in violation of their duty, released, without consideration, valuable parts of certain lands, upon which they held a mortgage, and that in consequence serious loss resulted to the estate. The executors, on the third of May, 1870, conveyed certain unimproved lands, lying in the outskirts of the city of Newark, to Nehemiah Perry, for the sum of \$40,000. Ten thousand dollars of the purchase money was paid in cash, and a mortgage given on the lands conveyed for the balance. The mortgage was payable at any time within five years from its date, and bore interest at the rate of 7 per cent. per annum. Mrs. McCartin took possession of the mortgage and cash. For some years prior to this date, she had had the exclusive possession of the other securities belonging to the estate, and had also performed the principal duties incumbent on the executors. Soon after his purchase Mr. Perry procured a map to be made of the lands, on which streets were laid out, and the lands divided into city lots. Some of the streets, so laid out, were subsequently opened and graded. On the twenty-first of April, 1871, the executors released to Mr. Perry nine of the lots covered by their mortgage, and on the nineteenth of August, 1872, they executed another release to him, releasing 21 other lots. Both releases were executed without the payment of any part of the mortgage debt. The lots released were some of the most valuable of the tract. The mortgage was subsequently foreclosed, and the mortgaged premises purchased at the foreclosure sale, in October, 1878, by the executors for \$15,000. They are still held as part of the assets of the estate. The proof shows that they cannot be sold now for enough to restore to the estate the amount of the mortgage debt. The claim of the complainant is that his mother and Mr. Van Vorst, and the administrator of Mr. Traphagen, are bound to pay him, and the other beneficiaries under the will, the present value of the land released, or so much thereof as may be required to make good to them the amount of the mortgage debt, after crediting thereon whatever may be realized from the sale of that part of the mortgaged premises still held by the estate.

There can be little doubt, in view of the pecuniary condition of one of the persons against whom this claim is asserted, and the ties which exist between another and those who are to be benefited by its judicial recognition, that this suit is prosecuted mainly, if not solely, for the purpose of fastening this claim on the estate of Henry M. Traphagen, deceased. Mr. Van Vorst is an old man, hopelessly insolvent, without property and without expectations. A decree against him would, in all probability, be utterly worthless. Mrs. McCartin is the mother of the complainant and the other beneficiaries under the will. She and they all reside together as one family, and have continuously since the death of the husband and father, in 1859. The family occupy her house. She is the head of the family, and as such exercises the chief authority, and receives from her children the respect and obedience which her position entitles her to. The relations between the mother and her children have always, so far as the evidence discloses, been of the most affectionate and confiding character. They have lived together in the utmost harmony; having, apparently, no interests or purposes which were not mutual and common. The love which the mother has always exhibited for her children has been a sure guaranty to them that she would never consciously do an act which she thought it was possible could result in harm or loss to them. Under these circumstances it cannot be believed that the son in whose name this suit is brought, or that either of the children in whose interest it is prosecuted, would, if their mother had alone been liable, have allowed it to be brought. Nor is it possible to believe that, if a recovery is had against the mother, the children will allow the decree to be enforced against her. These considerations make it almost absolutely certain that this suit is the result of a family combination to fasten this claim, either in whole or in part, on the estate of Mr. Traphagen. Such a combination to enforce a just claim, by due process of law,

while all the proofs, both for it and against it, were fresh and clear, and easily accessible, would, perhaps, even in a case where the persons seeking to establish it had arranged in advance, with one of the persons liable, not to enforce it against him, but compel the other to pay the whole, be free from objection on legal grounds. But the fact that parties, standing apparently in an attitude of hostility to each other, were not so in fact, but were in truth animated by a common purpose, that their ostensible positions towards each other in the litigation were deceitful, would induce a court always to be extremely vigilant to see to it that a claim which was false in fact was not pronounced just.

The case under consideration is, however, of an entirely different complexion. Here the claim sought to be enforced is an extremely stale one. No attempt was made to enforce it until the person against whom it is mainly aimed was deprived of all power to resist it by death; nor until much if not the entire body of the evidence which may have existed, tending to show that it was groundless, had, by the decay of time, been either entirely destroyed, or become so obscure as to leave scarcely a trace of the truth. The releases were executed in 1871 and 1872. Some of the beneficiaries were present at their execution. The fact that they had been executed was known and fully discussed just prior to the institution of the suit to foreclose the Perry mortgage in 1877. The loss resulting from their execution was demonstrated and made known by the sale of the mortgaged premises in October, 1878. Mr. Perry and Henry M. Traphagen were both then living. The former did not die until November, 1881, and the latter not until May, 1884. The complainant attained his majority in February, 1880, his sisters were of full age when the releases were executed, and his brother became 21 in 1873. This suit was not instituted until July, 1886, more than six years after the complainant attained his majority, and nearly eight after the sale of the mortgaged premises. Great delay is a good bar in equity. Courts of equity have from the earliest times, upon general principles of their own, even where there was no analogous statutory bar, refused relief to stale demands. More than 100 years ago Lord CAMDEN said: "A court of equity, which is never active in relief against conscience or the public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth the activity of a court of equity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced; and therefore from the beginning of this jurisdiction there was always a limitation to suits in equity." *Smith v. Clay*, 2 Amb. 645, reported in a note to *Deloraine v. Brown*, 3 Brown, Ch. 640. The wisdom of this principle, both as a rule of justice and a regulation for the benefit of the public welfare, is so obvious that it has been universally adopted. 2 Story, Eq. Jur. § 1520, and notes.

The reason of the rule is apparent, and consists in the difficulty, and in many cases the impossibility, of ascertaining, after a great lapse of time, the facts necessary to enable the court to exercise its power with safety. He who delays asserting his rights until the proofs respecting the transaction out of which he claims his rights arose, are so indeterminate and obscure that it is impossible for the court to see whether what seems to be justice to him is not injustice to his adversary, should be denied all relief; for, by his laches, he has deprived the court of the power of ascertaining, with reasonable certainty, what the truth is, and thus of doing justice.

Tested by this rule, it is plain, I think, that the claim made in this case should be rejected. The persons making it did not assert it until their delay had put them in the best possible position, and their adversary in the very worst. They seek to turn their fault into an advantage. The evidence which they produce in support of their claim consists largely of written matter, which endures notwithstanding the flight of time, while living witnesses both

forget and die. From the character of the claim, it is manifest that the only defenses which could have existed against it were such as rested entirely in the knowledge and judgment of living witnesses. The important question is, what were the circumstances under which the releases were executed? Mrs. McCartin swears that she has no recollection of executing but one release, and that she executed that under a representation that it embraced only two city lots. At this time she had possession of the mortgage, and exercised almost a supreme control over the affairs of the estate, and managed them, with the assistance of her daughters, as she thought proper. The duty of safely keeping and protecting the securities of the estate rested on her. Now, if it be true that she was tricked into executing a release of nine or twenty-one lots, under the belief that the release only embraced two, may it not also be true that the signatures of the other releasors were procured by the practice of a similar fraud? And may it not likewise be true that the fraud by which the releases were obtained was so shrewdly planned, and so cunningly executed, that the most cautious person would have been entrapped by it? What the truth is cannot be discovered now. Mr. Traphagen and Mr. Perry are both dead, and the recollection of Mrs. McCartin and Mr. Van Vorst is so faded that it is quite evident that, when they attempt to tell what they recollect about the transaction, they give dim impressions and conjectures rather than actual recollection.

But suppose there was no fraud, who can say, after the lapse of 15 or 16 years, that the acts of the executors, in executing the releases, were not, in view of the considerations which controlled their judgment, wise and prudent, and just such as they ought to have done? They are not liable for mere errors of judgment, such as prudent persons, exercising ordinary caution, under like circumstances, might have committed. The measure of their duty was this: They were bound to use the same degree of care that a person of common prudence would ordinarily exercise in the management of his own affairs of like character. "The law," says Professor Pomeroy, "does not cast upon a trustee an extraordinary duty, nor demand an extraordinary care, nor hold him liable for mere error of judgment; much less does it make him an insurer of the property. If he has exercised the care and judgment of ordinary prudent men in their own affairs, he will not be chargeable for his mere errors of judgment, nor for accidental injuries or losses." 2 Pom. Eq. Jur. § 1070. To be able, therefore, to form a just judgment, whether what the executors did was within or without the line of their duty, it is necessary that we should have before our minds all the considerations which led to the judgment on which they acted, and that we should weigh them now just as a man of ordinary prudence and discretion would have weighed them then. After a cause has produced its results, it is much easier to see the connection which existed between cause and effect than it is to see, in advance, what effect a cause will produce. The foolish may be wise after an event has happened; but, when an act may produce one of two directly opposite results, it is only a person possessing the penetration of a prophet that can foresee which of the two will certainly occur. It was this consideration which once led Lord HARDWICKE to remark, in substance, that it is by no means just in a judge to say, after bad consequences have arisen from an act done by a person exercising fiduciary powers, that he should have foreseen what subsequently happened, and therefore be held guilty of a breach of trust. If he did not foresee what no person of ordinary foresight, standing in his place, could have foreseen, he has violated no duty and incurred no liability.

It would be impossible for us now to get back in expectation and judgment to just where the executors were at the time these releases were executed; but this much may be remembered, as part of the familiar history of those times, that it was believed, by even the shrewdest and most cautious, that suburban property, like that with which they were dealing, located in the outskirts of

a growing and prosperous city, possessed greater possibilities than property of almost any other kind. Such investments had, in many instances, resulted in great fortunes, and the belief was almost universal that they afforded the surest road to speedy and great wealth. The proofs show that, at the time the releases were executed, and for some years afterwards, Mr. Perry was reputed to be a gentleman of large wealth, abundantly able to raise the money necessary to pay the mortgage debt. He had the right, by the terms of his mortgage, to pay at any time. He threatened, if the releases were not executed, that he would pay. The investment was a choice one. The debt was secured by the bond and mortgage of a gentleman reputed to be worth \$100,000. It produced an annual income to the estate of \$2,100. It was the duty of the executors to preserve the investment, if they could. The proofs now before the court, on the part of the complainant, show that that part of the mortgaged premises which remained pledged for the mortgage debt, after the releases were executed, was worth, according to the prices prevailing in 1872, over \$43,000. This estimate may be less than the same witness would have made in 1872, before his judgment respecting its value was enlightened by any of the events which have since occurred. What estimates and whose judgment Mr. Traphagen acted on in executing the releases we do not know. He cannot tell us now. His lips are closed forever. There is no reason to suspect that he was controlled by fraudulent motives. No charge of that kind is made. There is no hint in the evidence that his relations with Mr. Perry were such as would have been likely to have induced him to disregard his duty to favor Mr. Perry. So far as appears, he was entirely free from the least temptation to betray his trust. His interests, as well as his inclinations, were such as would have naturally constrained him to guard, rather than endanger, the rights of his *cestuis que trust*; and the fact that his acts, which are made the foundation of this claim, have so long stood unquestioned, serves to produce a strong conviction in my mind that they were not assailed before, because, while the recollection of the considerations which led to them, was fresh and clear, they were known to be right and unassailable; and that the reason they are challenged now is either because the recollection of the facts which led to them has become, to a great extent, effaced, or because it was supposed all evidence of them is lost. The persons in whose behalf this claim is made have delayed all attempt to establish it by judicial proceedings until the tongue of the person most deeply interested in resisting it has been silenced by death, and until the memory of all others who could have given evidence respecting it is greatly faded or totally lost. They have delayed until, by the lapse and decay of time, their adversary has become defenseless. They are too late. Their claim, in my judgment, must be rejected.

#### MATHEWSON v. MATHEWSON.

(Supreme Court of Rhode Island. October 22, 1887.)

#### DESCENT AND DISTRIBUTION—ALLOWANCE OF REALTY TO WIDOW—DOWER MUST FIRST BE ASSIGNED.

Pub. St. R. I. c. 185, § 4, provides that if there be no children or their descendants living, the court of probate shall allow and set off real estate to the widow from her deceased husband's estate, not required for the payment of debts, as may be suitable, etc., and in accordance with the circumstances of the estate, in addition to dower, to hold upon the same terms, etc., as if dower estate. The court of probate of J., there being no children, and the whole of the estate being suitable for the support of the widow, etc., without setting off dower, set off the whole of the estate to the widow, under the above statute. *Held*, the court of probate must first assign dower before it can proceed to assign the widow any more of the real estate.

Appeal from the probate court of the town of Johnston.

Louis L. Angell, for appellant. Stephen A. Cooke, Jr., and Robert W. Burbank, for appellee.

DURFEE, C. J. This is an appeal from a decree of the court of probate of the town of Johnston, setting off to Elizabeth, widow of Benoni Mathewson, late of said town, all the real estate which he had at his decease. The decree was made on petition of the widow under Pub. St. R. I. c. 185, § 4, which provides that if there be no children or their descendants living, at the decease, "the court of probate shall allow and set off to the widow such portion of the real estate of her deceased husband, which shall not be required for the payment of debts, as may be suitable for her situation and support, and be in accordance with the circumstances of the estate; and such widow shall hold such real estate, in addition to her dower, upon the same terms and condition and for the same period as she holds her estate of dower."

The decree, after reciting that there were no children or their descendants; that none of the real estate will be required for the payment of debts, and that the whole of it is suitable for the situation and support of the widow, etc., orders and adjudges that the whole "be and is hereby allowed and set off to said Elizabeth T. Mathewson, in addition to her dower, upon the same terms and conditions and for the same period as she holds her estate of dower. The case is before us now on motion of the appellant to dismiss the proceeding, on the ground that the court of probate has no jurisdiction in the premises until after an assignment of dower to the widow.

We think the motion must be granted. The language of the statute is that the court shall set off "such portions of the real estate," etc., and "such widow shall hold such real estate in addition to her dower upon the same terms," etc., "as she holds her estate of dower." The widow cannot hold such portion "in addition to her dower" on the same terms as "she holds her estate of dower," until her estate of dower has come into existence by assignment. Her dower, until assigned, is a mere right of action, and previous to the assignment it cannot be known what part of the estate will remain out of which the additional portion can be set off. It is argued that it is unnecessary to have the dower assigned and the portion set off by distinct proceedings when the whole estate is going to be awarded to the widow as dower and as "suitable portion" in addition to dower. There might be force in this argument if the statute did not provide for distinct proceedings with distinct appeals therefrom, when both proceedings originate in the court of probate; but such being the statute, the argument cannot avail. If the dower were first assigned, it may be that the heir would abide by the assignment without appeal, his only objection being to the portion subsequently set off in addition, and he is entitled not to have the two matters complicated by confounding them together.

The proceeding is dismissed as premature.

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### ARNOLD v. GARST.

(Supreme Court of Rhode Island. October 22, 1887.)

#### FRAUDS, STATUTE OF—ORAL CONTRACT FOR SALE OF LAND—ACTION TO RECOVER EXCESS PAID.

Defendant bought land for 40 cents per square foot, and sold orally a part thereof to plaintiff, agreeing to charge him 10 cents per square foot less than he had paid. The conveyance was made and defendant told plaintiff, who did not know the facts, that he had paid 50 cents, and plaintiff paid him 40 cents per square foot. Upon learning the facts, he brought *assumpsit*, to recover back the excess. *Held*, evidence showing these facts is admissible, the action not being brought to charge the defendant on his oral contract to sell land at 10 cents less per square foot than he paid for it, but to charge him on an implied contract to refund the money, which, in consequence of his misrepresentation, plaintiff paid to him in excess of the contract price. Therefore the clause of the statute of frauds, "no action shall be brought whereby to charge any person upon any contract for the sale of lands, \* \* \* unless the promise \* \* \* shall be in writing, signed by the party to be charged," etc., does not apply.

Exceptions to court of common pleas, Providence county.

*Edward D. Bassett and Frederick Hayes, for plaintiff. Rathbone Gardner, for defendant.*

**DURFEE, C. J.** This case comes up from the court of common pleas on exceptions to an order of said court nonsuiting the plaintiff. The action is *assumpsit* for money had and received. In support of the action in the court below, the plaintiff submitted testimony to show that some time in 1880 the defendant purchased of one McCrillis a lot of land in South Providence, for which he paid a price of 40 cents per square foot; that afterwards, representing to the plaintiff that the lot was larger than he needed for himself, and that he wanted to have the plaintiff for a neighbor, he offered to sell the plaintiff a portion of the lot at 10 cents less per square foot than he had paid, and the plaintiff accepted the offer, the contract on both sides being oral; that the defendant conveyed to the plaintiff under the contract about 6,000 square feet of land, representing to the plaintiff, who did not know what the defendant had paid, that he had paid 50 cents per foot, in consequence of which the plaintiff paid him at the rate of 40 cents per foot, being 10 cents per foot in excess of the price agreed. Subsequently the plaintiff, having learned how he had been deceived, brought this action to recover back such excess. The court below, having at first admitted the plaintiff's testimony *de bene esse*, against the defendant's objection that it was inadmissible under the statute of frauds, at the conclusion thereof ruled it out, and nonsuited the plaintiff. The only question made at the bar is whether the testimony is admissible under the statute of frauds.

The clause of the statute of frauds under which the question is made is this, to-wit: "No action shall be brought whereby to charge any person upon any contract for the sale of lands, tenements, or hereditaments \* \* \* unless the promise or agreement upon which such action shall be brought, or memorandum thereof, shall be in writing and signed by the party to be charged," etc. We do not think the action here is within this clause. It was brought, not to charge the defendant on his oral contract to sell a portion of his land for 10 cents less per square foot than he paid for it, but to charge him on an implied contract to refund the money which, in consequence of his misrepresentation, the plaintiff paid to him in excess of the contract price. The terms of the contract were offered in proof, not to show a liability under the contract, but merely as evidence to show, in connection with other evidence, a liability outside of it, and as such were admissible. *Browne, St. Frauds*, (4th Ed.) §§ 124, 125; *Goodspeed v. Fuller*, 46 Me. 141. See, also, *Chit. Cont.* (11th Amer. Ed.) 422, note *i*.

The plaintiff cites *Holtz v. Schmidt*, 59 N. Y. 253, to show that *assumpsit* for money had and received will lie for the recovery of money paid in consequence of fraud or mistake in excess of what was agreed to be paid. We do not understand that any question is made on that point.

Exceptions sustained.

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#### ADAMS v. BAKER, Adm'r.

(*Supreme Court of Rhode Island. October 14, 1887.*)

**NEGOTIABLE INSTRUMENTS—ACTION AT LAW ON LOST NOTE—AVERMENT OF LOSS.**

The loser of a negotiable instrument can recover in an action at law against the maker's administrator, upon proof that defendant can pay it without the hazard of being required to pay it a second time, and an averment of the loss of the note is not necessary.

*Assumpsit.* On demurrer to the declaration.

*Rollin Mathewson, for plaintiff. Warren R. Perce, for defendant.*

DURFER, C. J. This case comes before us on demurrer to the second count of the declaration, which count sets forth that the defendant's intestate, at Providence, on July 23, 1857, made his promissory note for \$500, payable to James A. Requa, or order, two months after date, and that said Requa then and there indorsed and delivered it to the plaintiff; that it was not paid at maturity; that after maturity, and before any part of it was paid, it was lost by the plaintiff; that after the loss, the plaintiff demanded payment of the defendant, and the defendant refused payment. The ground of demurrer is that an action at law will not lie on such a note so indorsed and lost, the only remedy being in equity.

There is a conflict of decision on the question. The English doctrine is that the only remedy on a lost negotiable note or bill is in equity, the reason alleged being that the maker, upon paying the note, is entitled to have it surrendered to him for his protection against suit thereon by any other person coming into possession of it, and a court of equity can afford protection by exacting an indemnity bond, whereas a court of law cannot. In this country the English doctrine has been adopted in several states, but in others it has been materially modified or rejected. In this state, in *Aborn v. Bosworth*, 1 R. I. 401, which was an action on a bill of exchange lost, tried to the jury in 1850, this court instructed the jury that the drawee was entitled to recover upon proof, either that the bill was destroyed, or surrendered, or so indorsed that no third person could recover it. The counsel for the defendant disparages the authority of this case because it was determined at *nisi prius*; but it should be remembered that, at the time it was tried, the full court were required to sit in the trial of cases to the jury, and the court, when so sitting, was accustomed to listen to very thorough discussions of legal questions on both principle and precedent. We think that the case has been, and should continue to be, accepted as settling the law, so far as it goes, for this state. The ground of decision was that the loser is entitled to recover in an action against the maker, whenever the recovery will put the maker in no worse position than he would have been in if the loss had not occurred.

The averment here is that the note was lost after indorsement, but also after maturity. The averment of the loss was not necessary to the maintenance of the action; and, in our opinion, it is competent for the plaintiff to prove, not only the loss, but also the destruction of the note. 2 Pars. Notes & B. 309. In *Peabody v. Denton*, 2 Gall. 351, the note was lost after maturity, and, in action thereon by the indorsee against the maker, tried 18 years after the loss, the court held that, after so great a lapse of time, it was incumbent on the defendant to show, either that the note existed or had been demanded of him, or that it must otherwise be presumed that no demand would ever be made. In the case at bar, for anything that is averred, the note may have been lost 30 years ago.

In *Swift v. Stevens*, 8 Conn. 431, the note disappeared some six years before the trial. The cashier of a bank to whom it had been delivered for safe keeping, testified that he had made diligent search for it, but was unable to find it; that he had never delivered it to any person; and that he verily believed it had been accidentally destroyed, and on motion for new trial after verdict for the plaintiff, the court held that the evidence was proper to go to the jury to prove the destruction or non-existence of the note. The circumstances in the case at bar, for anything that appears, may be equally or more cogent to prove the destruction or non-existence of the note. Moreover, all that is required to entitle the plaintiff to recover is proof that the defendant can pay the note without the hazard of being required to pay it a second time. Accordingly, it has been held that the loser is entitled to recover when any future action on the note will be barred by the statute of limitations. *Torrey v. Foss*, 40 Me. 74; *Moore v. Fall*, 42 Me. 450. Any future action on this note would be barred, so far as appears; and, if so, the defendant will be protected.

And, furthermore, the action here is not against the maker personally, but against his administrator; and it has been stated that the maker's estate was represented insolvent; that commissioners were appointed who allowed the plaintiff's claim; and that the allowance was stricken out by the defendant, and this action brought under Pub. St. R. I. c. 186, § 15. If this be so, the estate, if really insolvent, will be protected without any indemnity bond, since no creditor who has not presented his claim to the commissioners can maintain any action upon it against the estate unless there is a surplus remaining after all the debts allowed have been paid. We think, therefore, that the demurrer must be overruled, since it does not appear but that the plaintiff is able to show that the defendant can pay the note to him without risk of being obliged to pay it again to any other person.

The plaintiff contends that he is entitled to recover, because, though the note was lost after indorsement, it was over-due when lost, and therefore any person taking it would take it subject to the equities, and could get no better title than the person had from whom he took it. A number of cases support this view. *Thayer v. King*, 15 Ohio, 242; *Sloo v. Roberts*, 7 Ind. 128; *Elliott v. Woodward*, 18 Ind. 183; *Smith v. Walker*, 8 Smedes & M. 131, 135; *Chaudron v. Hunt*, 3 Stew. 31; *Fales v. Russell*, 16 Pick. 315, 317; *Renner v. Bank*, 9 Wheat. 581. But, against this view, it is urged that the holder of the note, by simply producing it and verifying the signature, makes a *prima facie* case for himself, throwing on the defendant the burden of proving that the note was lost before maturity,—a burden involving a risk which he ought not to be exposed to. 2 Pars. Notes & B. 295. We do not find it necessary to decide the point now, and therefore leave it undetermined.

Demurrer overruled.

#### STATE v. FLYNN.

(Supreme Court of Rhode Island. October 22, 1887.)

#### CONSTITUTIONAL LAW—TWICE IN JEOPARDY—TRIAL BY JURY—STATUTE DECLARING PERSON COMMON DRUNKARD.

Pub. St. R. I. c. 244, § 24, provides that every person who shall have been convicted three times within a period of six months of intoxication, etc., or who shall be proved to have been thus intoxicated three times within six weeks, shall be deemed a common drunkard. *Held*, that this section is not affected by the fifth amendment to the constitution of the United States, that no person shall be subject for the same offense to be twice put in jeopardy of life or limb, which imposes restriction only on the general government; and even were it in our state constitution, the offenses are different. Nor does the act in question violate the provision of the state constitution securing the right of trial by jury, there being nothing to prevent any person complained of under the act from having a trial by jury on any question of fact arising, and there being provision for jury trial on complaint for indecent intoxication.<sup>1</sup>

Exceptions to court of common pleas.

*Nicholas Van Slyck*, City Sol. of Providence, for plaintiff. *Charles A. Wilson* and *Thomas A. Jenckes*, for defendant.

**DURFEE, C. J.** This is a complaint charging that the defendant, at Providence, on the twenty-third day of August, 1887, "is a common drunkard, having been convicted of being intoxicated in the city of Providence, under such circumstances as to amount to a violation of decency, three several times in the six months immediately previous to the date of this complaint.

<sup>1</sup>A single act may be an offense against two statutes. The sufficiency of the plea of former jeopardy depends, not upon whether the defendant has already been tried for the same act, but upon whether he has been tried for the same offense. *State v. Stewart*, (Or.) 4 Pac. Rep. 128. The failure of the state to convict of the higher crime does not preclude conviction of a lesser crime, even though arising from the same state of facts. *Hilands v. Com.*, (Pa.) 6 Atl. Rep. 267. See note to *Id.* 269.

against the statute, and the peace and dignity of the state." The complaint was made under Pub. St. R. I. c. 244, § 24, which enacts that "every person who shall have been convicted three times within a period of six months of intoxication, under such circumstances as to amount to a violation of decency, or who shall be proved to have been thus intoxicated three several times within a period of six weeks, shall be deemed a common drunkard." By a preceding section a common drunkard is punishable by imprisonment for not less than six months, nor more than three years.

The complaint is brought into this court from the court of common pleas by the defendant, by a bill of exception, which raises the question whether the section 24 above quoted is constitutional. The defendant contends that the section is unconstitutional—*First*, because it is in conflict with the declaration contained in the fifth amendment to the constitution of the United States, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb;" and, *second*, because it violates provisions of the state constitution which secure the right of trial by jury.

A sufficient answer to the first objection is that the fifth is one of several amendments to the federal constitution which impose restriction only on the general government, and do not apply to state governments. *Barron v. Mayor, etc., of Baltimore*, 7 Pet. 243, 247; *State v. Paul*, 5 R. I. 185; *Com. v. Whitney*, 108 Mass. 5. We do not think, however, that the section would be in conflict with the declaration if the declaration were in our state constitution. The defendant's contention is that the section makes him renewedly liable to conviction and punishment for offenses which he has previously been convicted of and punished for. Clearly, this is not so. His previous offenses were offenses of being intoxicated in the city of Providence, under such circumstances as to amount to a violation of decency. The offense of which he is now accused is that of being a common drunkard. The difference is this: His previous offenses were separate acts of intoxication, whereas the offense of which he is now accused consists in his having a character attached to him by force of the section in consequence of having been convicted of his previous offenses; namely, the character of a common drunkard, for which he is punishable under a preceding section.

The section is similar in effect to a former statute of Massachusetts. The statute provided that where a person had been twice convicted of offenses punishable by confinement to hard labor for any term of years he should, on his second conviction, be sentenced to solitary confinement, etc., in addition to the punishment prescribed for the offense; and also, if the first conviction was not known in time for this, that the further sentence should be imposed by the supreme court on information setting out the facts. In *Ross' Case*, 2 Pick. 165, the validity of such further sentence, imposed on information, was affirmed. The policy of such statutes is to prevent the repetition of offenses by punishing with increased severity the offender who, by repeating his offense, shows that the lighter sentences have been inefficient. *Plumbly v. Com.*, 2 Metc. 413; *Com. v. Hughes*, 133 Mass. 496.

We do not see any valid ground for the second objection. There is nothing to prevent any person who is complained of under chapter 244, § 24, from having a trial by jury on any question of fact arising under the complaint, if he desires it, and there is, and long has been, provision for jury trial on complaints for indecent intoxication; so that the three convictions cannot have been obtained against him without jury trial, unless he has seen fit to forego it.

Exceptions overruled.

## BEATTIE and others v. THOMASON and others.

(Supreme Court of Rhode Island. October 29, 1887.)

## WILL—TESTAMENTARY CAPACITY—UNDUE INFLUENCE—EVIDENCE.

Testimony going to show that real estate devised by a will in contest to the testator's sister was in part acquired by the earnings of the testator's wife, and her daughters by a former husband, although it stood in the testator's name, is admissible; the will being contested on the ground that the testator, through mental weakness and disorder, was incapable of making it, and also that the will was obtained by undue influence.

Appeal from probate court, city of Providence.

On the appellees' petition for a new trial.

*William H. Sweetland*, for appellants. *George J. West* and *Daniel L. D. Granger*, for appellees.

DURFEE, C. J. This is an appeal from a decree of the municipal court of the city of Providence admitting to probate the will of Joseph Knight, who died August 30, 1886. The will, dated July 9, 1886, gives to his sister, with whom, until shortly before his death, he had been on bad terms for years, his real estate, and two-thirds of the personal estate; the remainder being given to his brother. He made a will July 24, 1884, by which he gave his entire property to his wife, who died June 28, 1886, leaving two daughters by a former husband, who are the appellants. At the last term of this court the case was tried to a jury, who returned a verdict against the will. It is before us now on petition for a new trial, for alleged erroneous rulings, and on the ground that the verdict was against the evidence and the weight thereof.

The only ruling now complained of is a ruling by which the appellants were allowed to introduce certain testimony going to show that the real estate devised by the will in contest to the testator's sister was in part acquired by the earnings of Mary Knight and her daughters, although it stood in the name of the testator. The contention is that the testimony was irrelevant, but at the same time prejudicial, since it was likely to appeal to the sympathies of the jury, and lead them to suppose that this was a proper proceeding to establish the equitable claim of the step-daughters.

We think the testimony was properly admitted. The will was contested on the grounds—*First*, that the testator, through mental weakness and disorder, was incapable of making it; and *second*, that it was the offspring of undue influence; and any evidence tending to show that it is unreasonable or unjust, as compared with the prior will, under which the contestants claim, was relevant to the issues. "Where a will is impeached for imbecility of mind in the testator, together with fraudulent practices by the devisees," says GIBSON, C. J., in *Patterson v. Patterson*, 6 Serg. & R. 55, "the intrinsic evidence of the will itself, arising from the unreasonableness or injustice of its provisions, taking into view the state of the testator's property, family, and the claims of particular individuals, is competent and proper for the consideration of the jury." See, also, to the same effect, *Fountain v. Brown*, 38 Ala. 72; *Kevil v. Kevil*, 2 Bush, 614; 1 Redf. Wills, 521. Moreover, the testimony objected to was connected with the testimony going to show that the testator had years before the death of Mary Knight, when he was confessedly of sound mind, recognized her right to the real estate, and, on being asked to make it over to her, he promised to do so by will; the claim of the appellants being that the will of 1884 was made to carry out this promise.

We do not think that a new trial should be granted on the ground that the verdict was against the evidence or the weight thereof. The testimony in regard to the mental condition of the testator was very contradictory, and was, in our opinion, such that different minds, in reading it, might fairly come to different conclusions. Petition dismissed.

## LEWIS and others v. TOWN OF NORTH KINGSTOWN and others.

*(Supreme Court of Rhode Island. October 29, 1887.)***EQUITY—INJUNCTION TO RESTRAIN TRESPASS—PERFORMANCE OF AOT PENDENTE LITE.**

A bill in equity was brought for an injunction to restrain the town surveyor from removing a building and obliterating the boundaries of the complainants' lot. The answer admitted the removal, but claimed that the land where the building stood was a part of the public highway. A supplemental answer said the complainants ought not to maintain their bill, because the respondents had fully carried out their objects by removing the building and grading the lot. General replications were filed to both answers. Upon respondents' motion to dismiss the bill, on the ground that the bill does not state a case for equitable relief, and, if it does, the case stated has ceased to exist, *held*, the motion must be denied. The case falls within the class of cases in which threatened trespasses are enjoined. The statements of the supplemental answer are not reasons for granting the motion, those statements being denied by the replication. Even if admitted, they do not make a case for dismissal, for a defendant, in an injunction suit, cannot oust the court of its jurisdiction by committing, *pendente lite*, the very acts to prevent which the suit was begun.

Bill in equity for an injunction. On motion to dismiss the bill.

*Samuel W. K. Allen*, for complainants. *William C. Baker*, for respondents.

**DURFEE, C. J.** This bill sets out that the complainants are owners in possession of a lot of land situate on Washington street, in the village of Wickford, in the town of North Kingstown, in highway district No. 37 of said town, on which lot there is a building belonging to them; that the defendant John H. Weeden, the surveyor of the highways of said district, acting under orders of the town council of said town, the members whereof are likewise made defendants, has entered on said lot, and is engaged in raising said building, and taking away the foundations, for the purpose of removing said building and foundations, and grading said lot, thereby throwing the estate open to the public, and obliterating its boundaries, to the irreparable injury of the complainants. The bill prays that the defendants may be enjoined from carrying out their purposes, and from further interfering in any way with the estate, and for general relief. The bill was filed February 28, 1885. The defendants, by their answer, filed May 27, 1885, admit that they are or were doing as charged, but deny that the lot is part and parcel of the estate of the complainants, and allege that it is and ever has been, from a time whereof the memory of man runneth not to the contrary, part and parcel of a public highway, and that the building had stood thereon by sufferance of the town. The defendants also by supplemental answer, filed September 28, 1886, allege that their purposes have been fully carried out by removing the building and foundations and grading the lot, and set up that the complainants ought not to maintain their bill, because their remedy is complete at law. To both answers the complainants have filed general replications. In this state of the pleadings, the defendants move that the bill be dismissed, because the complainants have an adequate remedy at law, and, in support of their motion, contend—*First*, that the bill does not state a case for equitable relief; and, *second*, if it does, that the case stated has ceased to exist by reason of the removal of the building and foundations, and the grading of the lot.

It is true that, in case of threatened trespasses, courts of equity generally leave the suffering party to his remedy at law; but when such party is in possession, and the trespass, if permitted, would result in irreparable injury, or tend to the destruction of the estate, the courts interpose by injunction. In the case at bar, the bill averred that the defendants were purposing, when the bill was filed, not only to remove the building from the lot belonging to the complainants, thus destroying a portion of their estate, but also to grade the lot, thus obliterating its boundaries, and throwing it open to use as a part of the highway, so that, in order to reach a complete remedy, the complainants

might not only have to prosecute the defendants for their damages, but also to establish their right as against the public. We think the case as stated in the bill falls within the class of cases in which threatened trespasses are enjoined. *Winslow v. Naysen*, 113 Mass. 411, 421; *Fox v. Fitzsimons*, 29 Hun, 574, 579; *McPike v. West*, 71 Mo. 199; *Erwin v. Fulk*, 94 Ind. 235; *Gilbert v. Arnold*, 30 Md. 29; Kerr, *Inf.* 295.

We do not think the motion should be granted because of the statements of the supplemental answer, since those statements are controverted by the replication. Moreover, if they were admitted, we do not think they would make a case for dismissal. It ought not to be in the power of a defendant in an injunction bill to oust the court of its jurisdiction by committing, *pendente lite*, the very acts to prevent which the suit was begun, and such, we think, is the law. "It is well settled," says the supreme judicial court of Massachusetts, "with little or no conflict of authority, that when a defendant in a bill in equity disengages himself, pending the suit, to comply with an order for specific relief, the court will proceed to afford relief by way of compelling compensation to be made, and for this purpose will retain the bill and determine the amount of such compensation, although its nature and measure are precisely the same as the party would otherwise recover as damages in an action at law." See *Milkman v. Ordway*, 106 Mass. 232, a case which contains a very full citation and discussion of authorities, and goes even beyond the passage quoted. See, also, 2 Story, *Eq. Jur.* (12th Ed.) §§ 794, 799. It may be that an amendment of the bill setting forth the acts committed by the defendants *pendente lite* will be necessary, notwithstanding the supplemental answer, if the complainants desire, not only an injunction from further interference, but also an award of damages; but, if so, the complainants should have opportunity to make it.

Motion dismissed.

### LANGLEY, Adm'r, v. METROPOLITAN LIFE INS. CO.

(*Supreme Court of Rhode Island.* November 5, 1887.)

#### PLEADING—GENERAL DEMURRER TO DECLARATION CONTAINING SEVERAL COUNTS.

A general demurrer to an entire declaration, containing a special count on a policy of life insurance, a count on account settled or stated, and the common counts, is bad, if any count is sufficient.

*Assumpsit.* On demurrer to the declaration.

*William P. Sheffield and William P. Sheffield, Jr.*, for plaintiff. *Francis W. Miner and William G. Roelker*, for defendant.

**PER CURIAM.** The demurrer to the declaration must be overruled. The declaration contains a special count on a policy of life insurance, also a count on account settled or stated, and the common counts. The demurrer is a general demurrer to the entire declaration. Of course it is bad if either count is sufficient. The defendant does not claim to point out any defect in any but the first count, and we do not discover any defect in the other counts. Gould, Pl. c. 5, § 6; 1 Chit. Pl. \*696. Demurrer overruled.

### O'BRIEN v. FOWLER and others, Examiners, etc.

(*Court of Appeals of Maryland.* November 3, 1887.)

#### 1. ACTION—COVENANT—PLEADING—EXTRA WORK.

In an action of covenant upon a sealed contract which stipulated that no claim for extra work should be allowed, unless such work was done upon a written order signed by the engineer and approved by the examiners, the plaintiff alleged, in one count of his declaration, that defendant was indebted to him for extra work done under the contract; that defendant had failed to give him written orders for

such work, but had expressly agreed to pay for such extra work. *Held*, that a demurrer to the count was properly sustained; that plaintiff might have an action in *assumpsit* for such work, but, in the absence of the stipulated written orders, could not recover for it under the contract.

2. SAME—PLEADING AND PROOF.

In an action of covenant upon a sealed contract, which stipulated that no claim for extra work should be allowed, unless such work was done upon a written order signed by the engineer and approved by the examiners, plaintiff alleged in one count of his declaration that such extra work was done according to contract, and offered evidence to show that such work was done without such written orders, but with the consent of defendants, and upon their express promise to pay for the same. *Held*, that the evidence was not responsive to the pleadings, and was properly excluded.

Appeal from circuit court, Baltimore county.

*R. R. Boorman*, for appellant. *H. E. Wootton* and *D. G. McIntosh*, for appellees.

ALVEY, C. J. This is an action of covenant brought by the plaintiff, the present appellant, against the defendants; the latter being a board of examiners, created by the act of the general assembly of 1882, c. 171, amendatory of the act of 1880, c. 443, providing for the completion of Edmondson avenue, in Baltimore county. The plaintiff was the contractor for doing work on the line of the road, and it appears that he entered into three separate contracts for doing the work on three sections or distinct parcels of the line. The contracts are all under the hands and seals of the parties thereto, and the declaration contains five counts; the claim of the plaintiff being for money due for work done under the several contracts, and for extra work done, as contemplated by said contracts, according to the allegations of the plaintiff. To the first four counts of the declaration the defendants pleaded, and upon which pleas issues of fact were formed and tried, resulting in a verdict and judgment for the plaintiff. But to the fifth count of the declaration, as finally amended, the defendants demurred, and that demurrer was sustained by the court. This ruling upon the demurrer gives rise to the question presented on this appeal.

The fifth count demurred to is in form as follows: "And for that, whereas, the plaintiff did and performed certain other work, and furnished materials therefor in and upon said three parcels of said Edmondson avenue, specified in the contracts mentioned in the foregoing counts, which work and materials were not embraced in said written contracts, but which said written contracts authorized and sanctioned in the terms following: 'No claim for extra work will be allowed, unless the same shall have been performed through a written order signed by the engineer, and approved by the examiners;' and all of which work was done and materials furnished by the plaintiff by order and direction of the defendants and of their engineer, and was received and accepted by them and their engineer, and said defendants expressly promised to pay for the same, and the written orders so required therefor were not received by the plaintiff only through inadvertence, procrastination, and neglect, and were waived by the defendants; and that said engineer made an estimate of the work so done under said contracts, but that the same was fraudulently made, whereby the character, quantity, and value of said work was greatly underestimated; and that the defendants refused to pay the plaintiff the fair and true value of said work, although often requested so to do, to the damage of the plaintiff to the amount of \$5,000."

As will be observed, according to the allegation in this fifth count, it was expressly stipulated in the contracts, that no claims for extra work should be allowed under the contracts, unless the same was done by written order signed by the engineer, and approved by the examiners. This was an important stipulation of the contracts, inserted for the protection of the public. It was made a condition precedent, and the plaintiff was under no obligation to do

extra work in the absence of such written order and approval; nor can he claim for doing such work under the contracts, except by alleging and showing the written order of the engineer, with the approval of the examiners, for such extra work. Without the written order and approval, as provided by the contracts, any extra work that may have been done was not embraced by such contracts, and that is in terms alleged; and, to entitle the plaintiff to claim under the contracts, he must claim in conformity to the terms thereof, and not otherwise. The very object of the stipulation in the contracts was to exclude such claim for extra work, except upon the condition prescribed. *Cemetery Co. v. Coburn*, 7 Md. 202; *Abbott v. Gatch*, 13 Md. 314, 329; *Myers v. Sarl*, 3 El. & El. 306; *Russell v. Sa Da Bandetra*, 13 C. B. (N. S.) 149. This is an action of covenant upon sealed contracts, and the recovery can only be had upon those instruments in accordance with the terms and stipulations therein contained. The case is wholly unlike that where a party sues upon a sealed contract, alleging a breach thereof, and the defendant is allowed to plead in bar that he had been, by mere parol, discharged of the breach, or that his performance of the contract had been excused or waived, and the contract itself rescinded, by mutual consent, as in the cases of *Insurance Co. v. Hamill*, 5 Md. 170, and the recent case of *Herzog v. Sawyer*, 61 Md. 345.

It is alleged that the extra work and materials were furnished by the order and direction of the defendants, and were accepted by them, and that they expressly promised to pay for the same; and that the written orders, as required by the contracts, were not received for such extra work and materials, by reason of inadvertence and neglect, and that the defendants waived such written orders and approval thereof. If these facts be true as alleged, the plaintiff would not be without remedy; for, while he cannot be allowed to recover for such extra work and materials on the original contracts under seal, it does not follow that he may not recover in an action of *assumpsit* for the value of such extra work and materials. Many cases could be cited in support of such right; and in the case of *Watchman v. Crook*, 5 Gill & J. 239, 263, some of the cases are referred to, and the principle fully recognized by the court. It would seem to be too clear for question that the court below ruled correctly in sustaining the demurrer to the fifth count.

The same question as that raised by the demurrer was attempted to be raised by the plaintiff, under the allegations of the fourth count of his declaration, upon offer of proof. But, apart from the general objection to the plaintiff's right to recover on such proof in this action, the proof was inadmissible as being in conflict with the allegations of the pleadings. The allegation in the fourth count of the declaration (the only count under which the plaintiff sought to introduce the evidence) was that the extra work claimed for was done upon the written orders of the engineer, with the approval of the defendants. This allegation, instead of being supported by the proof offered to be introduced, would have been directly negatived by it. The court was therefore clearly right in rejecting the offer made by the plaintiff, as stated in the bill of exception.

It follows that the judgment of the court below must be affirmed.

#### McCULLOUGH IRON CO. v. CARPENTER.

(Court of Appeals of Maryland. November 3, 1887.)

##### 1. MASTER AND SERVANT—CONTRACT OF HIRING—BY THE YEAR—AT WILL.

In an action against a corporation for damages for wrongful discharge from its service, defendant asked the court to instruct the jury that, notwithstanding they might find that plaintiff did hire himself to defendant in April or May, 1882, for a year, and after its expiration continued in defendant's service without any new contract as to time of service, then their relations, after the first year, was a hiring at

will, and could be terminated by either party at any time. *Held* properly refused, because if plaintiff hired for a year and continued from year to year without a new contract, it would constitute a hiring by the year.

**2. SAME.**

In an action against a corporation for damages for wrongful discharge from its service, plaintiff claimed to have been hired for a year from April 1, or May 1, 1886. Defendant asked the court to instruct the jury that if they found that the hiring was for an indefinite length of time, and that no subsequent contract fixed a definite time, then they must find for defendant. The court had already instructed the jury that, "to enable plaintiff to recover he must satisfy the jury that he entered upon said employment for a year, commencing on the first of April or the first of May, 1886, upon the mutual understanding and agreement of himself and defendant that it should continue for a year." *Held*, that the refusal to give the instruction was not error.

**3. SAME—EVIDENCE OF HIRING BY THE YEAR.**

In an action against a corporation to recover damages for wrongful discharge from its service, plaintiff claimed that he was hired by the year. The evidence showed that, after plaintiff had been hired, defendant hired another man, and told him they would hire him the same as they did plaintiff, "by the year." Defendant asked the following instruction, which was refused: "That there is no evidence in this case legally sufficient to entitle plaintiff to recover." *Held*, the refusal was not error.

Appeal from circuit court, Cecil county.

*William J. Jones and L. Marshall Haines*, for appellant. *Albert Constable*, for appellee.

IRVING, J. The appellant is an iron manufacturing corporation. It was sued by the appellee for wrongful discharge from its service. The declaration contains two counts. The first alleges that the defendant hired the plaintiff for a year from the first of April, 1886, as assistant manager, at the wages of \$1,000 a year, payable in monthly installments, together with the privilege of a house and cow-keep, and such articles as he might purchase of the defendant at cost; that he entered into the defendant's service upon those terms, and was discharged from service before the end of the year. The second count alleges a like contract, only making the contract and service to start from the first day of May, 1886, and avers like wrongful dismissal before the year was out. *Non assumptis* was pleaded, and issue joined; and no question arose on the pleadings. No instructions were asked by the plaintiff. The defendant asked seven instructions. His second, third, fourth, and seventh were granted. The first, fifth, and sixth prayers were rejected, and the refusal to grant them is the ground of this appeal.

By the first prayer the court was asked to say that "there is no evidence in this case legally sufficient to entitle the plaintiff to recover." This prayer assumes the truth of all the evidence offered by the plaintiff, and asks the court to say that in law the evidence is insufficient to support the plaintiff's action. The plaintiff testified that for 27 years he had been in the employment of the defendant in its rolling-mill, during which time he had been paid part of the time by the day, part of the time by the ton, and the balance of the time by the year; and that the change in his pay began the first of April, 1882. At that time he was appointed assistant manager at \$1,000 per year, payable in monthly installments of \$83.33 each; and that under this contract he worked till the first of September, 1886, when he was discharged. He said he also got a house worth six dollars and a half per month, a cow kept free, and coal at cost. On cross-examination he said when he was appointed assistant manager the secretary of the company handed him an envelope on which was written \$1,000 a year, and asked him if that would satisfy him with the other privileges he was getting, viz., house and cow-keep. He kept right along, and the \$83.33 was regularly paid every month. Nothing was said to him about salary, amount of salary, or length of service, except what appeared on that envelope, from that time till his discharge. On cross-examination he

further said there was no bargain except what he said took place in A. 1882. He said he replied to the offer made that it would do, and accepted terms, and worked accordingly and was paid accordingly.

Ephraim Stine testified that he was employed by the appellant as forge from the twentieth of April, 1885, to September 1, 1886, when he was charged. He said when he was employed Mr. Harvey, the president of company, Mr. Whitely, the treasurer and director, and Mr. McDaniel, secretary and director, were all present; that these officers then present said that "would hire him for a year, and said, 'We will hire you just as we hire F. Carpenter, [meaning the plaintiff,] by the year,' and that they told him that he should receive his orders from the plaintiff." As no question is raised except such as depends on the legal sufficiency of the testimony to support plaintiff's action, it is unnecessary to state the evidence respecting the character of the work done, the sickness of the plaintiff for part of the time before his discharge, but from which he had recovered, and reasons assigned for the charge which only involve retrenchment of expenses. There can be no doubt that, in this country, the rule is, an indefinite hiring is *prima facie* a hiring at will. It is also well settled that a hiring at so much a week, month or year, no time being specified, does not, of itself, make more than an indefinite hiring. It is competent for the parties to show what the mutual understanding was; but, unless there was a mutual understanding, it is only an indefinite hiring. Wood, Mast. & Serv. (1st Ed.) 272; *Prentiss v. Ledyard*, Wis. 131; *Orr v. Ward*, 73 Ill. 318; *Haney v. Caldwell*, 35 Ark. 156.

By the second instruction asked by appellant the jury was told that "the burden was on the plaintiff to satisfy them that he was employed by the defendant for one year from the first of April or the first of May, 1886," as the rule laid down in the authorities cited requires. Now, under the law, as we understand it to be, if the plaintiff's case rested solely upon his own testimony there would seem to be no escape from instructing the jury there was no legally sufficient evidence of a contract for a yearly hiring. But the plaintiff's testimony is supplemented by the testimony of Ephraim Stine as to what the officers told him the contract with the appellee was in respect to the time of service, and we think that with that and the other testimony in the case there was no error in rejecting the first prayer. Stine's testimony, if believed by the jury, certainly showed how the appellant understood the contract. It was an admission of the defendant that the plaintiff was hired by the year, and, if the plaintiff had rested on that admission alone, the jury might have found the contract provided for a year's service. With such admission by the defendant, the court could not say there was no legally sufficient evidence to justify the jury in finding the defendant had hired the plaintiff for a year.

The fifth instruction was rejected, no doubt, for the reason that in the second and third and seventh instructions asked by the appellant the court instructed the jury most emphatically that, to find for the plaintiff, they must find the defendant had agreed to hire him for a year from the first of April or first of May, 1886. The fifth instruction stated an abstract proposition of law, which, though it be true, was wholly immaterial if the jury found from the evidence there was an agreement to hire him for one year. The jury were told so emphatically that they must find the defendant did agree to hire him (the plaintiff) for a year before they could find for the plaintiff, we can see how the rejection of the fifth prayer could have prejudiced the defendant (appellant here.) The jury, having found for the plaintiff, must have found on the evidence that the defendant had hired the plaintiff for a year; and granting of the prayer embodying the abstract proposition contained in the fifth instruction could not have affected their verdict. That prayer asked that the jury be told that, if they found the hiring was for an indefinite length of time, and that no subsequent contract fixed a definite time, then they must

find for defendant. In the seventh prayer, which was asked and granted, this language was used: "And to enable the plaintiff to recover, he must satisfy the jury that he entered upon said employment for a year, commencing on said first day of April or May, 1886, upon the mutual understanding and agreement of himself and defendant that it should continue for a year." With such explicit instruction how could the fifth have aided them? and how can its rejection be ground for reversal?

The sixth prayer, in substance, asked the court to tell the jury that, notwithstanding they might find the plaintiff did hire himself to the defendant in April or May, 1882, for a year, and, after its expiration, continued in defendant's service without any new contract as to time of service, then their relation after the expiration of the first year was a hiring at will, and terminable at the pleasure of either party. This prayer was rejected, which it is claimed was error. The refusal of this prayer is justified by the weight of authority both in England and this country. The case of *Beeston v. Collyer*, 4 Bing. 309, distinctly decides that, if the contract for a year is made, and the parties do not disagree, and the service continues, the same contract prevails for the next year during which service has continued, without new agreement. This is admitted to be the law in England, but, it is urged, is not the accepted law in this country. We do not think this contention sustained by the authorities. Mr. Wood, in his work on Master and Servant, § 96, says, when the contract for a year is not expressly renewed, and the service continues in the same business, the presumption is the contract was continued. This is an American authority of high repute, and he cites numerous American decisions in support of the law announced in the text. In *Iron Co. v. Richardson*, 5 N. H. 294, such contract is likened to the case of a tenant holding over. In *Wallace v. Floyd*, 29 Pa. St. 184, the court says the presumption is, when the service continues, it is under the same contract. The same principle is maintained in *Ranck v. Albright*, 36 Pa. St. 367; *Nicholson v. Patchin*, 5 Cal. 474; *Huntington v. Clain*, 38 N. Y. 182; and in *Vail v. Manufacturing Co.*, 32 Barb. 564. Being only a presumption, it is liable to rebuttal by evidence of a change of contract. By the seventh instruction the jury were told, on the application of the appellant, "that even though they might find the plaintiff was employed by the defendant for one year from the first of April or May in the year 1886, and that he continued in the employ of the defendant down to and beyond the first of April, 1886, yet this is not conclusive to prove that he continued in the service of the defendant after said first of April or May, 1886, on a contract of hiring for one year from the last-mentioned dates, or either of them; but the jury must determine from all the facts and circumstances proved in the case what the contract between the plaintiff and defendant really was under which the plaintiff continued in said service after said last-mentioned dates; and to enable the plaintiff to recover he must satisfy the jury that he entered upon said employment for the year commencing on said first of April or May, 1886, upon the mutual understanding and agreement of himself and defendant that it should continue for a year, but said mutual understanding and agreement need not be by an express contract, but may be inferred by the jury from all the facts and circumstances in evidence before them, if the jury find there are such facts and circumstances sufficient to warrant such finding." In the face of such an instruction, granted at appellant's instance, we cannot see how complaint can be sustained for the refusal to grant the sixth instruction, or any other instruction they asked for. Without sanctioning the instruction thus granted, and which we are not called on to express opinion upon, we are of opinion that the appellant has no ground to complain, and the judgment must be affirmed. Judgment affirmed.

STATE v. LASHUS.<sup>1</sup>*(Supreme Judicial Court of Maine. October 27, 1887.)*

## 1. INTOXICATING LIQUORS—COMMON SELLER—PRIOR CONVICTION—EVIDENCE.

The record of a prior conviction of the respondent, as a common seller of intoxicating liquors, is admissible in evidence upon a trial for the same offense, although it is not so fully extended as to embrace the indictment at length, and a copy of the indictment does not accompany it.

## 2. SAME—IDENTITY OF PERSON—PROVINCE OF JURY.

The identity of the respondent with the person named in the record is a question of fact for the jury, and the mere identity of name is not sufficient to authorize the presiding judge to withdraw the question from the jury, and treat it as one of law.

On exceptions by respondent from superior court, Kennebec county.

Indictment for common seller of intoxicating liquors. At the trial the jury returned a verdict of guilty, and the respondent filed the following bill of exceptions:

"At the trial of this case, had at the present term of court, evidence was introduced tending to show that the defendant had sold intoxicating liquors during the time named in the indictment. The county attorney, against the seasonable objection of the defendant's counsel, was allowed by the presiding judge to introduce the following record, to-wit:

## "RECORD.

"*State of Maine, Kennebec—ss.*: At the supreme judicial court, begun and holden at Augusta, within and for the county of Kennebec, on the first Tuesday of August, being the first day of said month, Anno Domini, 1871. By the Honorable CHARLES DANFORTH, a justice of said court.

## "State vs. Levi Lashus.

"Indictment for being a common seller of intoxicating liquors, found at the March term, 1871, when and where the defendant being arraigned pleads not guilty, thereupon the issue being presented to a jury duly impaneled, they find a verdict of guilty, thence the action was continued to this term for sentence. Sentence first day of this term, fine \$100, and costs. Monday, August 7, 1871, committed for non-payment."

"This record was all the evidence introduced at the trial tending to sustain the allegation in the indictment of a former conviction of the defendant. \* \* \* The court instructed the jury that said record was introduced as bearing upon the amount of penalty or punishment following a conviction under the indictment, and that if the jury were satisfied beyond a reasonable doubt from all the evidence introduced before them that the defendant had, during any portion of the time named in the indictment, been engaged in selling intoxicating liquors as a business, they should return a verdict of guilty. The jury returned a verdict of guilty. To the ruling of the court admitting said record, and the instruction in the charge to the jury as to the basis of a verdict of guilty, the defendant excepts."

L. T. Carleton, Co. Atty., for the State. S. S. Brown, for respondent.

DANFORTH, J. The record of the prior conviction alleged in the indictment was properly admitted. None more extended had been or is usually made. The addition of the indictment would have given no more information as to the nature of the offense charged than is obtained from the record. In each it is described in the same language, using the words of the statute, viz. "A common seller of intoxicating liquors." The issue tried and the conviction following are so clearly set out as to leave no room for mistake.

<sup>1</sup> Reported by Leslie C. Cornish, Esq., of the Augusta bar.

The error is in the instruction to the jury, in which they were told "that, if they were satisfied beyond a reasonable doubt from all the evidence introduced before them that the defendant had, during any portion of the time named in the indictment, been engaged in selling intoxicating liquors as a business, they should return a verdict of guilty." Thus the jury were required to and did render a verdict of guilty of the higher offense charged, upon testimony sufficient only to convict of the lower. It may be true that, so far as the sufficiency and legal effect of the record are involved, a question of law only is presented. But the identity of the defendant on trial with the person named in the record is a question of fact. The identity of name is some evidence of identity of person, more or less potent according to the connecting circumstances; but it is not, certainly in this case, sufficiently conclusive to authorize the court to take it from the jury, and treat it as a question of law. But neither of the rulings objected to in any way affects the verdict so far as it relates to the lower offense charged. Upon that it rests on evidence and instructions not objected to. The prosecuting officer may therefore enter a *nol. pros.* as to the allegation in the indictment of a prior conviction, and let there be judgment for the state, otherwise the exceptions must be sustained.

PETERS, C. J., WALTON, VIRGIN, EMERY, and FOSTER, JJ., concurred.

### STATE v. HALL.<sup>1</sup>

(*Supreme Judicial Court of Maine. October 27, 1887.*)

#### 1. INTOXICATING LIQUORS—NUISANCE—ALLEGATION OF PLACE.

An allegation in an indictment for liquor nuisance, that the building alleged to be occupied by the respondent is situated "at the corner of Depot square in said Gardiner," is sufficiently certain without stating on which corner.

#### 2. SAME—RECORD OF PRIOR CONVICTION—PAROL EVIDENCE.

If the description of the building in the record of a prior conviction is not inconsistent with that in the pending indictment, though less complete, evidence *alibunde* may be introduced to show that both descriptions refer to the same building.

#### 3. SAME—EFFECT OF PRIOR CONVICTION.

Such record of prior conviction is evidence of the intention of the use of the building described in the pending indictment as a nuisance, only when it appears that the building is the same in both instances.

On exceptions by respondent from superior court, Kennebec county.

Indictment for liquor nuisance. The jury returned a verdict of guilty. The respondent filed a motion in arrest of judgment, alleging that "the said indictment is bad for uncertainty in the following particular: That the building alleged to be occupied by the respondent is therein alleged to be situated at the corner of Depot square, in Gardiner, in the county of Kennebec, and not stating therein on which of the corners of said square." The presiding judge overruled this motion. In the course of his charge to the jury the presiding judge instructed them as follows: "He [the counsel for the government] then asks you to consider further the force of evidence tending to show a former conviction of the crime of maintaining a liquor nuisance. He asks you to apply this, and draw the inference from it which you feel authorized to draw. You have a right to consider that, gentlemen, as bearing upon the intent with which he maintained this place, if you find he did maintain the same place in the same building. And I say to you further that if you find that he maintained another place in the city of Gardiner for the illegal keeping or the illegal sale of intoxicating liquors, although it was not located in this precise place, you have a right to consider that in determining with what intent he maintained the premises in the condition in which the officer de-

<sup>1</sup> Reported by Leslie O. Cornish, Esq., of the Augusta bar.

scribed them in this case." To these instructions, and to the ruling of the court denying the motion in arrest of judgment, the respondent excepted.

*L. T. Carleton*, Co. Atty., for the State. *H. M. Heath* and *G. W. Heseton*, for respondent.

DANFORTH, J. The motion in arrest of judgment in this case was properly overruled. The building is sufficiently described in the indictment, and whether in fact it corresponded with that description was a question for the jury. The controversy with the collector and his deputy, and the proceedings against the latter for contempt, afford the respondent no ground for exception. The copy of the collector's record, having been taken and sworn to by a competent witness, was admissible. *State v. Lynde*, 77 Me. 561, 1 At. Rep. 687. The fact that the building is not described in the same language as in the indictment, if material, could only make it necessary to show that it was the same by other testimony. *Com. v. Austin*, 97 Mass. 597. The certificate of the witness attached to the record was not sufficient to authorize its admission, and might have been objectionable but for the oral testimony in court; with that it became immaterial. The record of the former conviction was admissible for certain purposes. The situation of the building is more particularly described in the present indictment than in the former; but the two descriptions are not inconsistent. It was then permissible to show by other testimony that both referred to the same building. But we think the instruction to the jury in regard to the use to be made of this evidence was erroneous. After giving the correct instruction, the justice added: "And I say to you further that, if you find that he (the defendant) maintained another place in the city of Gardiner for the illegal keeping or illegal sale of intoxicating liquors, although it was not located in this precise place, you have a right to consider that, in determining with what intent he maintained the premises in the condition in which the officer described them in this case. The jury must have understood that, if they found that the building referred to in the record was not the same as that in the indictment, still they might consider the record of the former conviction as having some tendency to show the intent of the defendant in maintaining the building described in the indictment. This was evidently giving the record much too broad an application. It is very much like admitting the proof of one crime to sustain the charge of another. This would be in violation of a rule to which though there may be an apparent, there is no real, exception. It is not unlike proving the defendant's bad character before he has opened the door by offering evidence to prove his good."

There was no prior conviction alleged in the indictment, so there was no occasion to offer the record to prove such an allegation. It could only be competent so far as it tended to prove any fact material to the issue in the case at bar: and for that purpose it derives no efficacy from the fact that it was the record of a conviction, except it may be more reliable testimony. It is conclusive between the parties, like the judgment in a civil suit, as to the facts in issue; and this is true whether the judgment is founded upon a plea of guilty, or is the result of a trial and verdict. *State v. Lang*, 63 Me. 222. Hence no facts can properly be proved by such a record, except such as from their relevancy to the issues involved in the case on trial might well be proved by any other competent testimony.

The indictment in this case is for maintaining a certain building, and using it for the illegal keeping and illegal sale of intoxicating liquors, whereby it became a nuisance. The facts in issue, and which the defendant was called upon to answer, were the keeping and use of that particular building. It was competent for the government, as tending to sustain this charge, to show a similar maintaining and illegal use of this building prior to the time alleged in the indictment. *Com. v. Kelley*, 116 Mass. 341; *Com. v. McPike*.

3 Cush. 184; *State v. Plunkett*, 64 Me. 534. If the building described in the record were the same as that in issue in the case at bar, the facts there involved would, under these authorities, be pertinent to the present case. But, if the building were not the same, it is evident that the facts there settled would not be competent, and the record should have been so restricted in the instructions. The application and limitation of this kind of testimony is more fully illustrated in *Com. v. Tuckerman*, 10 Gray, 197; and in a note to *The King v. Wylie*, 2 Heard's Crim. Cas. 32.

For this error only must the exceptions be sustained.

PETERS, C. J., WALTON, VIRGIN, EMERY, and FOSTER, JJ., concurred.

### SCHWAB v. CHARLES PARKER CO.

(*Supreme Court of Connecticut.* November 11, 1887.)

#### 1. RIPARIAN RIGHTS—OVERFLOW OF EMBANKMENT—FINDINGS—CERTAINTY.

Plaintiff was riparian owner on a stream on which defendant had mill privileges, and sued him for overflowing his land through neglect in maintaining an embankment. The court found the defendant guilty of the neglect, and that the extreme northern point to which it was the duty of defendant to maintain the embankment could not be exactly fixed, but was between the points P and Q on a map contained in the record, and that the water broke through between those points. *Held*, that the finding was sufficiently certain to maintain the judgment.

#### 2. SAME—MOTION TO AMEND FINDING, TOO LATE ON APPEAL.

Defendant moved the appellate court to recommit the finding against him for damages for failing to maintain a dike, with directions to locate the exact point to which he could maintain it. *Held*, that plaintiff's right to judgment for past damages was absolute, and that the motion, even if admissible, was too late.

C. R. Ingersoll, for appellant. R. S. Pickett, for appellee.

PARDEE, J. This is a complaint for flowing the plaintiff's land. The issue was closed to the court, judgment was rendered for the plaintiff, and an appeal taken by the defendant.

The finding is that the plaintiff is riparian owner on Quinnipiac river; that the defendant is the owner of a mill privilege thereon, and ponds the water to a higher level than that of the plaintiff's land, and restrains it therefrom by an embankment; that it has neglected to maintain this properly, and that, as a consequence of such neglect, water flowed upon and injured the plaintiff's land; also, that the extreme northern point to which it is the duty of the defendant to maintain the embankment cannot now be fixed with exactness, but is somewhere between the letters P and Q upon a map accompanying the record; and that in 1884 water broke through the embankment "at the place indicated by the letters P and Q on the map, and washed and gullied the plaintiff's land." Upon this, for reason of appeal, the defendant says as follows: That the finding of the report that "just where," between the points P and Q, the northerly end of said dike or embankment originally terminated, cannot now be determined, renders the further finding that the breaking of the waters through and over the locality between said points was due to the negligence of the defendant in not keeping said dike or embankment in repair, inconclusive, inconsistent, and erroneous.

We think the objection is not well taken. We must interpret the finding as saying that there is certainty as to the defendant's duty to maintain the embankment over a portion of the line next beyond P towards Q, but uncertainty as to the exact length of the line to be maintained; and that the judgment is based upon its failure to maintain the portion as to which there is certainty of duty. Otherwise we must impute this to the court, namely: A finding that the plaintiff's charge is not supported by any proof, and yet a judgment for him. This we cannot do. The finding is fairly susceptible of an interpretation in accord with the judgment.

Again, the defendant insists that it is our duty to recommit the finding, with directions to locate at some point the northerly end of the dike which the defendant is bound to maintain. We think we ought not now to impose this burden upon the plaintiff. He charged that the defendant owed him a duty at a particular place, and neglected to perform it, to his consequent injury. He proved the duty, the neglect, and the amount of the damage. His right to judgment and execution for this is absolute and perfect; it neither depends upon, nor can be affected by, the answer to the question whether the defendant owes him a duty at a point further north. Indeed, upon a proper interpretation of the finding and judgment, the reason of appeal does not question this right. And in effect the defendant's motion is that we shall make it a condition precedent to the enforcement of a judgment against it for neglect of duty at one place, that the plaintiff shall be burdened by the expense attending the inquiry whether, if water shall hereafter escape from the pond at another place, with consequent injury, the defendant will be liable in damages.

If it is within the spirit of the practice act that at any stage the defendant might graft such an inquiry into the original action, and make future possibilities part of a present judgment, we yet think the motion too long delayed.

There is no error in the judgment complained of.

(The other judges concurred.)

#### FARMERS' LOAN & TRUST CO. v. POSTAL TEL. CO. and others.

(*Supreme Court of Connecticut. June 7, 1887.*)

##### MORTGAGES—FORECLOSURE—SALE OF LAND IN ANOTHER STATE.

Plaintiff had a mortgage on the property of the defendant in several states, including New York and Connecticut. It sued defendant in New York, and foreclosed the mortgage. A referee was appointed, who sold defendant's real estate in Connecticut, and gave a deed thereof to the purchaser. Plaintiff then brought this suit to foreclose the mortgage according to the laws of Connecticut. B., an attaching creditor, set up as a defense the sale in New York. *Held*, that the deed of the referee conveyed no title to the land in Connecticut, and the rights of the parties were unaffected by the proceedings in New York.

*G. E. Terry*, for appellants. *F. E. Hyde*, for appellee.

CARPENTER, J. The Postal Telegraph Company, a New York corporation, mortgaged all its property, which was situated in several states, including Connecticut and New York, to the plaintiffs, in trust to secure the payment of its bonds. Upon a failure to pay the interest, the plaintiffs brought a suit for a foreclosure in the supreme court in the city of New York. Judgment was rendered for the plaintiffs, pursuant to which a referee was appointed, who sold all the property, including the real estate in this state, and executed a conveyance of the same to the purchaser. The present suit is brought to foreclose the mortgage on the property in this jurisdiction, according to the law and practice of this state. The defendant, the Benedict & Burnham Manufacturing Company, an attaching creditor, appeared, and set up a special defense, alleging the foreclosure and proceedings in the state of New York. That defense was demurred to, and the demurrer sustained. The defendant appealed.

The question is not one of jurisdiction, as the defendant assumes; for the jurisdiction of the court in New York over the parties and the subject-matter of the suit, so far as the property in that state is concerned, cannot be questioned. But the question is, what effect had that judgment on the real estate in Connecticut? Or, if it is preferred to state it as a jurisdictional question, have the courts of that state jurisdiction over lands and land titles in this state? The validity of the defense depends upon the answer to this question.

If the result was to convey to and vest in the purchaser the title to that real estate, then the mortgage had performed its office before this suit was brought, and the plaintiffs have no title, equitable or otherwise. But if those proceedings were nugatory as to that estate, then the mortgage is in force, and the plaintiffs are entitled to a foreclosure. We think the latter is the better view. The courts of our state will not recognize the right of courts in other states to affect directly the title to real estate in the former. The most that can be done is to allow foreign courts, having jurisdiction of the parties, to compel conveyances by the owner, and recognize as valid titles so acquired. We are aware of no case that has gone so far as to recognize the validity of a deed given by a referee or other officer of court by authority of law in another jurisdiction. The rule seems to be that the courts of each state have exclusive jurisdiction to settle the title to lands within its own limits.

In *Watkins v. Holman*, 16 Pet. 25, McLEAN, J., in speaking for the supreme court of the United States, says: "A court of chancery, acting *in personam*, may well decree the conveyance of land in any other state, and may enforce their decree by process against the defendant. But neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court." In *Booth v. Clark*, 17 How. 322, the same court says, speaking of a receiver appointed under a creditors' bill: "He has no extraterritorial power of official action, none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property."

It follows that, as to real property in this state, the rights of the parties remain as they were, unaffected by legal proceedings in the state of New York. There is no error in the judgment complained of.

(The other judges concurred.)

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BELL, Trustee, v. TOWNER and others.

(Supreme Court of Connecticut. December Term, 1886.)

WILL—TRUST FUND—ENTIRE—INCOME.

A person, after making certain provisions under his will, left the residue of his real and personal property in trust for certain purposes, among others, "to hold one-third part of all the rest and residue of my estate, \* \* \* together with the income thereof," for the use of his wife, during her life, "one-third part for the use of my son," and "one-third part for the use of my daughter." The will also provided that, upon the death of his wife, the property held in trust for her should be held in trust for the use of the son and daughter in equal shares. Held, that it was the intention of the testator that the trust estate should be held in one entire fund, and the income divided equally between his widow, son, and daughter.

J. W. Alling, for plaintiff. J. W. Bristol, for defendants.

PARK, C. J. Theron Towner, of the town of New Haven, in this state, after making certain dispositions of his property by will, devised and bequeathed all the residue of his estate to his executors, in trust for certain purposes, and among them the following: "And upon the further trust to hold one-third part of all the rest and residue of my estate, both real and personal, together with the rents, income, and profits thereof, for the proper use and benefit of my wife, Clarissa, during the term of her natural life, the same to be in lieu of dower; one-third part thereof for the use of my son, Theron W. Towner, during the term of his natural life; and one-third part thereof for the use of my daughter, Mary C. Holly, during the term of her natural life." "Upon the decease of my wife, if either of my children shall survive her, then the property so given for her use for life shall be held by my executors in trust for the proper use and benefit of my said son and daughter, in equal shares, for their lives, respectively; but, if they or either of them shall have deceased,

leaving children or other descendants, then equally for the use of the children or other descendants of such deceased son or daughter, such children or other descendants of my children to take *per stirpes* and not *per capita*."

The question at issue between the parties in this case is whether this provision of the will requires, before the death of the widow, that the residue of the estate shall be divided into three separate trust estates, one for the benefit of the widow, and one each for the benefit of the son and daughter, respectively, and, after the death of the widow, into two separate trust estates, one each for the benefit of the son and daughter; thus causing the needless expense of maintaining more than one trust estate. We think it is clear that the testator never contemplated the division of his estate into two or more separate trust estates, although the language used by him is susceptible of such a construction. Manifestly, the great object the testator had in view in this part of his will was to bequeath all the income from all the residue of his estate to his widow, son, and daughter in equal proportions, during the life of the widow, and after her death to divide the same equally among the beneficiaries named in the manner described. This was his purpose; but the mode of accomplishing the object he did not consider sufficiently to discover that there might be a difference between the income from one-third part of the residue of his estate, and one-third part of the income from all the residue; and this may account for the ambiguity of his language.

The difference is not manifest between a holding of all the property for the equal benefit of the widow, son, and daughter, and a holding of the separate thirds of the same property for the benefit of each respectively. A holding of all the property would be a holding of all its parts, on the principle that the greater contains the less. Hence it could be said that a holding of all the property for the equal benefit of all the beneficiaries would be a holding of the equal parts of the property for the benefit of each beneficiary. But the consideration that should govern the construction of this will is that the testator intended that the income of the widow, son, and daughter, derived from the residue of his estate, should be equal, which would result, and could result, only from an equal distribution of the income of the entire residue among the beneficiaries. In this way only can the purposes of the will be fully accomplished. We advise the superior court that the trust estate should be held in one entire fund for the purposes of the will.

(The other judges concurred.)

#### SPAULDING v. WARNER.<sup>1</sup>

(Supreme Court of Vermont. Washington. November 17, 1887.)

##### 1. EQUITY—JURISDICTION—PARTITION OF PERSONAL PROPERTY—ACCOUNTING.

Where there is inadequacy or absence of a legal remedy, as for a partition of personal property owned by co-tenants, equity has jurisdiction, and, if a partition is impracticable, will order a sale and an accounting between the co-tenants.

##### 2. ESTOPPEL—BY NEGLIGENCE—OFFSET.

Where the defendant's claim had once been before a court of competent jurisdiction, where it should have been adjudicated, in which court the claim had been in part satisfied by a judgment in offset, *held*, that the defendant was estopped by her neglect from setting up the balance of the original claim in a subsequent suit between the parties.

Appeal from chancery court, Washington county; VEAZY, Chancellor.

Bill in chancery. Heard on the pleadings and report of a special master, March term, 1887.

<sup>1</sup> Reported by Senter & Kemp, Esqs., of the Montpelier bar.

Decree for the orator to recover \$195.80 for his undivided half of the furniture at the time it was purchased by the orator, and for the use of the same at the rate of \$50 per year and interest. The facts sufficiently appear in the opinion.

*Jas. N. Johnson and S. C. Shurtleff*, for defendant.

A sale will not be ordered if the property can be divided. *Marshall v. Crow's Adm'r*, 29 Ala. 278; *Crapster v. Griffith*, 2 Bland, 5; *Tinney v. Stebbins*, 28 Barb. 290; *Kerley v. Clay*, 4 Bibb, 241. Formerly, equity would not order a sale against the will of the party. Pom. Eq. § 1390. A party is never compelled to take real estate against his will. *Barlow v. Scott*, 24 N. Y. 40; *Peabody v. Tarbell*, 2 Cush. 226. The defendant's plea in offset should be sustained, and the difference between the value of the security and the amount of the decree be allowed. R. L. § 1002; *Insurance Co. v. Wells*, 53 Vt. 14; *Hollister v. Young*, 41 Vt. 156, 42 Vt. 403; *Davis v. Savings*, 48 Vt. 532; *Roberts v. Lund*, 45 Vt. 82; *Ford's Ex'rs v. Cheney*, 40 Vt. 153; *Hall v. Hamblett*, 51 Vt. 590; *Quinn v. Halbert*, 52 Vt. 357.

*Zed S. Stanton and Geo. W. Wing*, for orator.

The former adjudication of this claim in offset by the county court is conclusive that no balance exists. It is barred. R. L. § 2127; *Probate Court v. Kent*, 49 Vt. 380; *Sabin v. Kelton*, 54 Vt. 284; *Soule v. Benton*, 44 Vt. 309; *Probate Court v. Gale*, 47 Vt. 473. Taking possession by foreclosure operated as a purchase in satisfaction of the debt, if the value of the security was equal to the amount of the decree, and, if less in value, then in satisfaction *pro tanto*. *Lovell v. Leland*, 3 Vt. 581; *Paris v. Hulett*, 26 Vt. 308; *Thomas v. Warner*, 15 Vt. 110. The decree was correct. The refusal of the defendant to divide was a conversion, and warranted the court in decreeing the value of the property. The defendant refused to divide, unless certain conditions which she had no right to demand were complied with.

ROYCE, C. J. The parties are tenants in common of a lot of furniture situate in the Summit House at Roxbury, and the bill is brought to procure a division of it, or for a decree that the defendant pay the orator for his half, and the use of the same, and for that part that has been lost and destroyed by the defendant, and for general relief.

It is found by the master that on May 19, 1874, James P. Warner owned the Summit House, and the furniture therein, and that on that day he sold the same to Lucie Wilson, and in part payment for it took her and her husband's, Thomas Wilson's, notes for the sum of \$6,136.87, secured by mortgage on the real estate then sold. On the seventh of February, 1876, the Wilsons sold said real estate and furniture to the orator, who, as a part of the consideration for his purchase, assumed and agreed to pay to Warner the amount then due on the notes then given by the Wilsons to him, and secured by the mortgage given by them on the nineteenth of May, 1874. On the second of October, 1876, the orator, having paid nothing on the debt due to Warner, sold and conveyed the property, real and personal, to Doras L. Spaulding and John E. D. Colby, they agreeing to assume and pay the aforesaid debt to Warner. Warner instituted proceedings to foreclose his mortgage, and obtained a decree, which expired on the second of April, 1878. Warner died about the first of May, 1877, and his wife, the defendant, was appointed administratrix, and as heir and purchaser became owner of the entire estate. The defendant acquired title to an undivided half of the furniture in controversy on the eleventh of December, 1878, and has ever since had the exclusive possession of the whole of it; the orator acquired the title to the other half in March, 1884. Commissioners were appointed upon Warner's estate, and the orator presented before them a large claim consisting of notes and accounts, and the adminis-

tratrix presented in offset a claim against him consisting of notes and accounts. The commissioners found and reported a balance due to the orator of \$346.30. An appeal was taken upon that allowance.

Upon the hearing before the referees by whom the case was heard, the administratrix, in addition to the claims presented by her before the commissioners, presented a claim that the Summit House property received by her upon the decree was less in value than the debt that the orator assumed and agreed to pay; and the referee found that the property so obtained was worth less than the mortgage debt assumed by the plaintiff by a much larger sum than \$346.30; and that if the difference in the value of the property obtained under the decree, and the debt assumed by the plaintiff, could be offset against the plaintiff's claim, there was nothing due from the defendant. Judgment was rendered on the report for the defendant. The case passed to the supreme court, and is reported in 52 Vt. 29; and the judgment was affirmed. It was there settled that the claim made by the administratrix was of such a character that it could properly be offset against any claim made by the plaintiff, and that the probate court had jurisdiction over the subject; so that a judgment might have been rendered in favor of the estate for any balance that might have been found due.

Section 2127, R. L., requires that when a creditor, against whom the deceased had claims, presents a claim to the commissioners, the executor or administrator shall exhibit the claims of the deceased in offset to the claims of the creditor, and the commissioners shall ascertain and allow the balance for or against the estate as they find the same to be. In *Probate Court v. Gale*, 47 Vt. 473, it is said that it seems to have been the intention of the statutes to require all claims between estates and claimants to be adjusted by the commissioners, and claims not presented to and acted upon by the commissioners are by the omission barred from being claims that are enforceable for or against the estate afterwards. The claim set out in the defendant's pleas has once before been before a court of competent jurisdiction, where it might and should have been adjudicated, and it appears that the claim made in those pleas has been in part satisfied by the previous judgment. The defendant is estopped by her neglect from insisting that the claim described in the pleas can be set up as an offset in this suit. It is never allowable to thus divide up an entire claim, to suit the convenience or necessity of the party asking it.

The case was heard by the chancellor upon the pleadings and report, and an order was made that the orator recover of the defendant one-half of the value of the furniture at the time it was purchased by him, and a certain sum for the use of the same; and a question is made as to the propriety of the order.

The rules and proceedings which obtain at common law, and which are provided by statute, on the subject of partition, relate exclusively to real estate. But where there is an inadequacy of legal remedy, or there is an absence of it, a court of equity has jurisdiction, and, where a partition is not practicable, will order a sale. 3 Pom. Eq. Jur. § 1391. It is by reason of the want of legal remedy that the orator has sought the aid of a court of equity. The first question to be determined in this court is to ascertain if the property is of such a character and so situated that it can be divided, and, if it can be, to order a division to be made, and that an account be taken to ascertain what should be paid for the use of the same; and, if the property cannot be divided, to order a sale, and the proceeds equitably divided. We cannot find any warrant in the law to justify a decree that one co-tenant of property owned in common should pay his co-tenant for his interest in the common property, until it is ascertained that it is impracticable to divide it.

In the view we have taken of the case, it is not necessary to consider the question of the admissibility of the evidence of Colby.

The decree of the court of chancery is reversed, and cause remanded, with mandate that it be referred to a master to ascertain and report the character

and situation of the furniture described in the bill, and if it is practicable to make a division of the same, and, if so, how it should be divided, and what sum the defendant should pay for the use of the orator's portion of it during the time it has been in the possession of the defendant, and for any loss or destruction of the same.

### DIAMOND STATE IRON CO. v. GILES.

(Court of Errors and Appeals of Delaware. October 27, 1887.)

1. **NEGLIGENCE—CONSTRUCTION OF BUILDING—INJURY TO EMPLOYE—REASONABLE CARE.**  
Plaintiff was a carpenter in the employ of defendant, and worked upon the roof of a building in process of erection by defendant. The building fell, and plaintiff was injured. *Held*, that the right of plaintiff to recover depended upon the fact whether, under all the circumstances, defendant exercised reasonable care in the erection of the building.
2. **SAME.**  
A servant who goes upon the roof of a building as the employe of his master, to work thereon, has a right to assume, unless his attention is called to the contrary, without particular inquiry, that his employer has exercised the due care and caution observed by any ordinarily prudent man in the erection of the building.
3. **SAME—ILLEGAL CONSTRUCTION NOT PER SE NEGLIGENCE.**  
While the illegal erection of a building by a corporation cannot of itself give a person a claim for injuries received while working as the servant of the corporation on such illegal building, it may have a very material influence in determining the liability of the corporation.
4. **SAME—VIOLATION OF BUILDING ORDINANCE.**  
A section of the building ordinance of a city provided that the outside walls of a building having a trussed roof, such as churches, public halls, and the like, if more than 16 feet, and less than 25 feet, high, should average at least 17 inches in thickness. *Held*, that a rolling-mill, with a trussed roof, with walls 21 feet high, came under the provisions of that section.
5. **SAME—EXTRAORDINARY STORMS.**  
In an action by an employe for injuries caused by the fall of a building, defendant alleged that it would have withstood any ordinary storm, but that the one that overthrew it was most extraordinary. The court instructed the jury that the defendant would be liable, unless he showed that it was such an unusual storm as builders do not provide against,—“a phenomenal one.” *Held*, that all the judge said in relation to storms in his charge must be considered together, and that the charge, in substance, meant an “extraordinary storm such as builders do not provide against or contemplate, in planning their architecture,” and was correct.
6. **SAME—MISLEADING INSTRUCTIONS.**  
After a charge to the jury, defendant's counsel called the attention of the court to certain prayers for instructions. The court read the instructions prayed for, and declined to give them, because he had already instructed the jury as to the care required in putting up a building “of that kind.” *Held*, that the building alluded to was the one described in the charge, and that the language of the judge was not calculated to mislead the jury.

Appeal from superior court, New Castle county; JOSEPH P. COMEGYS, Chief Justice.

This was an action on the case brought in the superior court in and for New Castle county, at its September term, 1885, by Ferris Giles, the defendant in error, against the Diamond State Iron Company, the plaintiff in error, to recover for injuries suffered by the said Giles, by reason, as is alleged, of the negligence of the company. The defendant below, prior to this suit, was engaged in erecting a large building, to be used in connection with its rolling-mill, on its own land, in the city of Wilmington, and had contracted with a brick-layer to build a brick wall of great length and height, as a part of said building. That said wall was built by the contractor, according to plans furnished by, and under the supervision of, the defendant, and supported in part a trussed roof, upon which the plaintiff below was engaged as a carpenter, having entered the employment under a contractor for the wood-work of said building the day before he was injured, and when the roof was nearly fin-

ished and closed in. The day after his employment the building fell, and inflicted on the plaintiff below the injuries for which this suit was instituted. The evidence on the part of the plaintiff below tended to show that the building fell by reason of the insufficiency and weakness of the brick wall; that it was built of good material, and that the work of the brick-layer was all that it should be, but that the plans prepared by the defendant below were defective, and did not provide for sufficient thickness to the wall; that the attention of the defendant below was called to the thinness of the wall by the contractor, by the foreman of the brick-layers, and by the building inspector of the city. Experts were examined on both sides as to the sufficiency of the wall, and the plaintiff testified that his attention had never been called to the wall previous to going to work upon the roof; and it was proved that the wall, up to the time of its fall, was exceedingly plumb and straight, and was in good and workman-like condition and appearance. It was likewise in evidence that the wall did not conform to the building ordinance of the city of Wilmington in that regard. With some other evidence, as to a violent storm just before the accident, the case was submitted to the jury upon the charge of the court, and a verdict of guilty was rendered against the defendant below.

*Chas. B. Love, Geo. H. Bates, and Edward G. Bradford*, for plaintiff in error.

An ordinance of Wilmington contains the following: "In all business buildings, such as stores, warehouses, factories, public schools, etc., the thickness of outside walls of such structures two stories in height shall not be less than thirteen inches for the first and second stories, respectively; said buildings three stories in height, the walls shall not be less than seventeen inches in thickness for the first story, and thirteen inches in thickness for the second and third stories, respectively; for buildings four stories in height, the walls of the first and second stories shall be seventeen inches in thickness, and those of the third and fourth stories thirteen inches in thickness, respectively."

A rolling-mill, for the manufacture of iron, falls rather within the class of business buildings embracing "stores, warehouses, factories," etc., than the class of buildings embracing "churches, public halls, theaters, restaurants, and the like," for it is no more nor less than a *factory*.

Unless the falling of the building was caused by the violation of the ordinance there clearly could be no recovery. *Railroad Co. v. McKean*, 40 Ill. 218, 229; *Briggs v. Railroad Co.*, 72 N. Y. 26-30; *Mathiason v. Mayer*, 2 S. W. Rep. 834, (January, 1887.)

Nor could there be a recovery against the defendant below for any violation of the ordinance, if the plaintiff below can fairly be treated as having assumed the risk of the situation as it was. *Wood, Mast. & Serv.* § 397. Negligence, to be actionable, manifestly must be the cause of the injury complained of. *Whart. Neg.* §§ 73, 129; 2 *Thomp. Neg.* 1085, § 3.

The employer cannot be held for injuries resulting to the employe, if he has exercised the ordinary care which a prudent man should have observed. *Wood, Mast. & Serv.* § 326; *Whit. Smith, Neg.* 125.

The employer is not an insurer of the safety of the employe, nor can he be held for *culpa levissima*. *Whart. Neg.* § 831; *Wood, Mast. & Serv.* § 410; *Railroad Co. v. Barber*, 5 Ohio St. 541, 562; *Murray v. McLean*, 57 Ill. 378, 382.

It is erroneous in stating that when a building falls "it lies upon the defendant, who is such on that account, to prove that causes over which he had no control, and for which he is not responsible, brought about the result." *Leonard v. Collins*, 70 N. Y. 90.

The defendant below was not bound, in and about the planning and erection of the rolling-mill, to provide against storms of unusual violence, but was

only bound to exercise that degree of care due from an ordinarily careful and prudent man in and about the planning and erection of such a building. *Railroad Co. v. Brigham*, 29 Ohio St. 374.

In this action the burden of proof was upon the plaintiff to show due care on his part. 2 Thomp. Neg. 1053; Whit. Smith, Neg. 381; Whart. Neg. § 428. If the plaintiff and defendant below had equal knowledge, or means of knowledge, as to the risk or danger of the falling of the rolling-mill, there could be no recovery. *Priestley v. Fowler*, 3 Mees. & W. 1; *Williams v. Clough*, 3 Hurl. & N. 258; *Griffiths v. Gidlow*, 3 Hurl. & N. 648; *Griffiths v. London Docks*, 12 Q. B. Div. 493; *Dynen v. Leach*, 40 Eng. Law & Eq. 491; *Skipp v. Railway Co.*, 9 Exch. 223; *McGlynn v. Brodie*, 31 Cal. 376; *Malone v. Hawley*, 46 Cal. 408; *Hayden v. Manuf'g Co.*, 29 Conn. 548, 560; *Wright v. Railroad Co.*, 25 N. Y. 562, 566.

The plaintiff below, having been employed to work on the premises of the defendant below, was bound to make reasonable use of his eyes and thinking faculties, in order to avoid peril. *Stone v. Manufacturing Co.*, 4 Or. 52; *Hughes v. Railroad Co.*, 27 Minn. 137, 6 N. W. Rep. 553. He was therefore bound, at his peril, to take notice of patent defects in the rolling-mill upon which he undertook to work. *Gibson v. Railway Co.*, 63 N. Y. 449; *Wood, Mast. & Serv.* §§ 335, 382.

If the plaintiff either had knowledge, or the means of knowledge, which it was his duty to acquire, of the defects, if any, in the rolling-mill, and the risk connected therewith, he must be considered as having assumed that risk, and could not recover. *Stone v. Manufacturing Co.*, 4 Or. 52; *Hughes v. Railroad Co.*, 27 Minn. 137, 6 N. W. Rep. 553; *McGlynn v. Brodie*, 31 Cal. 376; *Way v. Railroad Co.*, 40 Iowa, 341; 2 Thomp. Neg. 994.

The plaintiff below must be held to have assumed whatever risk was connected with the thinness of the wall, or the fact that the end of the building was left open, and could not recover. *Priestley v. Fowler*, 3 Mees. & W. 1; *Asop v. Yates*, 2 Hurl. & N. \*768; *Seymour v. Maddox*, 5 Eng. Law & Eq. 265; *Wilkinson v. Farrrie*, 1 Hurl. & C. \*633; *Gibson v. Railway Co.*, 63 N. Y. 449; *McGlynn v. Brodie*, 31 Cal. 376; *Malone v. Hawley*, 46 Cal. 409; *Wright v. Railroad Co.*, 25 N. Y. 562.

In view of the testimony there was no such evidence of negligence on the part of the defendant below as justified the court below in submitting the case to a jury. *Toomey v. Railway Co.*, 3 C. B. (N. S.) 146; *Cotton v. Wood*, 8 C. B. (N. S.) 568; *Hammack v. White*, 11 C. B. (N. S.) 588.

*Geo. Gray and Levi C. Bird*, for defendant in error.

The owner who erects, or permits to be erected, on his land an unsafe structure, is responsible to those who, without negligence on their part, are injured by reason of the unsafe character of such structure. No intermediate agent or contractor can relieve the owner from such responsibility, if the structure erected is itself unsafe. The duty which the owner of the land owes to the public, and to all persons who come lawfully within, or are lawfully exposed to, the danger, is violated by his allowing it to be so erected. The violation of this duty is legal negligence. Whart. Neg. §§ 232, 232b; *Deford v. State*, 30 Md. 204; *Ellis v. Gas Co.*, 2 El. & Bl. 767; CLIFFORD, J., in *Robbins v. Chicago*, 4 Wall. 657, 678; *Hole v. Railway Co.*, 6 Hurl. & N. 488; *Vincett v. Cook*, 4 Hun, 318; *Indermaur v. Dames*, L. R. 2 C. P. 311; *Chapman v. Rothwell*, 1 El., Bl. & El. 168; *Roberts v. Smith*, 4 Hurl. & N. 315; *Bower v. Peate*, 1 Q. B. Div. 321; *Tarry v. Ashton*, Id. 314; *Gray v. Pullen*, 5 Best & S. 970, 983; *Pol. Torts*, 323; *Francis v. Cockrell*, L. R. 5 Q. B. 501, 513; *Pickard v. Smith*, 10 C. B. (N. S.) 478; *John v. Bacon*, L. R. 5 C. P. 437; *Holmes v. Railway Co.*, L. R. 4 Exch. 254; *White v. Francis*, 2 C. P. Div. 308; *Smith v. Docks Co.*, L. R. 3 C. P. 326; *Heaven v. Pender*, 11 Q. B. Div. 503-515; *Coombs v. Cordage Co.*, 102 Mass. 572.

When a servant is injured when engaged about the business of his master,

by the negligence of the master, the master is liable on the same principle on which he would be to a stranger who came lawfully within the danger. *Shear. & R. Neg.* § 89; *Beach, Neg.* § 96; *Whart. Neg.* §§ 205, 207, 214; *Clarke v. Holmes*, 7 Hurl. & N. 937, 943, 946, 949; *Smith, Neg.* 419; *Hough v. Railway Co.*, 100 U. S. 225; *Britton v. Great West Cotton Co.*, L. R. 7 Exch. 130, 137, 139. *Wood, Mast. & Serv.* § 834; *Bigelow, Lead. Cas.* 706.

The ordinary risks of the particular employment are assumed by the servant who voluntarily enters it; but the negligence of the master is not one of those risks; the negligence of fellow-servant is. *Beach, Neg.* §§ 95, 96; *Hough v. Railway Co.*, 100 U. S. 214-218; *Roberts v. Smith*, 2 Hurl. & N. 213, 216; *Wood, Mast. & Serv.* § 359; *Railroad Co. v. Herbert*, 116 U. S. 642, 647, 6 Sup. Ct. Rep. 590; *Murphy v. Phillips*, 35 Law T. (N. S.) 177, cited in *Whart. Neg.* § 210.

Though it is undoubtedly true that a servant undertakes the ordinary risks of the employment which he voluntarily enters, which include the risk of the negligence of fellow-servants, it is an equally well-established rule of law that the negligence of the master is never one of the risks of employment so undertaken by the servant. In fact, the negligence of the master may be said to be the one risk, of all others, which the servant does not undertake. *Clarke v. Holmes*, 7 Hurl. & N. 937, 943, 946, 949; *Smith, Neg.* 419; *Bradbury v. Goodwin*, 9 N. E. Rep. 302, (1886,) and many others.

Every one entering the employment of another has a right to assume that his employer has been guilty of no negligence, by himself or his agents, as to those things under his control, and which may affect the safety of those entering upon such employment. *Railroad Co. v. Swett*, 45 Ill. 197; *Railroad Co. v. Welch*, 52 Ill. 183; *Railway Co. v. Jackson*, 55 Ill. 492; *Railroad Co. v. State*, 44 Md. 283; *Paulmier's Adm'r v. Railroad Co.*, 34 N. J. Law, 151; *Gibson v. Railroad Co.*, 46 Mo. 163; 2 *Thomp. Neg.* 944, 946, 1052.

Did the plaintiff in this case, in going upon the building with the other carpenters and workmen to work as a carpenter, at the invitation of the defendant, and about his business, exercise that measure of prudence and carefulness that an ordinarily prudent man might be expected, under the circumstances, to exercise? *Beach, Neg.* 24; *Cook v. Railway Co.*, 24 N. W. Rep. 311; *Russell v. Railway Co.*, 20 N. W. Rep. 147; *Coombs v. Cordage Co.*, 102 Mass. 572, 595, 599; *Railway Co. v. Jackson*, 55 Ill. 492, and others.

An order given to a competent architect and contractor to build or repair the structure would be what an ordinarily careful and prudent man would do; yet this would not relieve the owner from liability for an unsafe building built by them, or fill the measure of his duty. 1 *Thomp. Neg.* 311, § 7.

The servant cannot be expected to exercise more skill or judgment than the master. *Wood, Mast. & Serv.* 679; *Railway Co. v. Jackson*, 55 Ill. 492; *Cayzer v. Taylor*, 10 Gray, 274.

"The charge of a court to the jury must be taken together, and if it harmonizes as a whole, and correctly presents the law, a new trial will not be granted because a separate instruction does not contain all the conditions which are to be gathered from the entire text." *People v. Doyell*, 48 Cal. 85.

"Instructions to the jury, and modifications of proposed instructions, are to be construed not as abstract propositions, but as they would be understood in the light of the particular circumstances of the case as disclosed by the evidence." *Sword v. Keith*, 31 Mich. 247.

"It is not error to refuse instructions asked by counsel, if the court correctly gives the law upon all points arising in the case." *Crisman v. McDonald*, 28 Ark. 8.

"Although some of the instructions of the court to the jury may not state the law with precise accuracy, yet, if taken as a whole, they are substantially correct, and could not have misled the jury to the prejudice of the defendant, the judgment will not be disturbed." *People v. Cleveland*, 49 Cal. 578.

"Where the principles declared in a request have already been properly laid.

before the jury in other instructions, the request may be refused." *McGonigle v. Daugherty*, 71 Mo. 259; *Railway Co. v. Ross*, 112 U. S. 395, 5 Sup. Ct. Rep. 184; *Bank v. Bank*, 21 Wall. 294, 301; *Walburn v. Babbitt*, 16 Wall. 580.

SAULSBURY, Ch. What is negligence? The term is relative, and its application depends on the situation of parties, and the degree of care and vigilance which circumstances reasonably impose. That degree is not the same in all cases, but may vary according to the danger involved in the want of vigilance. All the surrounding or attendant circumstances must be taken into account when the question involved is one of negligence. Negligence, in a legal sense, is no more nor less than the failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury.

Negligence is sometimes classified as gross negligence, ordinary negligence, and slight negligence; but this classification only indicates that, under the special circumstances, great care and caution are required, or only ordinary care, or only slight care. If the care demanded is not exercised, the case is one of negligence, and a legal liability is made out when the failure is shown. There is no contention in the present case as to the relation which existed between the plaintiff below and the defendant below. That relation was one of master and servant. A master's negligence may consist in subjecting the servant to the dangers of unsafe buildings or machinery, or to other perils, on his own premises, which the servant neither knew of, nor had reason to anticipate or to provide against, when he entered the employment, or subsequently. The general rule is that, while the owner of real estate is not bound to provide safeguards for wrong-doers, he is bound to take care that those who come upon his premises by express or implied invitation be protected against injury resulting from the unsafe condition of the premises, or from other perils, the existence of which the invited party had no reason to look for. The invitation to come upon dangerous premises without apprising him of the danger is just as culpable, and an injury resulting from it is just as deserving of compensation, in the case of a servant as in any other case. No reason of public policy, and none to be deduced from the contract of the parties, can be suggested which should relieve the culpable master from responsibility. A man cannot be understood as contracting to take upon himself risks which he neither knows nor suspects nor has reason to look for, and it would be more reasonable to imply a contract upon the part of the master not to invite the servant into unknown dangers than one on the part of the servant to run the risk of them. But the question of contract may be put entirely aside from the case, and the responsibility of the master may be planted on the same ground which would render him responsible if the relation had not existed. Whether invited upon the premises by the contract of service, or by the calls of business, or by direct request, is immaterial; the party extending the invitation owes the duty to the party accepting it to see that at least ordinary care and prudence is exercised to protect him against dangers not within his knowledge, and not open to observation. It is a rule of justice and right which compels the master to respond for a failure to exercise this care and prudence.

While these propositions are true, it is equally true that the master will be exempted from responsibility in all cases where the risks are apparent, and are voluntarily assumed by a person capable of understanding and appreciating them. No employer, by any implied contract, undertakes that his buildings are safe beyond a contingency, or even that they are as safe as those of his neighbors, or that accidents shall not result to those in his service from risks which others would guard against more effectually than it is done by him. Neither can a duty rest upon any one which can bind

to so extensive a responsibility. Negligence does not consist in not putting one's buildings or machinery in the safest possible condition, or in not conducting one's business in the safest way; but there is negligence in not exercising ordinary care that the buildings and machinery, such as they are, shall not cause injury, and that the business as conducted shall not inflict damage upon those who are guilty of no neglect of prudence.

These general remarks in reference to the duties, rights, and liabilities resulting from the relation of master and servant will tend to illustrate what I conceive to be the principle which should govern in the decision of this case, which is that the right of the plaintiff below to recover damages from the defendant below depends upon the fact whether, under all the circumstances proved, the latter exercised reasonable care and prudence in the erection of the building he did erect, and upon which the former was engaged as a carpenter for hire at the time that building is proved to have fallen. Was the erection of that building, under all the circumstances proved in the cause, reasonable or lawful? And was such reasonable care and prudence exercised by the corporation, in the erection of it, under all the circumstances, and upon which the plaintiff, as its servant, was employed at the time he received the injuries, compensation for which he brought his suit? And was the law, as given in charge by the court to the jury, properly subject to the exceptions taken by the appellant? These questions necessarily lead, in the first instance, to the inquiry whether the erection of the building itself was lawful; for if the erection of the building itself was not lawful, while such erection in and of itself, on account simply of its illegality, can give to the plaintiff no right of private action against the corporation, yet it may have a very material influence in determining the liability of the corporation to the plaintiff for compensation and damages for any injuries proved to have been sustained by the plaintiff while working as the servant of the corporation in and upon such illegal building.

By section 7 of an ordinance providing for building regulations for a building inspector, and prescribing his duties for the city of Wilmington, approved January, 1885, it was, among other things, ordained as follows: "*In all business buildings*, such as stores, warehouses, factories, public schools, etc., the thickness of outside walls of such structures *two stories* in height shall not be less than thirteen inches for the first and second stories, respectively. For buildings *three stories* in height the walls shall not be less than seventeen inches in thickness for the first story, and thirteen inches for the second and third stories, respectively. For buildings *four stories* in height the walls for the *first* and the *second* stories shall be *seventeen* inches in thickness, and those of the third and fourth stories thirteen inches, respectively. The outside walls of buildings having trussed roofs, such as churches, public halls, theaters, restaurants, and the like, if more than sixteen and less than twenty-five feet high, shall average at least seventeen inches in thickness." Now, while a rolling-mill, such as the building erected by the appellant, may, as I think, without the least impropriety, be called a factory, it is not such a building as was contemplated in the first paragraph or sentence of the ordinance as herein cited, for a building two stories in height was thereby contemplated; nor was it a building contemplated by either or any of the other provisions of said ordinance as cited, unless it was such a building as was contemplated in the last sentence of such ordinance as I have cited it. My opinion is that it was such a building as was and is contemplated and meant in and by said last sentence quoted from said ordinance. Such sentence is the only one in said ordinance which embraces buildings having trussed roofs, such as churches, public halls, theaters, restaurants, and the like. The building erected by the appellant was only one story in height, and it had a trussed roof.

The ordinance manifestly was meant for the protection of all persons who should have occasion for being in said building, either as employees or for other

lawful purposes and objects. The protection of persons who might lawfully be in churches, public halls, theaters, restaurants, and the like, was certainly the object of the provision of this ordinance. The words "and the like," occurring after the particular buildings or structures mentioned, cannot properly be interpreted as limiting the buildings having trussed roofs to uses similar to the uses to which churches, public halls, theaters, and restaurants are particularly appropriated, but are meant to give extension to the uses to which buildings having trussed roofs may be properly applied, and protection to persons properly and lawfully in any such buildings having trussed roofs, whatever their lawful uses may be, was as much intended by this provision of the ordinance as it was to the persons who might be in churches, public halls, theaters, or restaurants. The designation of these particular buildings was meant, as the court below very properly said, as illustrations, and not as limitations. Trussed roofs are roofs packed or bound closely. They are necessarily very heavy roofs, and, although they are sometimes said to be self-supporting, this is said only in respect to their being packed or bound closely, and not otherwise; for their weight, when supported either by walls or pilasters, is uncommonly heavy in comparison to the weight of other kinds of roofs.

It is stated in the opinion of the court below, and I suppose correctly, for it is a part of the record in this court, that the rolling-mill or building erected by the defendant below and plaintiff in error, was 250 feet long, 56 or 57 feet wide, and 21 feet high, to the square. One side was to be a brick wall 21 feet high from the foundation, and nine inches or one brick thick, with pilasters 16 feet apart from center to center, 17 inches (or two bricks) in thickness, and about 26 or 27 inches wide. The other side of the building, and one of its ends, were built of wood, but the other end was left open from the ground, at the instance, as the court below says, and by the orders of, the defendant, through its agents, (there being no other floor,) to the square of the building.

"This opening was," says the charge, "about 56 feet wide by 21 feet high." "The nine-inch wall," says the charge, "was pierced in the middle of the space between each of the pilasters with an opening for a window about four and a half feet wide by seven or eight feet high, in which window frames were secured." "The whole structure," says the court, "was covered by what was called by the witnesses a 'trussed roof,' self-supporting, and framed as shown by the plans exhibited. Upon the brick wall was a wooden plate three inches thick and thirteen wide, and properly secured where the pieces of it were joined to make it continuous. There were girders resting upon this plate over each of the pilasters. They were well secured to the wall through the plate, according to the testimony. There was nothing resting upon the nine-inch wall but the plate described. All the actual weight, therefore, of the truss-frame, with its covering of inch boards, and longitudinal ventilator of 250 feet, and slating to be done upon the whole, was to be borne by the pilasters, with the lateral support the nine-inch walls between them would give to them." This was the building upon which, on the twenty-eighth July, 1885, the plaintiff below went to work as a carpenter and servant of the defendant below. On the next day, while the plaintiff was working upon the roof as a carpenter, or upon a longitudinal ventilator, the building fell, and the plaintiff received the injuries in respect to which he instituted the action below.

Now, I think it may be safely stated, in conformity with the decisions in well-adjudged cases, that a servant, when he goes upon the roof of a building as an employe of his master to work thereon, has a right to assume, without particular investigation or inquiry into the fact that the master has exercised due care and caution in the erection of the building, and has not omitted the performance of any duty in respect thereto which should have been observed by an ordinarily careful and prudent man. The employment of the plaintiff below did not necessarily require a minute inspection of the whole building,

and every part thereof, in order to ascertain whether the owner of the building had properly performed his duty in respect to work not a part of that which the servant, as a carpenter, was more immediately connected with. He had a right to assume, unless his attention was directed to the contrary thereof, that the defendant below had performed, with ordinary prudence and care, as a reasonable and prudent employer, his whole duty in respect to the erection of the building, so far as the same had been then completed. His attention was not called or directed by the defendant, or any other person, as far as the record shows, to any imperfection in the building or work theretofore done by others in respect thereto. In this case the defendant interposed in the court below, and in the argument before us, the defense of contributory negligence. Regarding the case of a negligent injury, the general result of the authorities (says Cooley in his work on Torts, 674) seems to be that if the plaintiff, or party injured, by the exercise of ordinary care, under the circumstances, might have avoided the consequence of the defendant's negligence, but did not, the case is one of mutual fault, and the law will neither cast all the consequence upon the defendant, nor will it attempt any apportionment of it. This, he says, is the English rule, and that it has been accepted by the courts in this country. Judge Cooley cites with apparent approbation the opinion of Mr. Justice WIGHTMAN in a case before him, in which the following language is used as the proper rule on this subject: "It appears to us that the proper question for the jury in this case, and, indeed, in all others of the like kind, is whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary or common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case the plaintiff would be entitled to recover, in the latter, not; as but for his own fault the misfortune would not have happened. Mere negligence or want of ordinary care and caution would not, however, disentitle him to recover, unless it were such that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened. Nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff."

In delivering the charge to the jury below, the court necessarily had in view the building such as it was proved before them to have been, and all the circumstances attending its erection. There is comparatively little said in the charge in respect to the care and diligence which the master should have observed in causing the building to be erected, or in respect to the degree of negligence which would render the defendant below responsible in damages to the plaintiff below for the injuries he had received by reason of its fall.

After the charge had been delivered to the jury, and the counsel for the defendant had called the attention of the court to certain specific prayers which they had made for instruction, the chief justice then observed "that, when the charge covers instructions, the court are not bound to review the points which the charge covers." The record discloses that the court then read separately the instructions presented by the defendant's counsel, and said: "We decline to give instructions on the point covered by the first, as we have already instructed you on that point when we said that a man ought to exercise due care in a case of that kind, and must take something beyond the ordinary care in putting up a building of that kind." What was the building thus alluded to? It was the building a description of which had been given in the charge, and heretofore alluded to by me; a building erected contrary to the ordinances of the city, and for the erection of which the plaintiff was subject to a penalty; a building to the defects in the plan of which the attention of the president of the corporation had been specifically directed, and to the defects in which it is not proved that the attention of the servants or em-

ployes had been directed. I cannot believe that this remark of the chief justice did mislead, or was calculated to mislead, the jury in the finding of their verdict. There certainly was evidence enough to justify the verdict rendered, without attributing to these words which were spoken in reference to a "building of that kind," any effect greater than that manifestly intended.

There is but one other prayer for instruction that I deem it necessary to refer to, and that is the eighth, which is in these words: "That if the jury, from the evidence, believe that the building in question would not have fallen at the time it did fall but for wind pressure upon the building; and shall further believe that the building would have fallen under that wind pressure, even if the brick wall between the piers had been thirteen (13) inches in thickness, plumb, and properly constructed, then the plaintiff cannot recover." The charge of the court below in respect to the storm that was alleged by the defendant to have occurred on the afternoon of July 29, 1885, was in these words: "If you should find that the building would have resisted any usual storm in this latitude the same as other similar buildings of large proportions and well built do, but that the storm that overthrew it was extraordinary, such as builders do not provide against or contemplate in planning their architecture, then the defendant is entitled to your verdict. But the plaintiff is entitled to it unless the defendant shows this to your satisfaction. *Prima facie*, when a building falls, it is from negligence or insufficient construction. It lies upon a defendant, who is such on that account, to prove that causes over which he had no control, and for which he is not responsible, brought about the result. It is a most unusual thing for a house to fall to the ground, and he who, by no fault of his, suffers injury by it, has a right to call upon the owner for compensation for such injury. If he resists the action, he must show that he was in no default whatever." Thus the charge upon the matter rested when first delivered to the jury. The exception taken to the charge of the court in respect to this matter of the storm is as follows: "That the said court erred in charging the jury that unless a storm was a phenomenal one, such as builders do not provide against, and do not contemplate, that one is liable if a building fall by reason of that storm."

I see no just exception to the charge of the court as originally read to the jury. Examples of that form of charge are to be found in other cases, and in other courts. It was only after the charge had been read, and the attention of the court directed particularly to this prayer for instructions by the counsel for the defendant, that the chief justice said that he had told the jury "that, unless the storm was a phenomenal one, such as builders do not provide against, and do not contemplate, that one is liable if the building fall by reason of that storm." Now, these words must be construed in connection with words used by the same judge in his charge. All the court said upon this subject of storm and wind pressure must be considered together, and so interpreted as to make all the expressions on the same subject harmonious and consistent. Considered as an entirety, the charge must be construed as meaning by the description of a storm as phenomenal, an "extraordinary storm, such as builders do not provide against or contemplate in planning their architecture." It certainly would not be strictly accurate to speak of a storm as a phenomenon or as phenomenal in its character. "Phenomenal" means pertaining to a phenomenon in appearance. "Phenomenon," in a general sense, means an appearance; anything visible; whatever is presented to the eye by observation or experiment, or whatever is discovered to exist; as the phenomenon of the natural world; the phenomenon of heavenly bodies, or of terrestrial substances. It sometimes denotes a remarkable or unusual appearance, or an appearance whose cause is not immediately obvious.

But we do not sit to determine hypercritically the meaning of words, but to give to them a fair and rational interpretation, according to the intention and sense in which they are used. The building erected by the defendant below

was not such as met the requirements of the ordinance above referred to. The average thickness of its outside brick wall was not at least 17 inches, but only slightly over 10 inches, when the thickness of the pilasters is added to the thickness of that part of the wall which was only 9 inches thick. This defect in the construction of the outside wall was known to the defendant and was not proved to have been known to the plaintiff below. The building fell, and the plaintiff received injuries thereby, compensation for which in damages the jury, after considering all the facts in the cause, have duly awarded.

Without extending this opinion further, it is sufficient to say that, after considering fully the other causes assigned, we deem them insufficient to justify a reversal of the judgment of the court below, and that judgment is therefore affirmed.

### CURRY v. CURRY.

(*Supreme Court of Pennsylvania. October 12, 1887.*)

#### 1. JUDGMENT—BY CONFESSION—FRAUD—COLLATERAL ATTACK.

In an action of ejectment, the plaintiff claimed the property under a deed in consideration of the future support and maintenance of his grantor. Defendant's title was based on a sheriff's sale under a judgment subsequently confessed to him by plaintiff's grantor for a debt for domestic services rendered by defendant while living in his family, and alleged to exist prior to the date of plaintiff's title. On the trial, the plaintiff, in order to rebut defendant's claim for services, and to show that the judgment confessed therefor was fraudulent and void for want of consideration, offered to prove what it was worth to support defendant's two children living with her during the time she kept house for her judgment debtor. *Held* properly refused.

#### 2. SAME—FRAUD—DECLARATIONS OF JUDGMENT DEBTOR.

Where, on a question of the validity of a voluntary deed, as against a judgment subsequently confessed by the grantor for a debt which it was claimed existed prior to the conveyance, evidence tending to show that the judgment debtor had declared that the judgment was without consideration, and was given for the purpose of defeating the title of the grantees under the voluntary conveyance, is inadmissible.

#### 3. TRIAL—INSTRUCTIONS—MATHEMATICAL CALCULATION BY COURT.

The court, in charging the jury, made an arithmetical calculation of the amount due one of the parties, but expressly charged: "I only give these suggestions, and I do not intend to indicate to you that you should take them, but they are only suggestions of the way you may look at it; not the way you must look at it. That is exclusively for you." *Held* no error.

Error to court of common pleas, Mercer county.

The facts sufficiently appear from the following charge by the trial court: "This \* \* \* is an action of ejectment brought by James B. Curry against Mary J. Curry to recover a parcel of land situated in Deercreek township, in this county.

"The plaintiff shows, and it is conceded, that William H. Curry was the owner of this land; that his father, Robert Curry, owned it, and by will devised it to William H. Curry, his son. There is no dispute but what William H. Curry made a deed of this land to his sister-in-law, Rachel Curry, for the consideration of his future maintenance and support, and that Rachel Curry and her husband deeded the land to the plaintiff here, James B. Curry, their son, for the same consideration; that is, James B. Curry undertaking all obligations which his father and mother had undertaken to do and perform for William H. Curry, in consideration of the deed to them. These papers show, particularly, the contract in evidence between James B. Curry and William H. Curry, that James B. Curry knew what the contract was between his father and mother and William H. Curry, when the land was deeded to his mother. He took the land with full knowledge of that whole transaction. That title, so made, is complete and perfect against all persons, except such individuals

as might have valid claims and debts owing to them from William H. Curry at the time the deed was made by him to Rachel, which was in the year 1875.

"The defendant, Mary J. Curry, attacks this deed or title upon that point. She says that William H. Curry did owe her at the time he made the deed to Rachel, and that she obtained a judgment from William for that indebtedness, upon which an execution was issued, and the property sold by the sheriff, and she purchased it, and has now a sheriff's deed for the property. If that position be correct, if those allegations are true, then that would defeat James B. Curry's title. No man is permitted to convey away his land for future maintenance and support of himself, and by that means put it out of reach of his creditors, who are creditors at the time of such conveyance. And if William H. Curry owed, as she claims, the amount of the judgment, \$2,500, and owed that at the time this conveyance was made, then her title would be better than the deed of James B. Curry, and she would be enabled and would be entitled in this case to hold the land, and to a verdict in her favor.

"The question, then, is, was that money owing? She claims—and there is no dispute about that fact—that she did perform service for William H. Curry. Just how much is disputed. But it appears, without controversy, that after her father's death she lived with William; that the father died some time about 1854, if I recollect the testimony correctly, and that she lived with William up until 1875 or thereabouts; and that during that time, or a part of it, she performed services for him, and it is for those services that she claims she recovered this judgment. That position of hers is controverted by the plaintiff here on two grounds. One is that she is not entitled to any pay for those services she rendered; the other is that, if she is entitled to pay, she is not entitled to so much as the amount of this judgment, and that the excess in the judgment over and above what she would have been legally entitled to, if anything, renders the whole judgment fraudulent, therefore void, as far as this plaintiff is concerned, and she is not entitled to predicate anything upon it.

"Now, that brings us right to the questions that are for the jury in this case; to the question respecting which, or towards which, the evidence has been directed. Is she entitled to any compensation for her services? If she is entitled to any, then how much? Or was she entitled, at the time she got that judgment, to as much as the amount of it? First, then, consider this question: Did William H. Curry owe Mary anything for her services? It is a general principle and rule of law that where one individual performs services for another, if there be no express contract—no actual bargain—made as to the compensation or the wages that shall be paid for such service, the law implies a contract that the person serving shall receive as much as the services are reasonably worth, and that rule holds good as between all persons except parents and children. When a son works for his father, or a father works for his son, without any express or actual contract made that wages shall be paid for the services, then the person so serving, whether it be the father, or the son, or the daughter, is not enabled to recover anything for the services so performed. That is, the law will not imply any promises to pay for such services, but assumes that work was done without any expectation of pay or wages, and was done under what is known in our law as the 'family relation,' where each individual works for the benefit and comfort of the whole family, and without any expectation of receiving compensation or pay outside of the general comforts of all; and the father for whom the son may work does not expect to pay anything, and does not intend to pay anything, to his son, for the labor so performed, outside of the general benefits received by all the family by reason of such services. Then, that being the rule, the law would imply a contract or a promise on the part of William H. Curry to pay Mary such wages or price as her services were reasonably worth, unless, as the plaintiff here alleges, they were living in the family relation. That is, under that same

sort of circumstances that brothers and sisters live together when they constitute part of their father's family, and are all working together for the general benefit.

"That, then, is perhaps your first question to determine. How did they live there? Were they considering each other simply as brother and sister, doing what they could, and what they did do, just to advance the general interests of both, without the expectation on the part of Mary that she would be paid any wages, and without the intention or purpose on the part of William that he would pay her any wages? You will observe that I put both these propositions, because if Mary was expecting wages, and performing the services with that idea—that intention—that she would be paid, though William might have concluded he would avoid paying her, she would be entitled, under the general principles of the law, to receive for compensation so much as she deserved, and as her services were reasonably worth; that is, unless both parties understood that they were living in what I have described as the family relation. How is that under the evidence you have in this case?

"Now, I will not undertake to detail the evidence to you. It has been lengthily and ably argued by the counsel on both sides. You will recollect it. I might call your attention to prominent features of it. The plaintiff's general position is that the defendant had two children who were living there with her; that they made their home together, as ordinary families do live; that they purchased goods at the stores, as ordinary families purchase, and upon the accounts of William, for the most part; and that she continued to serve there for a long number of years without demanding any pay, and without receiving any pay, as wages. And there is the testimony of one witness, Seymour Williams, as to what she said to him, or in his presence, on this subject. And there is perhaps another witness that mentions something about her saying that she had no interest there, many years ago; and on facts of that character the plaintiff relies as proof that they were living together without her expecting to be paid, or without any purpose on William's part to pay her. On the other hand, you have the testimony of William Curry himself, and you have the testimony of Brice Hazen, if I remember the name correctly, and you have the confession of judgment itself, so far as it goes, and matters of that character, upon which the defendant relies as evidence that she was entitled to compensation.

"The argument, you observe, upon the part of the defendant is substantially this: That, before William Curry made the deed to Rachel, he and Robert had a conversation, during which they talked about Mary's being about to bring suit for wages, etc., and that that would not have occurred if she were not entitled to wages, and if he did not expect that he would have to pay her wages. Whether such a conversation occurred or not, of course, is for the jury.

"Then, gentlemen, if you determine that they were living in what we call the family relation, as I have undertaken to describe to you, that she was not expecting to receive any pay for her services, then William Curry did not owe her anything as a debt at the time that he made the deed over to Rachel, and in that event she would not be entitled to recover in this action. But if, in fact, you find that she was entitled to compensation for her services, then you will proceed one step further, and inquire how much she was entitled to receive; because, if she was entitled to receive but little,—less than the amount of the judgment, \$2,500,—and if that judgment was swelled,—made larger than the amount actually due to her,—for the purpose of reaching this land; if the judgment, in other words, was a fraud to any extent, intentionally entered there for the purpose of accumulating a large debt that James B. Curry could not or would not pay to save the land, and the land was sold in consequence of that judgment,—then that, being a fraud, would render void that judgment, so far as the plaintiff is concerned in this case. Then it would be nec-

essary for you, if you concluded that she was entitled to wages, to inquire whether that judgment is fraudulent or not. When you come to that question you have the evidence of a number of witnesses as to what wages servant girls were reasonably entitled to at about that time. Some witnesses spoke about wages in the country, and some of them about wages in town, and in other locations. Of course, you will take all that into consideration. Here in our country, where people can move freely, there is not a very large amount of discrepancy between wages, in localities that are near to each other; because a competition in the business, like in every other business, is very likely to bring them closer to an equality.

"When you come to consider this question, there is perhaps another thing or two that you ought to take into consideration. William Curry testifies, among other things, this: 'I do not recollect that I ever agreed to pay her anything. I told my father, when he wanted to change his will,—I told him, to get rid of him, and not to bother me,—that I would take care of her, and I promised that she should be kept off the farm.' Now, if this be true, you may take into consideration and inquire whether, in point of fact, he (William) felt under obligations to keep and maintain Mary whether she labored or not. You may consider whether he had made such a promise to his father, and whether he was keeping that promise; and if he was, or was intending to, then that might have effect upon the question of the amount of her wages. Servant girls, as I understand it,—but that, of course, is for you,—ordinarily, I believe, are for the time being members of the family in which they serve. They are fed at the family table; and if Mary was being fed or 'kept,' as the expression is, off the farm there, independent of her work, then the fact she worked and was entitled, if she was, to her boarding outside of that, might have some effect upon the question of how much she should receive for her services.

"There is another thing that you should take into consideration, and that is, that she would be reasonably entitled to interest upon the money that would be due to her from time to time. This, of course, is now on the assumption that you conclude that there would be anything due to her. I made a hasty, therefore, perhaps, not absolutely correct, calculation, or two of them,—indeed three of them. If we were to assume that Mary's services were reasonably worth \$1 per week, and we were to extend that over a period of twenty-one years prior to 1875, and count interest on the sum, \$52, from the end of each year up to the time of confessing this judgment,—I mean simple interest, not compound,—the sum due her at the time of confessing this judgment would be about \$2,135. If we were to assume that her services were worth \$1.50 per week during that time, and count simple interest from the end of each year up to the time of confessing this judgment, the amount due to her then would be about \$3,200. If we were to assume that her wages should be, say \$60 per year, or nearly \$1.15 per week during that time,—continuously, I mean during that time,—and in a like manner count simple interest from the end of the year up, the amount due to her at the time of the entering of this judgment would be about \$2,470. Now, I do not mean, gentlemen, that you shall adopt any such a view. I only give these suggestions, and I do not intend to indicate to you that you should take them, but they are only suggestions of the way you may look at it; not the way you must look at it. That is exclusively for you. If you come to the conclusion that she was entitled to wages, and determine on the amount, and that amount is so much less than the amount of this judgment that you are convinced and satisfied that this judgment is swelled, increased, fraudulently, wrongfully, then you ought to exclude it entirely, and find a verdict for the plaintiff. But if the amount of that judgment, though it may be more than you, gentlemen, to-day, would come to the conclusion Mary would really, fairly, be entitled to, yet if it is of that amount not so much in excess as to, by its amount, convince you

that it was a fraud, you may conclude, if you find it, under all the circumstances, reasonable, that these parties were honest in the transaction, and that, while this amount was more than you think she would be entitled to, yet if you are honestly of the opinion that she was entitled to that amount, and William confessed judgment, feeling assured that she was entitled to the amount of it, it would not be fraudulent, even though it would exceed the amount that you to-day, were you trying the case, would be willing to give her. But if it exceeds so much, or if the evidence in the case satisfies you, from any other fact, that it was increased fraudulently, then it could not stand in this case, as against this plaintiff.

"These are the principal features of this case, so far as the law is concerned, in a general way.

"There are some points presented by the attorneys, and it is the duty of the court to answer them, each one specifically.

"The plaintiff presents these points:

"(1) If the jury find as a fact that William H. Curry and Mary lived in the same relation in which members of the same family usually live together, contributing by their joint labor to the common benefit and general comfort, and neither expecting pay from the other, they lived together in family relation.' *Answer.* This point is answered as follows: If the jury find as a fact that William H. Curry and Mary J. Curry lived in the same relation in which members of the same family, composed of parents and children, usually live,—that is, each one contributing by his or her labor to the common benefit and general comfort, without any expectation on the part of either to receive pay from the others, and without any purpose on the part of either to pay the others for their services, except such pay and compensation as each received from the joint labor of all, for the common benefit and general comfort of all,—then they lived together in the family relation.

"(2) If the jury find that such a family relation did exist between William H. Curry and Mary J. Curry, then their verdict should be for the plaintiff without further inquiry, unless they find from the evidence that William H. Curry expressly agreed and undertook to pay Mary Jane Curry for her services.' *A.* This point is affirmed.

"(3) If the jury find from the evidence that Mary Jane Curry lived with W. H. Curry from 1857 to 1875, serving in the capacity of a domestic servant, and during that time she would be absent from two to three years together without demanding past wages, and finally left in 1875, demanding no wages until for over four years thereafter, that the presumption is, either that the wages have been paid, or that the services were performed on the understanding that no wages were to be paid.' *A.* This point is affirmed. But the presumption which arises on such a state of facts as is assumed in the point, is not a conclusive presumption; and, notwithstanding the length of the services and delay in demanding payment for them, still the defendant may show that she has not, in fact, been paid wages, and may show that she did not serve with the understanding that no wages were to be paid her. If she has so shown, then she may recover notwithstanding the delay in demanding payment. Whether she has so shown is a question for you.

"(4) That if the jury believe any part of the judgment confessed by William H. Curry in favor of Mary J. Curry was fraudulent, then the whole judgment was fraudulent, and the verdict should be for the plaintiff.' *A.* This point is affirmed.

"(5) If the jury find that William H. Curry was not honestly and legally indebted to Mary Jane Curry, at the date of the deed to Rachel Curry, in April, 1875, he could not be generous to Mary Jane at the expense of others, and no act of his after 1875 could make that a debt against him which was not such before, so as to affect the title of Rachel or James B. Curry to this land.' *A.* This point is affirmed. That is, the jury must find that this was an actual

ting, and not a mere gratuity given to her in consequence of her services rendered before, but for which he did not owe her.

defendant presents points as follows:

That the conveyance of the land in dispute to Rachel Curry, being for the consideration of the future support and maintenance of William Curry, the grantor, was void as against any and all creditors of said William Curry, whose debts and claims were in existence at the time of said conveyance.' *Answer.* That point is affirmed.

That if, at the time of the said conveyance, William H. Curry was indebted to Mary Curry for her work in any amount, and said conveyance was accepted for the purpose of hindering and delaying the collection of the debt, then the verdict in this case must be for the defendant, regardless of the judgment confessed by William H. Curry in favor of Mary Curry for a larger amount than was due her or not.' *A.* This point is re-

*Miller.* I would like to have your honor call their attention to the verdict."

*Court.* This is a second trial. Our law permits any claimant in this case to insist upon, and gives him the right of, two trials, two verdicts, and two judgments against him, before it will conclude against him the title to the property.

The evidence before the jury is that James B. Curry was in possession of the land, and that Mary Jane Curry, the present defendant, brought an action against him to recover this land from him, and that that suit was tried in 1885, in December, and that jury rendered a verdict for the plaintiff, James B. Curry, in that case, and that judgment was entered upon that verdict that a writ of error was taken to the supreme court, and that the supreme court affirmed that judgment, and, as a result, James B. Curry, who was in possession of the land, was turned out of it, and Mary Jane Curry, the present defendant, went into possession of it. Now, James Curry is entitled to a matter of legal right, to bring this action of ejectment to recover possession from her, notwithstanding that former recovery. All the facts and circumstances in that case are in evidence before you, and you have a right to weigh them. They are not conclusive; for you will observe, gentlemen, that the evidence of that verdict and that judgment was conclusive upon you, and you would have nothing to do in this case. It would be folly to send a second jury here to try the case when it was already concluded, as a matter of law, in the former case. It is not conclusive, but it is persuasive, and you are to look at it in this light: that the parties tried that case as well as they then could, or as they thought it necessary to try it, and submitted such evidence as was reasonably within their reach, or such as they thought was reasonably pertinent, and, having submitted the whole case to the jury, that that jury found a verdict for Mary Jane Curry, and that the court refused to set that verdict aside, and that the supreme court affirmed the judgment of the court below, so far as the matters of law were concerned. It is that in this case you have evidence that was not before that jury, and that verdict is not binding upon you. It is evidence, however, to assist you in coming to a conclusion in this particular case; and if, at any point in the evidence, you would be doubtful as to where the weight of evidence should be placed, then that verdict and that judgment ought to conclude it in favor of the defendant.

You will observe that the burden of proof in this case is upon the plaintiff, James B. Curry, and he must satisfy you, by the weight of the evidence, that he is entitled to recover, and if the evidence is equally balanced, or balanced against him, then the verdict should be for the defendant. But if it weighs in his favor, and you so find, then you should find a verdict for the plaintiff. If you find a verdict for the plaintiff, you will find a verdict

for the land described in the writ of ejectment, and six cents damages and costs. If you find a verdict for the defendant, just say you find for the defendant."

The jury found for the defendant. Plaintiff assigns as error:

"*First.* The court erred in not sustaining the competency of the testimony of T. C. Cochran and others offered by plaintiff, which offer and ruling of the court were as follows: 'Plaintiff proposes to prove by T. C. Cochran, to be followed by other witnesses, what it was worth to support the two children of Mary Jane Curry during the time she claims for alleged services rendered to William H. Curry, and this to counteract or rebut the claim she puts in for services during that time; and also to show that the judgment confessed for so large an amount was fraudulent as against the plaintiff in this case.'

"*Second.* The court erred in overruling the offer of plaintiff to introduce the testimony of Joshua Meyers and other witnesses, which offer and ruling of the court were as follows: 'Plaintiff proposed to ask the witness as to a conversation that he had with William Curry since the trial of the last case, in which conversation he (William Curry) told witness that he did not owe Mary Jane Curry anything, that he had never agreed to pay her anything, and that the only reason that he did this was that he would rather she would get the property than Jim Curry. To be followed with other witness to whom he declared that he did not owe Mary Jane one cent, but that he would have to give a judgment against himself in order to cut out Jim, and that he and Mary understood each other; and another conversation with William Curry in which, after he had confessed judgment, he said there would have been nothing of this if it had not been for persons upon the hill, referring to Mary Jane Curry; and also, by another witness, the following statement by William: "She said she was after me, and stated she could do nothing as long as I stood in the way, and, if I would sign my claim over to her, that she would go snuks with me, and then she could set him (Jim) out."'

"*Third.* The court erred in overruling the offer of plaintiff to prove the declarations of William H. Curry to Joshua Meyers and others, which offer and ruling of the court were as follows: 'Plaintiff renewed the offer to prove declarations of William H. Curry to Joshua Meyers and others, as in said offer stated, and also to prove that, prior to the confession of judgment by William H. Curry to Mary J. Curry, he had a conversation with Joshua Meyers, in which he (William H. Curry) stated to him (Meyers) that he thought of confessing this judgment to Mary Jane Curry for the purpose of defeating James B. Curry, and asked him (Meyers) his advice and counsel in regard thereto; and this offered in connection with the admission of Mary Jane Curry herself, as sworn to in the deposition of Seymour Williams, that she had no claim there, and that she never was to get anything there.'

"*Fourth.* The court erred in its charge to the jury as follows: 'There is another thing that you should take into consideration, and that is that she would be reasonably entitled to interest upon the money that would be due to her from time to time. This, of course, is now on the assumption that you conclude that there would be anything due to her. I made a hasty, therefore, perhaps, not absolutely correct, calculation, or two of them,—indeed, three of them. If we were to assume that Mary's services were reasonably worth \$1 per week, and we were to extend that over a period of twenty-one years prior to 1875, and count interest on the sum, \$52, from the end of each year up to the time of confessing this judgment,—I mean simple interest, not compound,—the sum due her at the time of confessing this judgment would be about \$2,135. If we were to assume that her services were worth \$1.50 per week during that time, and count simple interest from the end of each year up to the time of confessing this judgment, the amount due to her then would be about \$3,200. If we were to assume that her wages should be, say \$60 per year, or nearly \$1.15 per week during that time,—continuously, I

mean, during that time,—and in a like manner count simple interest from the end of each year up, the amount due to her at the time of the entering of this judgment would be about \$2,470. Now, I do not mean, gentlemen, that you shall adopt any such a view. I only give these as suggestions, and I do not intend to indicate to you that you should take them, but they are only suggestions of the way you may look at it; not the way you must look at it. That is exclusively for you."

*J. A. Stranahan and R. A. Stewart*, for plaintiff in error. *Miller & Gordon*, for defendant in error.

**PER CURIAM.** There are four assignments of error in this case, neither of which can be sustained. The rulings in the case throughout were correct, and the judgment just. The judgment is affirmed.

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### MCPHERSON'S APPEAL.

(*Supreme Court of Pennsylvania.* October 13, 1887.)

#### **WILL—TESTAMENTARY CAPACITY.**

The evidence showed that the testator originally possessed a strong mental organization, which had become weakened by a sun-stroke and the use of liquor, but the evidence was insufficient to show that the testator did not possess, at the time of the execution of his will, sufficient mind and memory to appreciate and understand the nature of the act by which he was to direct the disposition of his estate. *Held*, an issue to try the validity of the will was properly refused.

Appeal from decree of orphans' court, Armstrong county.

This was an appeal from a decree refusing to certify an issue to the common pleas of Armstrong county to try the validity of the will of John McPherson. The following is the opinion of the court below, filed on discharging rule to show cause why an issue should not be granted:

"On the sixth January, 1883, the last will and testament of John McPherson was admitted to probate, and letters testamentary issued to Joseph McPherson and Jas. Baker. On the fifth July, 1884, a *caveat* was filed and petition filed praying the register to set aside the probate of the will, or grant a precept to the common pleas for an issue, and giving as reason therefor want of testamentary capacity in the testator. The question of granting an issue is now before the court upon a rule to show cause why an issue should not be granted.

"Conceding the question of the regularity of the rules, we consider the real question as to the validity of the will, either by reason of incapacity at the time of the execution of the will, or undue influence exercised in directing the disposition of the estate of testator. From the testimony on file we can discover that by reason of a sun-stroke the mind of testator, some years ago, was somewhat affected. He was also addicted to the use of strong drink. A number of witnesses have testified to the mental unsoundness of the testator. Dr. C. J. Jessop alone, of those who testified, can be treated as an expert. It was at one time proposed to have proceedings instituted for the appointment of trustee, etc., but this intention was not carried out.

"Considering all the testimony, we are brought face to face with the fact that Mr. McPherson originally possessed a strong will, which may have been weakened somewhat by disease and dissipation. But at the same time this testimony is insufficient to satisfy our mind that, at the time of the execution of the will, the testator was not of sufficient mind and memory to appreciate and understand the nature and character of the act by which he was to direct the disposition of that estate after his death.

"The testimony of the respondents is of a positive character as to the mental condition of the testator at the time of his making the will. We cannot disregard its effect, especially when we are asked to allow an issue that seeks

in its results to take from the rightful possessor of an estate accumulated by his own labor, the liberty of disposing of it according to his own will. Disqualification by proceedings at law for performing ordinary lawful acts is a deprivation of individual rights, and in order to have effect must be complete. *Leckey v. Cunningham*, 56 Pa. St. 370. We might, in further support of this conclusion we have reached, refer to the *Mulberger Will Case*, in this county, which certainly seemed to present stronger features of disposing capacity than the present. Also, *Cauffman v. Long*, 82 Pa. St. 72, and the latest case reported on this subject, *Comb v. Hankinson's Appeal*, 105 Pa. St. 155.

"Nor is there any evidence to satisfy us that undue influence was practiced. For the reasons stated the rule is discharged."

*David Barclay*, for appellants. *Buffington & Buffington*, for appellees.

**PER CURIAM.** We are inclined to think that the conclusion reached by the learned judge of the court below in this case was the correct one, and that an issue could have resulted properly in nothing but the establishment of the testamentary capacity of John McPherson at the time of the making of his will. That he was frequently drunk, and generally ill-natured and stubborn, is, we think, established by the contestants' evidence; nevertheless, an examination of that evidence fails to convince us that when sober he was not capable of transacting his business, or that up to the time of the execution of his testament he was not in the possession of a sound disposing memory.

The appeal is dismissed, and the decree affirmed, at the costs of appellants.

### Appeal of McCall.

(*Supreme Court of Pennsylvania.* October Term, 1887.)

#### TRUST—CREATION BY ORAL AGREEMENT—PLEADING.

An oral agreement to purchase for another at a *bona fide* sheriff's sale will not of itself raise a trust. Fraud at the time of the sale, or the payment of the purchase money is necessary, and a bill in equity which seeks to establish a trust in a person who has purchased at a sheriff's sale, but does not state facts bringing the complainant within those rules, is not sufficient.<sup>1</sup>

Appeal from court of common pleas, Cambria county.

A suit in equity was brought by appellant McCall, in which the following bill was filed:

"Your orator complains and says:

"(1) That he was in possession of and the owner of a certain lot of ground situate in Croyle township, in said county, in the village of South Fork, bounded and described as follows: (description of property.)

"(2) That your orator became indebted to Owen McCall in the sum of one hundred and seventy-three dollars and eighty-five cents, interest, and costs of No. 118, March term, 1879. See Ex. Docket Vol.

"(3) That upon execution on said judgment, the said lot of ground was sold to John Rourke, the respondent in this case, by the then sheriff of said county, for the sum of one hundred and seventy-two dollars, and the sheriff's deed duly acknowledged in open court, second April, 1879.

"(4) That when said property was sold by the sheriff to the said John Rourke, your orator was absent from the said county of Cambria in the state of Kan-

<sup>1</sup>In *Kansas*, where one was authorized by parol to negotiate for the purchase of land for another, and the agent paid the purchase price himself, and took the title in his own name, the court held that the transaction was not within the Kansas statute of frauds; that the controlling question was not whether the principal advanced the purchase money or not, and that a trust resulted in favor of the principal. *Rose v. Hayden*, 10 Pac. Rep. 554.

sas. That the respondent is married to your orator's sister, and was attending to your orator's business at the time of said sale by the sheriff to the said Rourke.

"(5) That the said Rourke purchased said property for your orator, and not for himself, and that the evidence thereof is both written and parol, viz., correspondence showing the purpose of the purchase by said Rourke from the sheriff, as well as the conversation when at South Fork between the orator and respondent.

"(6) That valuable improvements were erected thereon, to-wit: A two-story dwelling-house, fencing, etc., by your orator, before the said purchase by Rourke, to-wit, to the value of six hundred dollars.

"(7) That your orator has tendered to the said respondent the full amount, and over, due to the said Rourke on a statement of account between them, and did demand a conveyance of the title so acquired by the said Rourke at the sheriff's sale. All of which was refused by the said Rourke, but that he refused, and still doth refuse, to render to your orator an account, or to give him, your orator, possession of the said premises, but doth occupy, and says he is determined to retain the same.

"(8) Whereupon your orator prays that the said respondent may be compelled to surrender the possession of the said premises as before described, as he had agreed to do, and to render to your orator an account of the dealings between the said parties.

"(9) And that your orator may have such further and other relief in the premises as to your honors shall seem meet. And he will ever pray," etc.

After trial judgment was entered for defendant, the following opinion being rendered:

"This case comes before us on the report of an examiner and master in chancery. The master has performed his labors so carefully and ably as to bring every question of fact and of law so fully before us as to render our labor comparatively easy; and, while we cannot assent to all the positions of the master, we commend his presentation of the law and the facts to the members of the profession, as raising, in a clear and forcible manner, every question.

"Patrick McCall, the plaintiff, was owner of a house and lot in the village of South Fork, Cambria county, in 1878. In the same year, he left Pennsylvania for Kansas, where he remained some three years. Before he left, suit was instituted against him by one Owen McCall, upon which judgment was obtained July 15, 1878, for \$121.46, and costs. Upon a writ of *fi. fa.* upon this judgment, the real estate was extended; and afterwards, upon a *vend. expon.*, sold to John Rourke, the defendant, for \$172, the amount of the execution, with interest and costs. A sheriff's deed to John Rourke, dated April 2, 1879, duly acknowledged, completed the legal title of the defendant. The plaintiff alleges that the facts connected with the purchase create a *trust*; that John Rourke is only a trustee for Patrick McCall; and prays for a decree to compel the alleged trustee to convey the legal title to Patrick McCall, the *cestui que trust*. The plaintiff's bill alleges that John Rourke 'was attending to your orator's business at the time of said sale by the sheriff to the said Rourke.' See fourth paragraph. If this were so, it is clear that the legal title of John Rourke would inure to the benefit of Patrick McCall. An agent or attorney may not purchase the property of his principal, and any purchase so made would inure to the benefit of such principal. There is no evidence, however, of any such agency. The bill further asserts, in the fifth paragraph, 'that said Rourke purchased said property for your orator, and not for himself.' Upon this question of fact, and the proof of tender, testimony has been taken and reported by the examiner, together with his conclusions as master upon the facts and the law of the case.

"The master finds in accordance with the decisions, as matter of law,

that a mere parol promise of a purchaser to hold the land for another, without more, does not create a trust enforceable in equity. Under the statute of frauds, more especially the act of 1856, in order to create a resulting trust of one of two things must be shown: *First*, the purchase must be made with the funds of the alleged *cestui que trust*; or, *second*, there must be such fraud in procuring the legal title as to raise a resulting trust *ex maleficio*.

"1. In the case before us the defendant purchased *with his own money*. It is true the judgment upon which the sale was effected was reduced by payments made by the present plaintiff, the then defendant; but these credits were unknown to the purchaser, who bid the full amount of the judgment and in furnishing the receipts for \$65, the amount of payments, the then defendant only reduced the judgment to the proper amount, in case of the purchaser, which created, at most, but a moral obligation of John Rourke to repay.

"2. But was the defendant, John Rourke, guilty of such conduct, or misconduct, as would create him a trustee *ex maleficio* for Patrick McCall? Let us see. The trust in such case must be co-ordinate with the title; in other words, the bad faith or fraud must be an element of the title. If there was no fraud or bad faith at, or connected with, the act of purchase, no subsequent act of the purchaser could produce it. Let us, then, in this light, examine the facts connected with the purchase. Patrick McCall, the plaintiff, lived in Kansas, and wrote to his brother, Philip McCall, shortly before the sale, as he swears: 'I was in correspondence with my brother Philip, during my stay in Kansas. I learned through him that the property was to be sold. I then wrote to him to buy the property and keep it for me until such time as I would want it, and I would never forget him for doing so. Philip's statement of what the last letter contained, as made in my presence, and before the examiner, was correct and full, to the best of my recollection, and to what it contained. Philip wrote to me after the sale and told me what he bought the property.' This is his testimony bearing upon the question, and it will be seen that he authorizes no agent but Philip McCall, and no course but a sale and a purchase.

"Philip McCall testifies, after proving loss of letter of Patrick McCall: 'At the time I got the letter I read it. It stated for me to go to sheriff Ryan and get him to knock down the property as cheap as possible, and for me to buy it in, and keep it until such time as he could pay me. I went down to South Fork to John Rourke's. John Rourke is a brother-in-law of mine. We talked over the matter. I told him that I had a mind to pay that debt which was against Patrick McCall. He said I should not do it—to let it go to sale. I then told him, if he wished, to keep it and get his account out of it. I don't remember the exact words used. However, he agreed to it—to keep the property until such time as he would get what he had against it out of it. He agreed to buy the property at the sale, and keep it until he would get his money out of it. He was to keep the property until such time as Patrick McCall would pay the debt, and all that was against the property, including what he owed him, John Rourke.' Again he swears: 'I did not see John Rourke again to speak to him till the day of sale. Between the time when I had the conversation with John Rourke and the day of sale, to make the matter sure for Patrick, I came down to Johnstown, went to a certain party, and made arrangement to borrow money, for fear of any objection at the sale, so as to have enough to secure it for Patrick, for it was all he had. The day of the sale I met Mr. Rourke in Johnstown at the depot. I asked him if he had money enough to pay on it. He said he thought he had. I said if he didn't have enough, I would walk up the railroad to where I could get enough to pay on it,—to buy it. He said, "Never mind, I have enough." I told him I wanted it in hands, so that when Patrick would pay all that was against it, he should get his property. He then said that was all right; when Patrick would pay

him what was against, or he had against, him, he (Rourke) would give him, Patrick McCall, back his property. This was all said in presence of three of us, viz., John Rourke, Michael McCall, and myself.

"Michael McCall testifies: 'John Rourke and Philip McCall agreed to buy the property in for Patrick McCall. John Rourke bought the property. Philip McCall did the bidding. John Rourke agreed that he would give the property back to Patrick McCall, when he (Patrick McCall) came back, and would pay him (Rourke) the money he had paid on it. Philip McCall asked Rourke if he had money enough to buy the property in, saying if he had not, he (Philip McCall) would get it from Joseph Wiss. John Rourke told him, to the best of my recollection, that he had money enough to pay what was against it.'

"Now, this is all the testimony of the plaintiff as to the facts occurring before and at the time of the purchase. And the defendant, on oath, denies everything alleged so far as any trust is concerned; while in his subsequent letters there is no acknowledgment such as would make him a trustee *ex maleficio*. We can find nothing in the testimony to impeach the defendant with fraud or bad faith in securing the legal title. He only met the agent twice, and each time the agent sought him, and not he the agent. The first time the agent tells him he has received a letter from the plaintiff, and suggests a sale and purchase of the property for the plaintiff, or a payment of the judgment. The defendant suggests a sale, the only thing authorized in the letter of the plaintiff. The second meeting was on the day of sale, and he asks defendant if he has money enough to purchase. The defendant tells him he has, will transfer it to plaintiff when he is paid, etc. Now in all the plaintiff's testimony it nowhere appears that Rourke sought by any unfair means the title to this property. No doubt his main purpose was to secure his own \$125, and that he then intended to reconvey to plaintiff. But the question is, did he obtain the title by fraudulent means such as to make a trustee *ex maleficio*? There is no evidence that he obtained the confidence of the plaintiff, or of his agent by undue means, the approach being on the other side. Nor is there a *scintilla* of evidence that he, or any one else in his interest, sought to depreciate the price of the property in order to acquire the title at less than its value. In short, the sheriff's sale seems to be as fair as such sales usually are. And the mere fact that the property sold at less than its cash value would not, *of itself*, aid in creating a trust; and what else have we?

"The admissions of a defendant are always evidence against him; the only admissions claimed here are in alleged letters of defendant. Yet it is most unfortunate that some of the letters are lost, and parol testimony sandwiched between them. Nay, worse than that, portions of letters are lost, or not produced, and we are left to infer the balance of the letter from the portion produced.

"Philip McCall testifies in his testimony *in chief*: 'In writing to Patrick I wrote him that the property had been sold and to John Rourke'—not a word about a *trust*. And Patrick McCall testifies: 'Philip wrote me after the sale and told me who bought the property.' Then comes this remarkable letter from Patrick McCall to Philip McCall: 'HARTFORD, March 25, 1879.

"*DEAR BROTHER:* I write to you those few lines in return for yours of March 7, and I am glad to read of Rourke getting the house iff there is anything to be made on it let him have it in welcome, and as for the receipts I wrote to Junction two weeks ago to the postmaster I sent money from there twist sow iff they are any good to you I will get them all for you and send them to in your next letter let me know how much the house went for and hoe all all bid on it, and was it cash down.'

"April 12th he again writes:

"*DEAR FRIEND JOHN:* I received your letter,' etc.; and after speaking of the Owen McCall receipts he proceeds to say: 'I am well satisfied you have bought the house & keep it.'

"Now these letters were directly after the sale to Rourke. Ten days after the second one Rourke writes and speaks of McCall's receipts, and the payment for the property by himself; but not one word relating to a trust. Then follow letters or statements, one of which is admitted to be only a portion of a letter—the other upon its face is clearly so. The production of a portion of a letter, without the whole, if receivable at all as evidence, is of a very suspicious character. The produced portion commences: 'Now, I tell you what I will do;' what went before this is left to conjecture. In this paper Rourke states that he will take \$275 for the house and half the lot, but it contains no reference to any trust or promise. The next *portion* of letter from Rourke says: 'I would like to have it settled on the fifteenth of April. If you wish to redeem it, you can have it. I have neither heart nor eye for it. I would wish you to be as smart as you can and get all things settled.' The first part of this letter is not produced, and what we have of it shows no evidence of a trust.

"Two years after the sale Patrick McCall returns, pays \$100 to Rourke on the repurchase or redemption of the property; and, some time after, receives the same money back; and finally, some four years after the purchase by Rourke, the amount originally demanded is offered and refused by Rourke. Then counsel seems to have been consulted by both parties, and we have the case here. Now, it is fairly presumable that the first object of the defendant, in making the purchase, was to secure his own debt; and it is equally probable that he intended to reconvey to the plaintiff as soon as he would be indemnified. The evidence would show that he got the property at half its value, and that since the purchase the property has doubled in value.

"The statute of frauds and perjuries, including the act of 1856, has been and must be sustained in all its force and integrity by courts of justice. The master in the present case properly enunciates the law; but, as it strikes us, gives undue weight to the evidence adduced by the plaintiff.

"It must always be borne in mind the facts are not decided, as in ordinary jury trials, by the mere weight of the evidence. It must be 'clear, explicit, and unequivocal.' *McGinity v. McGinity*, 63 Pa. St. 38; *Nixon's Appeal*, Id. 279; *Lingenfelter v. Richey*, 62 Pa. St. 123; *Kistler's Appeal*, 73 Pa. St. 399; and other cases. The mind of the chancellor must be fully satisfied before a decree can be made. On this subject, we refer without more, to the opinion of the supreme court in *Moore v. Small*, 19 Pa. St. 461. Upon the question of trust, *Peebles v. Reading*, 8 Serg. & R. 484, has always been a leading case; and, though Judge DUNOAN's opinion in that case has not been approved as a whole,—one portion having been reversed, and the other questioned,—still, in the main, it stands as the leading authority upon the question of parol trusts. From that case down it would be only an affectation of research to quote the long array of authorities vindicating the main position of the leading case. We have been referred to the cases of *Lippincott v. Whitman*, 83 Pa. St. 244; *Wolford v. Herrington*, 86 Pa. St. 39; and *Cowperthwaite v. Bank*, 102 Pa. St. 397, as sustaining the plaintiff's position. Let us briefly examine these cases. In *Lippincott v. Whitman*, the facts never reached the jury. The judgment was taken for want of a sufficient affidavit of defense. The defendant testified in her affidavit of defense that she had been ensnared into signing a mortgage which she would not have signed but for a parol promise of plaintiff, as to its term, which he afterwards fraudulently repudiated. The court below rendered judgment against her for want of a sufficient affidavit. This the supreme court reversed, and, if on the new trial awarded her, evidence shall be 'clear, explicit, and unequivocal,' as to the facts, she will of course prevail. In *Wolford v. Herrington*, the action was brought by husband and wife, in right of the wife, Rachel Wolford. She had a friend who would take the title and wait a year. Herrington interposed and offered to secure the property *in writing*, and give her *two years*. The writing was drawn by his order. He

was asked at the sale to sign it; he said: 'Wait till I bid it off, and then I will sign it.' When again asked to sign it he said: 'Wait till I get my deed, then I will sign it.' He afterwards refused. The court held this such a fraud as created a trust *ex maleficio*. In *Cowperthwaite v. Bank*, the case was tried upon an offer of testimony. The defendant proposed to show that she claimed a *bona fide* interest in the property; that the plaintiff's agent sought her and proposed to bid it off for her, to which she assented; that he induced others to refrain from bidding, whereby the title was secured to plaintiff at an enormous sacrifice. The court held this to be a fraud upon the defendant, and created a trust, *ex maleficio*, in her favor.

"Now, these cases are all quite different from the one before us, and do not impinge on the general rule. The principles of the earlier cases remain in full force. Thus we feel constrained to reverse the conclusions of the master upon the evidence. But in doing so we shall in this equitable proceeding, as nearly as we can, reach the ends of substantial justice. For the \$65 paid in ease of the defendant on the purchase money, the plaintiff might have had his action for money had and received. As that would now be barred by the statute of limitation, we here insert it, and we shall so frame our decree. And now, September 7, 1885, this case having been fully argued, it is the judgment and decree of the court that the plaintiff's bill be dismissed, and that he pay the costs, including a fee of \$100 to the master, excepting the sum of \$90, which portion of the costs shall be paid by John Rourke, the defendant."

*Wm. H. Sechler*, for appellant. *Daniel McLaughlin*, for appellee.

**PER CURIAM.** A demurrer to the bill in this case would have been fatal to it, for there is not enough set forth therein to raise a resulting trust in favor of the plaintiff. An oral agreement to purchase for another at a *bona fide* sheriff's sale will not of itself raise a trust of any kind. Fraud at the time of the sale, or the payment of the purchase money, is necessary in order to toll the statute of 1856, neither of which appears to be alleged in the bill. The utmost that can be inferred from its language is that Rourke agreed to purchase the property from McCall, and afterwards refused to perform. This, however, on all authority, is insufficient to create a resulting trust. As for the facts of the case, they have been so well disposed of in the opinion of the learned judge of the court below as to render further comment by us unnecessary.

The judgment is affirmed.

### BONNELL'S APPEAL.

(*Supreme Court of Pennsylvania*. November 1, 1886.)

#### USURY—PERSONAL DEFENSE.

In an action for foreclosure of a mortgage, the grantee of the mortgaged premises sought to have credited on the principal debt the payments of interest made by the mortgagor in excess of the legal rate. *Held*, that the defense of usury is a personal right of the one who pays it, and cannot be transferred.

Appeal from court of common pleas, Butler county.

This is an action for the foreclosure of a mortgage upon real estate which had been conveyed by the mortgagor, Smith, to Bonnell by deed of general warranty. For some time Smith had been paying 7 per cent. interest on the mortgage debt, that being 1 per cent. in advance of the legal rate. It so happened that Smith had no interest in making any defense, and in the foreclosure proceedings, which were begun by issuing *scire facias* on the mortgage, Bonnell, as owner of the land, undertook to defend, and asked that the payments made by Smith in excess of the legal rate be credited on the principal.

*Clarence Walker*, for plaintiff in error. No appearance for defendant in error.

GREEN, J. We are unable to discover in the appellant's affidavit any defense of which he can avail himself. He sets up nothing but usury paid by the mortgagor, but he does not aver that the mortgagor desires to defend on that ground. The mortgagor is the defendant in the *scire facias*, and if he desires to make the defense of usury he can do so. But in the present state of the law that defense is personal, and, if the debtor does not choose to make it, one who is a stranger to the contract cannot. When the appellant bought the land of the mortgagor the mortgage in question was spread upon the record, and he bought with his eyes open. He knew the precise amount of the lien which incumbered the land, just as well as if it had been a judgment. In *Trust Co. v. Rosebury*, 81 Pa. St. 309, we held that when an owner of land borrowed money at usurious interest, and gave a bond for its payment on which judgment was entered, and he was afterwards adjudged a bankrupt, and his land was sold by the assignee, the purchaser could not have the judgment reduced by the amount of the usury. In the opinion all the recent decisions were reviewed, showing the changes in our usury law. MERCUR, J., said: "The defendant in error does not claim as a creditor. He claims as a purchaser at a sale made several months after the entry of the judgment. He bought with full notice of its existence. He knew that he bought subject to its incumbrance. Presumably he paid a sum equal to the amount of the judgment, less than he would otherwise have done. He was not defrauded. He got just what he purchased." We are unable to see how the fact of a general warranty in the appellant's deed changes the situation. The right of action on that account remains, but how it can confer a right to the covenantee to set off usury against the mortgagee, which the mortgagor, who is the covenantor, does not choose to assert in defense against the mortgage, we cannot understand.

Judgment affirmed.

### JENNINGS v. LONGDON and another.

(Supreme Court of Pennsylvania. October Term, 1887.)

#### 1. TRUSTS—RESULTING—PURCHASE BY HUSBAND WITH WIFE'S MONEY.

A husband bought land, paying for it in part with his wife's money. This land he sold, and bought other land, his wife joining with him in the sale. *Held*, that there was no resulting trust giving the wife a claim on the land last purchased.<sup>1</sup>

#### 2. SAME—ESTOPPEL TO ASSERT—JOINING WITH HUSBAND IN ASSIGNMENT TO CREDITORS.

After a wife has joined her husband in an assignment for the benefit of creditors, and the property so assigned has been sold, and the creditors paid from the proceeds, it is too late for the wife to assert a claim on the property so assigned for a resulting trust for money of hers given in payment for the property.

Error to the court of common pleas, Greene county.

Silas Jennings, the father of Joseph Jennings, bought a small farm, paying for it in part with money of his wife. This farm Silas Jennings sold to Joseph Dunn, his wife joining in the deed. About the time of this sale, Silas Jennings bought another farm from Joseph Clutter, paying for it partly in cash and giving his obligations for the balance. He afterwards sold part of this farm to James Dunn, his wife joining in the deed. This sale left Jen-

<sup>1</sup>In some states, when a conveyance is made to one person, the consideration for which moves from another, a trust results in favor of the latter. *Bigley v. Jones*, (Pa.) 7 Atl. Rep. 54; *Donlin v. Bradley*, (Ill.) 10 N. E. Rep. 11; *Harris v. McIntyre*, (Ill.) 8 N. E. Rep. 182; *Springer v. Young*, (Or.) 12 Pac. Rep. 400; *Smith v. Brown*, (Tex.) 1 S. W. Rep. 573; *Bedford v. Graves*, (Ky.) Id., note 537; *Ward v. Matthews*, (Cal.) 14 Pac. Rep. 604. And such trust results, even though the consideration has been in fact advanced by the grantee for the other person, the grantee holding the title as security for such advances. *Barroillet v. Anspacher*, (Cal.) 8 Pac. Rep. 804; *Walton v. Karnes*, (Cal.) 7 Pac. Rep. 676. But see, to the contrary, *In re Wood*, 5 Fed. Rep. 443; *Bear v. Koanigstein*, (Neb.) 20 N. W. Rep. 104.

a possession of about 62 acres of this Clutter farm. In payment of the notes still due for this farm, Jennings gave H. Andrew a judgment, which was recorded. Jennings being involved, his wife obtained judgment against him for the amount of her money used in payment for the farm. Afterwards Jennings made an assignment of the land to Andrew for the benefit of his creditors, and his wife, following the advice of Gibson Longbrother, joined in the assignment. Under order of court duly obtained the land was offered for sale, and the crier's bid of \$27.50 per acre was bid made. At a second sale, after some bidding, the land was adjudged to Longdon at \$26 an acre. The court confirmed the sale, and the money was paid, Longdon, however, having to obtain money from Andrew to pay for it. The proceeds of the sale were used up in payment of Jennings' debts. His wife declared thereupon that her consent to the assignment had been obtained by fraud, and that she had been defrauded of her share of the money which went to pay for the Clutter land. Jennings brought an action against Andrew for the land sold under the assignment in his wife. Andrew dying, Jennings and his wife took a voluntary assignment.

After this, Jennings and his wife sold their interest in the matter to Joseph Jennings, who brought this action of ejectment for the land conveyed to him. The court below came to the conclusion that, on the facts of the case, the plaintiff should not recover, and directed a verdict for the defendant. Plaintiff brings error.

**CURIAM.** We have examined both the argument of the learned counsel for the plaintiff, and also the evidence submitted to us, with care, and at the examination we have come to the conclusion that there is nothing in the case which requires a reversal. The evidence to establish a resulting trust is of its purpose, and even if such trust were established in Mrs. Jennings, she was too late in asserting it. Neither can we see that she was defrauded in the deed of assignment. The principal fault in the matter seems to be at the property did not sell for enough to satisfy her judgment against Andrew. Had it been otherwise, we should doubtless never have heard of the case. The judgment is affirmed.

# VERSEERS OF DONEGAL TP. v. OVERSEERS OF SUGAR CREEK TP.

(*Supreme Court of Pennsylvania. October Term, 1887.*)

## R--SETTLEMENT.

The evidence showed that, at the time of pauper's birth, her parents had their settlement in D. township, where they resided for 14 or 15 years; that the father then abandoned the family, and never took any further care of them, but moved into another township, and bought land, and lived with another woman; the mother (but at what time did not appear) sold the place, and removed into another township, and afterwards married, and went to live with her second husband in another township. The pauper lived with her mother both in A. and S. townships, but the evidence did not show that the mother acquired any settlement in S. during the minority of the pauper, or that the pauper acquired any settlement after majority. *Held*, that D. township was the last place of legal settlement of the pauper.

## -PROCEEDINGS FOR REMOVAL OF PAUPER.

Where a pauper, having a settlement in D. township, came into S. township, but before acquiring a settlement became insane, and was sent to the lunatic asylum, that this was not a case within Pennsylvania act June 13, 1836, § 23, relating to the removal of paupers who become sick or die before acquiring a settlement, and providing for notice to the township of their settlement and proceedings, by complaint to the quarter sessions; but that the overseers could proceed under sections 16 and 18 of that act, providing for proceedings for removal, by information before the quarter sessions, and the removal need not be actual, but a transfer by delivery of the pauper to the township of removal is sufficient.

to court of quarter sessions, Armstrong county.

On the trial of this case in the court of quarter sessions the following opinion was rendered:

"In the matter of the appeal of the overseers of the poor of Donegal township from an order of removal of eighteenth February, 1885, removing Emma Wolford from Sugar Creek township, Armstrong county, Pennsylvania, to Donegal township, Butler county. The facts of this case, as nearly as can be gathered from the evidence, are as follows: Prior to the year 1855, Andrew Wolford and Mary Ann Wolford, his wife, were living, and had their legal settlement in Donegal township, Butler county, where they were duly domiciled and resided. The name of the wife before her marriage was Mary Ann Fair. During their coverture they had more than one child, and of the children born to them was Sarah Emma Wolford, who was born while they, the parents, were living on the farm known as the 'Stewart Farm,' in Donegal township, which had been purchased by Wolford from one Stewart in 1855. According to the testimony of one witness, Sarah Emma was born in the year 1855, but the mother swore that she was born in 1857, December of that year. Subsequent to the birth of this child, who is now the subject of this controversy, Andrew Wolford continued to reside upon the same land until 1863 or 1862, and altogether he lived with his family in Donegal township about 14 or 15 years, in that time being the owner of some two tracts of land on which he had dwelled. About the year 1862 or 1863 the husband, Andrew Wolford, gave notice to his wife that he could not live with her longer, and, doubtless in pursuance of an arrangement with a former house-maid, he departed from the neighborhood, the house-maid, Mag. McDermott, disappearing at about the same time. He then abandoned his wife and family, and never returned to live with them, or took any further care of them afterwards. After his departure, at what particular time it does not appear, the farm was sold at sheriff's sale, and bought in at a nominal sum of \$100 by the brother-in-law of Mrs. Wolford, under an arrangement with her by which she was to have some advantage on a sale, which she did afterwards have, getting in all something over \$1,000. Afterwards this money was used in the purchase of a farm in Washington township, Armstrong county, which Mrs. Wolford bought from Ellenberger, which she sold to Foster. She then appears to have used the proceeds of this sale in buying a piece of land in Fairview township, Butler county, which she again sold. The proceeds, about \$1,250, were then loaned to — Devinney, her late husband. Mrs. Wolford appears to have lived on the Washington township farm for about three years, and Sarah Emma then lived with her. She also lived about the same length of time on the Fairview township farm, where Sarah Emma also lived with her. In October, 1884, she bought land in Sugar Creek township, Armstrong county, for which she paid \$1,000, and moved on to it in April, 1885. Sarah Emma appears to have lived out at times, but made her home with her mother or in Devinney's family. Mrs. Wolford appears to have remained in the neighborhood of her former home for some years afterwards, and received visits from her husband, Wolford, but they never seem to have cohabited after the first separation, and neither appears to have suffered much mental anguish on that account. The husband made overtures of resuming marital relations with his wife in case anything should happen to his paramour, which she refused to acquiesce in. He then departed for good. After leaving his wife he adopted the name of Andrew Hershey, and was seen and recognized afterwards by different persons, and was generally known as Andrew Hershey. In 1870 he bought a piece of land in Shaler township, Allegheny county, worth some \$2,500, to which he afterwards derived title. A house was built on this land by James Roach for Wolford, or Hershey, about 1879 or 1880. R. H. Roach says he lived on the land in Shaler township ever since the house was built. He died in February, 1884. There is no positive testimony that Wolford, or Hershey, was ever married to any other than the mother of the said Sarah.

Emma Wolford; though he was living with the McDermott woman in the Shaler township house previous to his death. Mrs. Wolford, after the separation, at some time, procured a divorce from her husband, and then married Devinney, with whom she lived in Sugar Creek township until his death, it would seem, on the land of Devinney. Papers are also in evidence showing the assessment to Andrew Hershey of:

28 acres of land in Shaler tp., valued at	-	-	-	-	-	\$2,240
2-story frame house,	-	-	-	-	-	500
Horse,	-	-	-	-	-	50

—for the years 1882, 1883, 1884.

"Also receipts for taxes for 1883 and 1884. And a paper *not in evidence* shows payment of taxes by Andrew Hershey in Shaler township for the years 1881, 1882, 1883. It also appears that in the year 1883 the pauper, Sarah Emma, was declared a lunatic, and was confined in the hospital at Dixmont, where she has continued to remain. It is in evidence that at the time the order of removal was taken out she was not discharged from the hospital, but was there at the time, consequently there was no actual delivery of the pauper in person to the overseers of Donegal township.

"From these facts it is clear, and we now find, that the said Sarah Emma Wolford, at the time of her birth, acquired an actual settlement in Donegal township, Butler county, by virtue of the then actual settlement of her parents in that township at the time.

"We further find that up to the removal of the mother from that township she was still a minor, and had till that time derived no other settlement; which would be conclusive as to the request of the first point of the defendant, (or appellee,) and that point is therefore affirmed. *Overseers v. Fairfield*, 112 Pa. St. 105, 3 Atl. Rep. 862; *Wayne Tp. v. Jersey Shore*, 81 Pa. St. 264.

"But the appellant's counsel would, at the very threshold of this case, have it dismissed, for the reason that it is distinctly within the twenty-third section of act of twelfth June, 1836, (Purd. Dig. 1349, pl. 59.) We fail to find throughout the testimony any evidence to support the theory of sudden falling sick or emergency, as contemplated in that section. Two years prior to these proceedings the pauper had been declared insane, and was duly committed to the hospital, and at that time she had been some years a resident of Sugar Creek township. In such a case, if the place of actual legal settlement had been known, the order of removal of the pauper to her proper district might have preceded proceedings *de lunatico inquirendo*. But it so frequently happens that in such cases the actual settlement of the alleged pauper may not at once be known, if these proceedings in lunacy would have to be postponed until the place of legal settlement were determined much harm might result. So that we deem it entirely right to have postponed the ascertainment of the legal settlement of the pauper till after the inquiry of lunacy had taken place. The first duty dictated by both humanity and public safety was clearly to provide for the care and custody of the unfortunate lunatic. Having done so, in this instance, we think the position of the appellant is untenable that the order of removal was invalid because there was no actual delivery of the pauper at the time of the service of the order of removal upon them. *Blewitt's Case*, 11 Phila. 652. The overseers, therefore, performed their duty, after having reason to believe that the township of Donegal was the place of the last legal settlement of the pauper, to obtain an order of removal to that township, which was the course taken in the case of *Overseers, etc., v. Directors, etc., Schuylkill Co.*, 44 Pa. St. 481, afterwards remedied in respect to jurisdiction by the act of fifteenth April, 1867. See *Directors, etc., v. Overseers, etc.*, 91 Pa. St. 433; *Overseers, etc., v. Forest Co.*, Id. 406. We have thus covered the ground embraced in the first, second, fourth, and tenth points presented by the counsel for the appellants, which we do not think are sustained by the law of this case, and they are therefore answered in the negative.

"In respect to the fifth point raised by the appellants' counsel, namely, that the father of Sarah Emma Wolford, having acquired property in Allegheny county subsequent to his departure from Donegal township, that the settlement of the father was communicated to the daughter. We think the position thus maintained by appellants' counsel would be good—*First*, if the said Andrew Wolford had continued to be the head of his family, (*Burrell Tp. Guardians of Poor*, 62 Pa. St. 474;) and, *second*, if the father, as such head of the family, had acquired a legal settlement elsewhere than in Donegal township prior to the daughter attaining her legal majority or emancipation from the family of her father. But the testimony does not establish that fact. Coupled with the fact of ownership of land, there must have been an actual residence upon it for one whole year at least. *Overseers, etc., v. Overseers, etc.*, 112 Pa. St. 99, 3 Atl. Rep. 862. If it were otherwise, and the mere fact of ownership of real estate could confer settlement, then a man would be entitled to a settlement in every township and district in which he might own real estate. Accordingly, we decline to affirm the appellants' fifth point, and refusing the appellants' fifth point we affirm the converse position of the defendants' or appellees' third point.

"The appellants' sixth point requires us to find that Andrew Wolford had a settlement in Shaler township, Allegheny county, by virtue of the payment of taxes in that township in 1881, and subsequently. This would be some three years after she, Sarah Emma, had attained her majority. There is no evidence that she had accompanied her father to that township by which a derivative settlement after majority might have been acquired. And although there was a legal separation at some time between the mother and father, yet that could not sever the relation between the father and daughter, and he must be regarded still as the father, and was capable of communicating a legal settlement to his daughter, unless she had become insane before attaining her majority. *Montoursville v. Fairfield Tp., supra*, 106. The settlement of the father is therefore the settlement of the child until it becomes of age or emancipated. *Id.* 106; *Overseers, etc., v. Overseers, etc.*, 3 Watts & 549; *Lewis v. Turbut*, 15 Pa. St. 146; *Overseers, etc., v. Eldred Tp.*, 84 Pa. St. 429. We decline, therefore, under the facts of this case, to sustain the appellants' sixth point. And, as we do not think the pauper ever acquired a legal settlement in Shaler township, we refuse the eighth point of appellants. The appellant (or plaintiff) in this case does not seem to contend as to the fact of the settlement of the child following that of the father, nor to insist or even assert that she derived a derivative settlement from the mother, although the line of examination of the witnesses suggests that purpose. In fact the eleventh point of plaintiffs wholly negatives the purpose of showing that she ever was so emancipated as to relieve the father. However that may be, we have found that when she came of age there is no evidence binding upon us to show that she was chargeable upon Shaler township. The father, at the time he had, it is true, acquired property in that township, but the evidence does not show that he had secured a settlement in Shaler township. It might have been possible that Mrs. Devinney, after her divorce from Wolford, acquired a settlement in Washington township, Armstrong county, or Fairview, Butler county, before her marriage with Devinney, but the evidence, although showing that she was Mrs. Devinney, does not disclose how long she had been married to Devinney. And while we think that she, Sarah Emma, was of sound mind when she attained her majority, unless she remained with her father's family she was emancipated, and could by her own acts have acquired a settlement elsewhere than she had acquired at her birth, yet the evidence does not sufficiently show that she did so. The eleventh point of the plaintiffs is therefore refused.

"The seventh and ninth points remain to be considered, which are as follows:

*Point.* There is no sufficient evidence that Sarah Emily Wolford had a settlement in Donegal township.

*Point.* Under all the evidence in this case, the appeal of the Donegal overseers should be sustained.

Conclusion is unavoidable that Andrew Wolford and his wife, at the time Sarah Emily, were legally settled in Donegal township, Butler county, Pennsylvania. We negative the seventh point, because that settlement at once settles the settlement of the child. Did she acquire another settlement, by her own acts after attaining her majority, or by virtue of the residence to her mother? The mother, it is true, after her separation from her first husband, was the owner of and actually lived on two farms, neither of which were in Donegal township, and in each case the residence was sufficiently long, if she had come within the ruling of *Overseers, etc., v. Eldred Tp.*, 84 Pa. St. 429, to have conferred a settlement upon her. But it is not affirmatively shown that at the time she lived in either Fairview or Washington township she was then married to her first husband, or that she was not then married to Devinney, her second husband. And at this time, during the minority of the child Sarah Emily, and in full accord with the position of the plaintiff, the settlement of the father, if there was a change of settlement as to Donegal township, would be communicated to his child Sarah Emily. There was no change as to him, and none is shown until 1881, then his legal residence was in Donegal township, and the child's would also remain unchanged. But the father seems to have withdrawn all parental care from the child after his separation from his wife, and the child thereafter continued to reside with her mother. The mother, however, removed, and came into Armstrong township, where she lived with her husband Devinney, and the child, the pauper, becoming a member of the family of the step-father the same settlement. The mother did not attach to the child that did to the mother. The mother, by her marriage, derived a new settlement if her husband then had one. But by reason of merely residing in the family the child did not acquire a settlement. She must come within some of the provisions of the statute conferring a settlement. The mere residence in her step-father's family, under a contract for wages, could not be regarded as sufficient. See *Davidson Tp.*, 71 Pa. St. 376. No such contract relation was shown to have existed. The mother has testified that she worked for him. How much of her time and where is not stated; this is too vague to establish a settlement by virtue of service. The residence with her step-father has been determined confers no settlement. See *Directors v. James*, 2 Watts & S. 568; *Wayne Tp. v. Jerome*, 1 Pa. St. 264; *Northumberland Bor. v. Milton Bor.*, 9 Atl. Rep. 457. In the latter case all the authorities are exhausted by ROCKEFELLER, and his conclusions affirmed by the supreme court. There are, however, no conclusions in the present case somewhat within the ruling of the recent case *Parker City v. Overseers, etc.*, 9 Atl. Rep. 457. But in the case last cited the pauper's father (the pauper's father) never lived in Pennsylvania. The pauper acquired an actual settlement by her own acts, and it was held that she had a settlement through her mother. He never had one in the state, though his father, who was never domiciled in the state. In the present case the father was domiciled in the state, acquired a settlement in the state, and remained here, and, whether his settlement changed or not, his residence for support of his family followed him. By virtue of his residence his daughter Sarah Emma acquired an actual settlement, which fact is the *Parker City Case*.

The overseers of Sugar Creek having succeeded in establishing the fact of an actual settlement of the pauper in Donegal township, we think the burden was cast upon the plaintiff to show affirmatively that that

original settlement was lost either by removal of the pauper from the state, and the acquisition of an extrastate settlement, or by showing that she had acquired a new settlement in some other district in the state. This has not been done.

"And now, twenty-ninth August, 1887, all the points of the plaintiff inconsistent with this opinion are refused, and all the points of the defendant appellees consistent with this opinion are sustained, all others refused. And we further find that Donegal township, Butler county, was the place of last legal settlement of said Sarah Emma Wolford, and chargeable with the costs of her maintenance and support, and the costs of this proceeding. The order of removal is sustained, and the appeal dismissed."

To which order and judgment Donegal township excepted for the following reasons:

*First.* The court erred in finding that the court of quarter sessions of Armstrong county had jurisdiction of these proceedings.

*Second.* The court erred in finding the last place of legal settlement of Sarah Emily Wolford was in Donegal township.

*Third.* The court erred in its answer to the first point of plaintiff in error, which point and answer are as follows: "(1) The undisputed evidence in this case is that Sarah Emily Wolford, the pauper, fell sick in Sugar Creek township, so that she could not be removed, and it thereupon became the duty of the overseers of Sugar Creek township, if they wished to recover from Donegal township, to proceed in the manner set forth in the act of thirteenth June, 1836, § 23, (P. L. 546; Purd. Dig. p. 1349, pl. 59:) and, having failed to do so, this appeal must be sustained. *Answer.* Refused."

*Fourth.* The court erred in its answer to the second point of plaintiff in error, which point and answer are as follows: "(2) Under the evidence in this case the overseers of the poor of Sugar Creek township, if they had any remedy, were bound to enforce it in the quarter sessions of Butler county. *A. Refused.*"

*Fifth.* The court erred in its answer to the third point of plaintiff in error, which point and answer are as follows: "(3) The evidence in this case showing that Sarah Emily Wolford, the pauper, at the time of granting the order of removal, was confined in the hospital of Dixmont, so sick that she could not be removed, the overseers of Sugar Creek township could not enforce any remedy they might have, by proceeding under section 16 of the act of thirteenth June, 1836, (P. L. 546; Purd. Dig. p. 1345, pl. 39.) Said act contemplates the actual and bodily removal of the pauper, and does not apply to the case of a pauper that cannot be actually and bodily removed. *A. Refused.*"

*Sixth.* The court erred in its answer to the fourth point of plaintiff in error, which point and answer are as follows: "(4) The evidence in this case shows that Andrew Wolford, the father of Sarah Emily Wolford, moved to Shaler township, Allegheny county, about 1859 or 1860 or 1863; that prior to his removal thereto he lived in Donegal township, and, having some difficulty with his wife, he left her, and went with Mag. McDermott; that in Shaler township he changed his name to Andrew Hershey; that on the twenty-fifth day of June, 1870, the said Andrew Wolford (in the name of Andrew Hershey) bought for \$2,603.81, 28 acres of land in Shaler township, Allegheny county, and dwelt upon the same for more than one whole year, and thereby acquired a settlement in said Shaler township, which settlement was communicated to his daughter Sarah Emily Wolford; and therefore the last place of legal settlement of said Sarah Emily was not in Donegal township. *A. Refused.*"

*Seventh.* The court erred in its answer to the fifth point of plaintiff in error, which point and answer are as follows: "(5) The evidence shows that Andrew Wolford (under the name of Andrew Hershey) was charged with and paid his proportion of the public taxes or levies for more than

two years successively, to-wit, for the years 1881, 1882, 1883, and 1884, in Shaler township, Allegheny county, and he thereby acquired a settlement in said township, which was communicated to his daughter subsequent to his residence in Donegal township; and therefore said pauper was not removed to her last place of legal settlement, and the appeal must be confirmed. *A. Refused.*"

*Eighth.* The court erred in its answer to the sixth point of plaintiff in error, which point and answer are as follows: "(6) There is no sufficient evidence to show that Sarah Emily Wolford ever acquired a settlement in Donegal township. *A. Refused.*"

*Ninth.* The court erred in its answer to the seventh point of plaintiff in error, which point and answer are as follows: "(7) The evidence in this case shows that the last place of legal settlement of Sarah Emily Wolford is in Shaler township, Allegheny county. *A. Refused.*"

*Tenth.* The court erred in its answer to the eighth point of plaintiff in error, which point and answer are as follows: "(8) Under all the evidence in this case, the appeal of Donegal township overseers should be sustained. *A. Refused.*"

*Eleventh.* The court erred in its answer to the ninth point of plaintiff in error, which point and answer are as follows: "(9) The court of quarter sessions of Armstrong county have no jurisdiction of this case. *A. Refused.*"

*Twelfth.* The court erred in its answer to the tenth point of plaintiff in error, which point and answer are as follows: "(10) There is no sufficient evidence in this case to show that Sarah Emily Wolford was ever emancipated from her father, Andrew Wolford. *A. Refused.*"

*Thirteenth.* The court erred in finding that the mother of Sarah Emily Wolford did not acquire a settlement in Fairview township, and that said settlement did not inure to the said pauper.

*Fourteenth.* The court erred in finding that the mother of Sarah Emily Wolford did not acquire a settlement in Washington township, and that said settlement did not inure to the benefit of the pauper, her minor daughter.

*Fifteenth.* The court erred in making the following order: "The order of removal is sustained, and the appeal dismissed."

*M. B. McBride and W. D. Patton*, for plaintiffs in error. *Buffington & Buffington*, for defendants in error.

**STERRETT, J.** The learned president of the quarter sessions was clearly right in finding the last place of legal settlement of Sarah Emily Wolford was in Donegal township, Butler county. All that can be profitably said on that subject will be found in his opinion. But, assuming the correctness of that finding, it is further contended that the court had no jurisdiction, because the pauper in question had been previously committed to Dixmont Insane Asylum by defendants in error, and has been there kept and maintained by them ever since; that their remedy, if they have any, is by proceeding under the twenty-third section of the act June 13, 1836, and not under the sixteenth and eighteenth sections of same act.

We cannot assent to this proposition. The twenty-third section was intended to provide for cases of sudden emergency, sudden sickness, injury, or death, and the like, and not for cases such as the one under consideration. While a strictly literal reading of the sixteenth and eighteenth sections may appear to favor the idea of actual removal and acceptance of the pauper, the spirit of the act gives it a much wider scope. In cases like the present, where actual removal of the pauper is impracticable and unnecessary, a constructive transfer from one district to the other, by delivery of the order of removal, is sufficient to meet all the requirements of the act in that regard. It does not appear that either the physical or mental condition of the pauper was such

as to have permitted her actual removal from the asylum, and delivery to plaintiffs in error; but, under the circumstances disclosed by the evidence, such a useless formality would have been inhuman and unnecessarily expensive to plaintiffs in error. Their refusal to honor the order of removal, by assuming charge of the pauper, was not based on her non-delivery to them in person, but because they denied that her last place of legal settlement was in their poor-district. The purely technical objection to the form of proceeding was an after-thought. It is unnecessary to notice, separately, each of the specifications of error. There is nothing in any of them that calls for a reversal of the order complained of.

The order of the court below is affirmed, with costs, to be paid by plaintiffs in error.

### EASLEY v. COMMONWEALTH.

(Supreme Court of Pennsylvania. October 13, 1887.)

#### 1. BASTARDY—NON-ACCESS—COMPETENCY OF HUSBAND AND WIFE TO TESTIFY.

In a trial upon an indictment for fornication and bastardy, in which the prosecutrix was a married woman, the jury were instructed that a married woman, while the relation of coverture existed, would not be permitted to bastardize her child; that neither she nor her husband could testify as to the husband's non-access. But if they were satisfied by other evidence beyond a reasonable doubt of the non-access of the husband, they could then consider her testimony as to the paternity of the child. *Held* not error.<sup>1</sup>

#### 2. SAME—DECLARATIONS IN EXTREMIS.

In a trial upon an indictment for bastardy, the physician who attended the prosecutrix was permitted to testify to declarations as to the paternity of the child, made by prosecutrix while in labor, although the physician was not certain that she was in *extremis*. *Held* not error, where the jury were instructed that they were only to consider the declarations if they believed them to have been made by prosecutrix while in *extremis*, and that at the time of making them she believed herself to be in peril, and not likely to survive.<sup>2</sup>

#### 3. SAME—PROOF OF MARRIAGE—FOREIGN STATUTES ADMISSIBLE.

In a trial upon an indictment for fornication and bastardy, the defendant introduced evidence to show that the prosecutrix was married, and also that she testified before the magistrate that she was not married. *Held*, it appearing that she had contracted a marriage in Ohio while under age, that the statutes and laws of Ohio were admissible for the purpose of showing that the marriage as contracted was invalid.

Error to court of quarter sessions, Armstrong county.

Indictment for fornication and bastardy.

The prosecutrix had been married in the state of Ohio, while under the age of 14, but left her husband shortly afterwards, and claimed to have seen him since. She was employed as a domestic in the family of the defendant.

On the trial of the case, Dr. Bryson, the physician who attended prosecutrix in her labor, was permitted to testify to declarations made by her as to the paternity of the child while she was in labor, but not in *extremis*. The testimony was admitted, and the jury instructed as follows:

"In corroboration of her testimony she produces the physician who was present at the birth of the child, and it is *almost* proper to say that the testimony should be excluded; but we will leave it with this explanation: that the

<sup>1</sup>On the question of the legitimacy of her children, the wife is incompetent to give evidence of the non-access of her husband. Such non-access and illegitimacy must be clearly proved by other testimony. *Mink v. State*, (Wis.) 19 N. W. Rep. 445. See, also, note to *Appeal of Goerman*, (Pa.) 1 Atl. Rep. 446.

<sup>2</sup>As to the conditions requisite for the admission of dying declarations in evidence, see *Whitaker v. State*, (Ga.) 3 S. E. Rep. 403; *State v. Newhouse*, (La.) 2 South. Rep. 799, and note; *Luker v. Com.*, (Ky.) 5 S. W. Rep. 354; *People v. Ramirez*, (Cal.) 15 Pac. Rep. 33; *State v. Johnson*, (Iowa,) 34 N. W. Rep. 177.

may be admitted when the woman is '*in extremis*,'—that is, when the act of giving birth to the child. Now, when '*in extremis*' occurs, it is almost impossible for us to define. You understand, gentlemen, when the pains are very severe, the labor pains, and during them it is frequently the case that the mother believes that she is not likely to survive, and account the law has permitted the declarations made in that extremity to be given in evidence, in corroboration as to the parentage, or the father of the child is.

If that was her situation at that time, and she was in such labor, '*in extremis*,' and believed herself to be in such peril, and under that belief made a declaration that this man was the father of the child, it is for you to believe it."

The prosecutrix was also permitted to testify, and the jury were instructed

In the present case, the defendant in this indictment is charged with the crime of fornication and bastardy. Now, that you may have a fair and proper understanding of that, we may say to you that fornication is criminal cohabitation between a male and a female unmarried. The woman, unless she is in the relation of marriage to the man with whom she may have connection, commits the offense of fornication, and either the man or the woman may commit the higher offense of adultery in the act. The offense of adultery is considered as a minor offense, or minor grade of crime. Bastardy is the result of that connection which is the birth of a child. When there is the simple offense of fornication committed, ordinarily we do not consider it much to do with that class of cases in court; but when there are cases of birth following the offense of fornication, they usually come before the court for settlement in our courts, where the parties are not married.

A married woman may be guilty of both offenses of fornication, and adultery, having connection with her, not being her husband, may be guilty of these offenses of fornication, and, when a birth follows, of bastardy. The rule of law is this: that when the husband and wife are living together, she cannot bastardize her own offspring. If they are living as man and wife, she cannot, even though some other person not her husband should have connection with her. When they are living as husband and wife, and cohabiting, the offense of bastardy could not be established unless there is some absolute physical disability on the part of the husband to procreate, in that case the offense of fornication and bastardy might be made out against her person. The presumption always runs that when the relation of husband and wife exists, that the father of the children born during the life of that relation is the husband. And after the death of the husband, within a reasonable time, the presumption follows that the husband is the father of the posthumous child, or child born after his own death. It is impossible for a wife to bastardize the children during that relation, or, that relation of marriage, and it is also impossible for her to swear to her own oath, in proving the husband's non-access; that is, that he had access to her, and consequently did not have connection with her. It is impossible for the wife to prove that, by her own oath; the husband cannot, neither can the wife do so.

If access has not been had, it must be proven by some other evidence; it must be satisfied from other testimony in the case that there has been no connection on the part of the husband. I am speaking now when the husband and wife are living separate and apart. It could not be shown that the husband had no access to his wife, by the evidence of the wife, nor by the evidence of the husband. He could not come into court and swear that he did not have access to his wife for the purpose of bastardizing, nor can she for the purpose of bastardizing her own offspring. It must be from some other

evidence that you must be satisfied that there was no access on the part of the lawful married husband of this woman.

"She could not prove his non-access, and he could not prove his non-access, and it must be proved outside; and if you are satisfied from the evidence in this case that he did not have access, it follows then that some one did have access, and it is absolutely certain that some one did beget this child. If you are satisfied that the husband of this prosecutrix is not the father, by reason of the impossibility of the access; if you are satisfied that there was no connection between the husband and wife; if the legal testimony satisfies you, beyond a reasonable doubt, that he did not have access,—then you come to inquire, who is the father of this child?

"You have the testimony of the prosecutrix, and it is unqualifiedly to the effect that she had connection with this young man, the defendant in the case. Her testimony is very positive on that point."

The court also admitted the statutes and laws of Ohio for the purpose of showing that the marriage in Ohio was invalid by reason of want of age. The testimony was introduced for the purpose of corroborating the prosecutrix, who swore on the trial before the justice that she was not married. The court in charging the jury said:

"You have this further: She has testified before the justice, and it has been dwelt upon, on the part of the defendant, with considerable force, that she gave false testimony in giving that testimony. Now, in order to let you understand that, it may be true as she herself states, she may have believed that she was telling the truth when she made those declarations before the justice, because here is the law of the state of Ohio, where she was married, which seems to authorize the marriage of girls under the age of 18, provided they have their father's consent, or, if they have no father, of their mother's or guardian's consent. But it is not such a statute that in its formal words says that any other marriage contract would be invalid. The act does not say so, and it becomes a further question to inquire to know when a marriage contract between a female under the age of 16 with a male person would be competent, and the marriage valid. Then the statute of Ohio says if the marriage should occur under the age of 16, and cohabitation follow that marriage, cohabitation after the age of 16, any time after the age of 16, that that would make it a valid marriage. We need not go so far as to say here, however, that there was an invalid marriage, because it is not in evidence or sufficiently proven that there was no cohabitation after the age of 16. It is true that the wife in this case, or the alleged wife, testified that she lived with her husband eight months, but she is incompetent as to that. She cannot come into court for the purpose of making that out, in this state, at least. She cannot be a witness against her own husband and make herself out an unmarried woman; and it must be shown that there was no such cohabitation after she reached the age of 16, in order to invalidate that marriage."

Verdict of guilty.

*Calvin Rayburn and David Barclay*, for plaintiff in error. *J. R. Henderson*, (with *D. B. Heiner*, Dist. Atty.,) for defendant in error.

PER CURIAM. As there is nothing in the exceptions in this case which we regard as worthy of special comment, we dismiss them, and concur in the rulings and judgment of the court below. The judgment is affirmed, and it is ordered that the record be remitted for execution.

## WAGLE v. BARTLEY and others.

(Supreme Court of Pennsylvania. October Term, 1887.)

**DEBT—RECOVERY IN EXCESS OF PENALTY—PLEADING AND PROOF.**  
 Action for rent, plaintiff alleged that, "under and by virtue of [a] contract in signed by and sealed with the seal of [defendant] he the said [defendant] con- n the possession and occupancy of the demised premises from term to term m year to year, \* \* \* until the first day of April, 1885, when a large money, to-wit, \$620, the rent aforesaid for the term of 31 years \* \* \* be- ue and payable \* \* \* and still is in arrears." The contract offered and d in evidence was, "that the said [defendant] binds himself, his heirs or his trators, to, \* \* \* for the use or rent of said farm for the term of three om the first day of April, 1854, to pay the said \* \* \* the sum of \$60. e true performance of the above agreement, the parties bind themselves in the penal sum of \$200." *Held*, that under the pleading and the proof n of debt would lie for an amount greater than the penalty.

Action of debt to recover rent due from a tenant holding over after the tion of his lease, which provided for a penalty in default of payment of the d, that the lessor was entitled to sue for the amount actually due, whether re or less than the penalty.

**REJOINDER.**  
 Action for rent, the plaintiff declared upon two counts. In the first the de- as made upon the lease, under seal, which stipulated a penalty for non- t of rent. The second demand was for use and occupation. The sum de- in each was the same and greater than the penalty. *Held*, that there was oinder.

court of common pleas, Armstrong county.  
 1885, D. P. Bartley and Mary Ann Bartley, administrators of the avid Bartley, deceased, commenced an action against Jacob Wagle overy of \$620, which they alleged to be justly due the estate under for rent as follows:

of agreement made and fully agreed upon between David Bartley, ounty, Center township, Pa., of the first part, and Jacob Wagle of part, of Allegheny township, Armstrong county, Pa., witnesseth, avid Bartley doth lease or rent unto the said Jacob Wagle his farm, Allegheny township, Armstrong county, Pa., for a term of 3 years first day of April, 1854, on the following conditions, viz., namely, The said Wagle binds himself, his heirs or his administrators, to rtley, or his heirs or his administrators, for the use or rent of said e term of three years from the first day of April, 1854, to pay to avid, or his heirs or executors or administrators, the sum of sixty ful moneys of the United States; and the said Wagle binds himself and to pay over the said moneys or rent to the said Bartley, with- tion; and the said Wagle binds himself, his heirs, his executors, to rtley to make use of no timber of the place for any use only for said place, nor is he to take or make sale of any straw raised on said B. The said Wagle has to pay all taxes of said farm during said . And for the true performance of the above agreement the parties selves, their heirs, their executors, or their administrators, in the of two hundred dollars, as witness our hands and seals this eighth A. D. 1854.

present: THOS. C. THOMPSON. DAVID BARTLEY. [Seal.]  
 ntiff's declaration was as follows: JACOB WAGLE." [Seal.]

Wagle, late of — township, in the county aforesaid, was sum- answer D. P. Bartley and Mary Ann Bartley, administrators of all ar the goods and chattels, rights, and credits which were of one tley, deceased, at the time of his death, who died intestate, of a e render unto them the sum of six hundred and twenty dollars, oves and unjustly detains from them. And whereas, the said D.

P. Bartley and Mary Ann Bartley, administrators as aforesaid, by H. N. Snyder, their attorney, complain and say that, whereas, the said David Bartley deceased, in his life-time heretofore, to-wit, on the eighth day of February, in the year of our Lord one thousand eight hundred and fifty-four, at the county aforesaid, demised the said Jacob Wagle a certain tract or piece of land, with the appurtenances, situated in the township and county aforesaid, to have and to hold the same to the said Jacob Wagle for a certain term of years, to-wit, for and during and until the full end and term of three years, to commence from the first day of April, one thousand eight hundred and fifty-four, yielding and paying therefor during the said term to the said David Bartley the sum of sixty dollars, lawful money of the United States, and agreeing to pay the taxes assessed on said farm or piece of land, said demise being in writing and signed and sealed by the said Jacob Wagle, by virtue of said demise the said defendant entered into the said demised premises, with the appurtenances, and was possessed thereof henceforth until the first day of April, one thousand eight hundred and eighty-five, when a large sum of money, to-wit, the sum of six hundred and twenty dollars, the rent aforesaid for the space of thirty-one years then elapsed, became and was due and payable from the said defendant to the said David Bartley in his life-time, and still is due and payable to the said David Bartley in his life-time, and still is due and payable to the said D. P. Bartley and Mary Ann Bartley, administrators aforesaid. And whereas, the said D. P. Bartley and Mary Ann Bartley, administrators of the estate of David Bartley, deceased, further complain and say that the said Jacob Wagle, to-wit, on the eighth day of February, 1854, in the life-time of the said David Bartley, contracted in writing with him, the said David Bartley, for the possession of a certain farm, with the appurtenances situate in the township of ———, Armstrong county, Pennsylvania, which said writing was dated the eighth day of February, 1854, said contract being signed by and sealed with the seal of the said Jacob Wagle, and now he has shown to the court, he, the said Jacob Wagle, entered into said demised premises, and was possessed thereof under and by virtue of said demise as tenant of said David Bartley during the life-time of him, the said David Bartley, from the eighth day of February, 1854, the date of said contract in writing as aforesaid, for and during the full term of three years, the term as named and mentioned in said contract in writing, as aforesaid, and under and by virtue of said contract in writing, signed by and sealed with the seal of the said Jacob Wagle, he, the said Jacob Wagle, continued in the possession and occupancy of said demised premises from term to term and from year to year during the life-time of him, the said David Bartley, until the first day of April, 1885, when a large sum of money, to-wit, six hundred and twenty dollars, the rent aforesaid for the term of thirty-one years then elapsed, and then came due and payable from said Jacob Wagle, to the said David Bartley in his life-time, and still is in arrears and unpaid to the said D. P. Bartley and Mary Ann Bartley, administrators as aforesaid, whereby an action hath accrued to the said plaintiff as the legal representative of the said David Bartley, deceased, to demand and have from the said Jacob Wagle, defendant, the sum of one thousand dollars. And whereas, also, the said Jacob Wagle, on the first day of March, one thousand eight hundred and eighty-five, at ——— township, Armstrong county, aforesaid, was indebted to the said David Bartley, in his life-time, in the sum of six hundred and twenty dollars, for the use and occupation of a certain farm or piece of land, with the appurtenances of the said David Bartley, situate in ——— township, Armstrong county, Pennsylvania, by the said defendant, and at his special instance and request and by the sufferance and permission of the said David Bartley, for a long space of time, before these elapsed had held, occupied, and enjoyed, and to be paid by the said Jacob Wagle, defendant, to the said David Bartley, deceased, when the said defendant should thereunto afterwards be requested, yet t

defendant, although often requested so to do, hath not paid the said sum of one hundred and twenty dollars, above demanded, or any part thereof to the said David Bartley, in his life-time or since his death to the said D. P. and Mary Ann Bartley, administrators of said David Bartley, dec'd, but he to do this hath hitherto wholly refused and still doth refuse, to pay the sum of said plaintiffs in the sum of one thousand dollars, and thereby bring this suit, etc. The plaintiffs bring here into court their let-administration, which give sufficient evidence to the court that they are administrators of the said David Bartley, dec'd."

Defendant pleaded *nil debet* and *non est factum*, and also filed an "affirmative defense," in which he alleges that he entered into the agreement in question in violation of his rights, and under the representations of David Bartley that he had an interest in a certain part of the land bought by the defendant from J. W. Graham, which he has since discovered to be unfounded in fact, and the agreement, which was for the payment of \$60, and no more; that he has been since long paid. The evidence introduced by plaintiff shows the occupation of the land by defendant as alleged. The defendant introduced in evidence a deed dated May 26, 1853, from J. W. Graham to Jacob W. Wagoner, for the purpose of showing that he went into possession of the land in his own right. The deed was not recorded until December 15, 1853. A number of receipts were introduced to show that plaintiff had been paid. After deducting payments made within the 20 years preceding the commencement of the suit, judgment was rendered for \$290. Upon the granting of the motion for a new trial the court, after briefly stating the facts, rendered the following opinion:

The trial defendant's counsel strenuously objected to the plaintiff's recovery on the grounds (1) that the action of debt would only lie for a simple contract; (2) that, if the suit was upon the article, the only proper form of action would be covenant. These objections the court did not sustain. This, however, forms the material reason now urged for a new trial. The defendant presented quite a formidable array of authorities in support of the position taken at the trial, and again presented as reason for the granting of a new trial.

We have carefully considered the reasons, and would feel constrained to admit the force of them, if we could reach the conclusion that the article named in the article could be construed as a final liquidation of damages. The light of many authorities, we are unable to adopt that view. It is hardly to be presumed that if, at the end of the three-years term, suit was brought, the amount of the penalty, two hundred dollars, could be recovered. A leading case upon the question, and going further than any of the others that might be cited, is that of *Shreve v. Brereton*, 51 Pa. 5, where the sum of \$10,000 was fixed as stipulated damages, and the court held to be only a penalty, as the article itself provided for an arrangement of ascertaining the real damages. The rule as laid down appears to be: '(1) Where the damages are uncertain, and are not capable of being ascertained by any satisfactory and known rule, whether the uncertainty lies in the nature of the subject itself, or in the particular circumstances of the case.'

Where, from the nature of the case and terms of the agreement, it appears that the damages have already been the subject of actual and fair adjustment between the parties.' Tested by this rule, it cannot instantly be supposed that two hundred dollars was intended as a fair adjustment of a default for three years for a sum of sixty dollars. It should, on the other hand, be regarded as a satisfaction for a default of thirty years at the rate of twenty dollars per year. We think, therefore, that the penalty in this agreement was not of such a character as limited the plaintiff to actions simply to a recovery of the amount specified, as liquidated damages.

*Burr v. Todd*, 41 Pa. St. 206; *Robeson v. Whitesides*, 16 Serg. & W. 400. If not, was the plaintiff confined in the form of action to the action of debt?

of covenant? We do not doubt that the action of covenant would have been a proper remedy. *Huber v. Burke*, 11 Serg. & R. 237. Many of the authorities suggest that, when the amount of the penalty alone is sought to be recovered, debt will lie as the proper form of action, and covenant when damages are sought to be recovered. *Sleeper v. Dougherty*, 2 Whart. 183; *Third Nat. Bank v. Miller*, 90 Pa. St. 244. We do not gather, however, from these authorities, that this is an invariable rule, and that the action of debt will not lie on an instrument containing a provision for a penalty for the actual amount of the obligation, if this is certain in its character or capable of being rendered certain.

"The fundamental principle governing the action of debt is that it must be for a demand certain in amount or which may readily be reduced to a certainty. 1 Chit. Pl. 108; 2 Troub. & H. Pr. § 1506. 'Debt lies upon any contract in which the certainty of the sum as duty appears.' SHARSWOOD, in *Kirk v. Hartman*, 63 Pa. St. 107; 1 Reporter, 134; *Weiss v. Mauch Chunk I. Co.*, 58 Pa. St. 295. Hence we find that the amount sued for and claimed in the declaration is specific; that the amount specified in the article is not uncertain, being fixed at an annual or triennial rate, and no difficulty could arise in ascertaining the gross amount due for a given number of years. Guided by this test, we are unable to see why an action of debt would not lie as well for the actual indebtedness as evidenced by the article or lease as for the penalty, if it were liquidated damages, in which case it is unquestioned that it would be a proper remedy. If the contract were in parol, and the suit were in *assumpsit*, clearly it would be recoverable in the form of *indebitatus assumpsit*. It has been held in this state that where *indebitatus assumpsit* will lie, debt will also lie. Here *indebitatus assumpsit* would not lie, but only for the reason that the evidence of the indebtedness is under seal, which does not hold as an objection to the action of debt. Therefore, in the present case, although covenant might have been the more appropriate remedy, the action of debt is concurrent. 1 Chit. Pl. 121; Jack. & G. Landl. & Ten. § 308; *Blume v. McClurken*, 10 Watts, 380; *Mackey v. Robinson*, 12 Pa. St. 170; *Noel v. Karper*, 53 Pa. St. 97; *Seabrook v. Moyer*, 88 Pa. St. 417.

"The lease having been put in evidence, possession under it proven, and other evidence in recognition of the tenancy also introduced, the burden was then cast upon the defendant to show why plaintiff should not recover. It was the duty of the defendant to show, by some of the exceptions recognized by the law, why the tenant should not be answerable for the rent, which would in effect be a denial of the landlord's title. 'It is a general rule that neither the tenant nor the one claiming under him will be permitted to controvert the title of the landlord, by showing a better title to the claimed premises either in himself or in a third party.' Jack. & G. Landl. & Ten. p. 336, § 615. To this rule there are, however, some exceptions, viz.: (1) When the tenant can show that the landlord had only a life-estate, which has terminated; (2) when he can show that the landlord's title has expired; (3) when the reversion has been sold; (4) when he can show that the title has been vested in himself by the advice of the landlord; (5) when he can show that he has been induced to accept a lease by the illegal behavior, fraud, or misrepresentation of the landlord; (6) when he can show that the landlord is holding in violation of the law.' Id. p. 336, § 616, and cases cited in foot-notes. Also the recent case of *Ward v. City of Philadelphia*, 6 Atl. Rep. 263.

"In the present case we can recall no offer of the defendant that would bring him within either of the exceptions. It is true that there was an offer of a deed to the defendant made prior to the execution of the lease. It may be a muniment of a good title, but it was not of a character to defeat the lease. The further offer of evidence on the part of defendant showing payment from time to time from the twenty-third of January, 1863, to December 28, 1878, in all six payments, amounting to \$135, which, admitted without objection,

not be regarded otherwise than as in affirmance of the lease in the absence of evidence to the contrary; and, while serving to diminish the claim, it would also rebut *pro tanto* the presumption of payment. If we regard the case as possibly one of hardship, if the defendant is the owner of the land, and would be pleased to have the whole facts stated, yet in view of the fact that he had his day in court, and now finding that convinces our own mind that the court committed error, we will grant the motion for a new trial, and discharge the rule. Therefore let judgment be entered upon the verdict."

*For* Clark and David Barclay, for plaintiff in error.

Two questions are raised by counsel for plaintiff in error. *First*. Can the plaintiff sustain an action of debt under the pleadings and proofs in the case? The defendant's plea was inadmissible in evidence, as it did not sustain the declaration. *Volle v. Brown*, 4 Whart. 365; *Tums v. Lewis*, 42 Pa. St. 402. *Second*. The second count in the declaration a misjoinder, and for that reason the second count is a misjoinder. *Jennings v. Newman*, 4 Term R. 109; *Cooper v. Bissell*, 16 Johns. 146; *Pell v. Lovett*, 19 Wend. 546. The action is bad, and requires distinct verdicts,—in one of the counts the sum must be for the penalty in debt, but the sum actually to be received is assessed as damages, on payment of which the judgment for the penalty is released, (*Buckwalter v. U. S.*, 11 Serg. & R. 193;) and in the other the sum is *indebitatus assumpsit*, and no precise sum is claimed to be due, (*U. S. v. Burke*, 11 Serg. & R. 238.) *Third*. The action being debt on a covenant containing a penalty, can the plaintiff recover more than the penalty. Under the agreement, there can be no recovery except to the extent of the penalty. 1 Troub. & H. Pr. (5th Ed.) pl. 455; 8 & 9 Wm. III. c. 2, § 1, Dig. 142. If the agreement contains a penalty, the party may bring an action for the penalty, or he may bring covenant, and secure more or less damages than the penalty. *Martin v. Taylor*, 1 Wash. C. C. 1. An action of debt will lie to recover after the time mentioned in the agreement. *Luciani v. Finance Co.*, 2 Whart. 167.

*For* Snyder, for defendant in error.

An action of debt lies upon the privity of estate, (Jack. & G. Landl. & Ten. in Pennsylvania, p. 184, § 7, pl. 303; *Kunkle v. Wynick*, 1 Dall. 305;) for rent where the lease is under seal, (1 Chit. Pl. 16th Ed. 126; *Blume v. Ken*, 10 Watts, 380;) for a sum either certain or that can readily be reduced to a certainty, (1 Chit. Pl. 16th Ed. 121;) for use and occupation when the lease is not under seal, because *assumpsit* would lie. (1 Chit. Pl. 98; *Shoemaker*, 1 Rawle, 135; Troub. & H. Pr., by Fish, p. 21.) Executors and administrators may have an action of debt for the arrearage of rent due to the decedent. Laws 1834, p. 76. A meritorious valuable consideration will raise a debt. *Smith v. Attery*, 6 Mod. 129. In an action for arrears, it is proper to declare on the deed in the first count, and to add a second count for use and occupation. *Seabrook v. Moyer*, 88 Pa. St. 405; *Shoemaker*, 1 Rawle, 135; 2 Chit. Pl. 223, note *d*. The agreement may be given in evidence in support of a count in which it is not mentioned. 1 Chit. Pl. 348. The plaintiff can recover for use and occupation from the time the contract was made, or from the time the defendant acknowledged the privity of landlord and tenant. *Brolasky v. Ferguson*, 48 Pa. St. 434. If a tenant holds over, it is optional with the landlord, either to treat the tenant from year to year, or as a trespasser. *Hemphill v. Flynn*, 2 Pa. St. 444. Where a tenant holds over he holds under the original lease. The purpose is not to make a new lease, but to continue the former with all its characteristic features. *Diller v. Roberts*, 13 Serg. & R. 62; *Phillips v. U. S.*, 4 Whart. 226; *Hollis v. Burns*, 100 Pa. St. 206. Where the condi-

tion is a penalty, the recovery is either for more or less, according to the amount due. *Shreve v. Brereton*, 51 Pa. St. 175.

**PER CURIAM.** We have been unable to discover the material defect in the pleadings in this case, which seems to be so obvious to the learned counsel for the plaintiff in error. The lease is well and properly set out, and its production in evidence established the relation of landlord and tenant between Bartley and Wagle. Nothing was shown on part of the latter to disprove that relation, and, therefore, the court below properly instructed the jury that that relation must be taken to continue down to the inception of this suit. The judgment is affirmed.

### Appeal of Fox and another.

(*Supreme Court of Pennsylvania*. October Term, 1887.)

#### 1. PARTNERSHIP—JUDGMENT AGAINST—CHARGE UPON INDIVIDUAL PROPERTY.

Upon a hearing before an auditor appointed to determine the validity of certain claims against an estate, a judgment obtained against the firm of which the deceased was a member was filed. *Held* that, as the record did not show the names of the individual members of the firm, the judgment could not be charged upon the individual property of the deceased.

#### 2. SAME—JUDGMENTS FOR LABOR CLAIMS—PRIORITY OF INDIVIDUAL CREDITORS.

Labor claims upon which judgments have been rendered against a firm after the transfer of the interest of one member, and an assignment by another, are invalid as against the individual estate of the latter, to the exclusion of individual creditors.

#### 3. JUDGMENT—ASSIGNMENT—VALIDITY.

It was contended before an auditor, appointed to determine the validity of claims against an estate, that a certain judgment held by the assignee was invalid, as the assignee was the real debtor, and the deceased the nominal one. The evidence showed a judgment regularly entered against the latter, and assigned to the former; that the property for which the judgment note was a part of the purchase money had been transferred to the assignee by deceased; that the former had paid most of the money on the judgment, and finally took an assignment. A daughter of deceased testified that she had heard him say the assignee had paid the purchase price of the farm in addition to the judgment, and that he was entitled to an assignment of it. *Held*, that the claim was properly allowed.

#### 4. FORGERY—NOTE—OPINIONS OF EXPERTS—ADMISSION OF GENUINENESS BY MAKER.

A note filed as a claim against an estate was contested on the grounds of forgery. The only evidence to support the forgery was that of expert witnesses, who testified that in their opinion the signature had been forged. There were others, also, who testified to the contrary. One witness testified to having heard the deceased say he owed the owner of the note the same amount called for by the note. The son of the owner testified that at one time he showed the note to the deceased, and that the latter had said that it ought to be paid. *Held* sufficient evidence upon which to allow the claim.

#### 5. LIMITATION OF ACTIONS—INDORSEMENT ON NOTE—PAYMENT IN MERCHANDISE.

The credit of a certain number of pounds of wool, on a note otherwise barred by the statute of limitations, is sufficient to remove the bar.<sup>1</sup>

#### 6. SAME—RUNNING ACCOUNT—CREDITS WITHIN SIX YEARS.

A running account of thirty years, showing cash credits made within six years, is not barred by the statute of limitations.

### Appeal from court of common pleas, Westmoreland county.

On the twenty-third day of January, 1885, David Fox made a voluntary assignment for the benefit of his creditors to his two sons, Christopher Fox and William Fox. The assignor was possessed of a small amount of personal property and several tracts of land. Embraced in the deed of assignment was the assignor's interest in what was known as the "Eureka Mines," being the undivided three-eighths of about 100 acres of coal land and five acres of surface, upon which were erected a lot of coke-ovens, tipples, tracks, and other necessary buildings. The remaining undivided five-eighths of these coal mines

<sup>1</sup>See note at end of case.

were owned by W. A. Kifer and S. Aspey. For several years prior to the assignment by Fox, these mines were operated by the owners, and the business was conducted in the name of Fox, Kifer & Co. About the year 1879, Aspey, who owned one-eighth of the mines, died, but the business was still conducted under the same name. About the year 1882, W. A. Kifer mortgaged his interest in the mines to Jacob F. Stoner for about \$7,000. This mortgage was foreclosed, and Kifer's interest sold by the sheriff to the mortgagee for less than the face of his mortgage, a short time after the assignment was made by Fox. Lying along-side of this tract of coal was another tract, which was owned by Kifer individually, and was operated through the entry and over the tippie belonging to the company, Kifer being the manager of the entire works. Two sets of books were kept; one for the coal mined for the company, and another for that mined from the Kifer tract. This latter tract was incumbered to its full value by purchase money liens of record, and was sold by the sheriff to Stoner along with Kifer's other property. Shortly after this sheriff's sale, the mines were taken in charge and operated by Stoner and the assignees of Fox, and the proceeds divided according to their respective interests. This management continued until the assignees made sale of Fox's interest in the mines. The share of the proceeds coming to Fox's estate amounted to \$317, and with this sum the assignees charged themselves in their account. Fox's interest in the mines was sold for \$1,800. The residue of his real estate was sold for about \$27,000. The surplus of the real-estate fund, after the payment of all liens of record at the date of the assignment, amounted to about the sum of \$5,000.

During November and December, 1884, and January, 1885, the laborers and miners employed in and about the Eureka mines failed to receive their wages. When the collapse occurred, Kifer's property having been sold by the sheriff, and Fox having made an assignment, a great number of suits were instituted before a magistrate against Fox, Kifer & Co., not only by the miners who were employed by the company, but also by those who had been employed in the mine belonging to Kifer alone. Judgment was uniformly entered for the plaintiff in every case. In all cases where the labor had been performed for Kifer alone, the assignees of Fox took appeals. After the appeals were filed in court, the assignees became security for the debt, interest, and costs in each case. Upon trial before a jury, the plaintiffs recovered in every instance. The assignees thereupon paid the judgments, and took assignments of the same, and took credit for these claims for wages in their account. Exceptions were filed to the allowance of these labor claims, and sustained by the auditors appointed to pass upon the same, and make distribution of the fund. The appellants filed exceptions to this report, which were dismissed by the court, and the report finally confirmed.

Among the liens of record entered against Fox, Kifer & Co. prior to the assignment was the judgment of John Exton, No. 33, November term, 1884. Suit was brought before a magistrate, judgment obtained, from which an appeal was taken, and, after trial by a jury, verdict and judgment rendered for plaintiff. This judgment was afterwards paid by the assignees, and assigned to them. The judgment was not allowed by the auditors, and the appellants filed an exception to their ruling in this behalf, which exception was dismissed by the court, and the same is assigned for error.

The auditors sustained the exceptions to the allowance of the labor claims, in the following opinion: "The exceptions relating to the allowance of the labor claims in the personal and real estate fund alike have been sustained, and the accountants surcharged with the entire amount, except two or three items in the personal estate. The amount with which they have been surcharged on this account is \$4,795.62. There are several distinct grounds upon which the exclusion of these claims rests, but it is enough that no part of the fund now for distribution, or in the hands of the assignees, at any time be-

longed to the firm of Fox, Kifer & Co., against whom these labor claims were. It is all the proceeds of the individual estate of David Fox, and, not being sufficient to satisfy his individual debts, these payments on account of the partnership debts cannot be sustained. And, further, these claims do not conform to the act of 1883, (P. L. 118.)"

#### THE CONTESTED CLAIMS.

(1) *The Note of John Holtzer.* The objection to this note was the statute of limitations, the note not being under seal. The testimony of Mr. Holtzer as to the credits on the note has been excluded as incompetent, but the testimony of the other witnesses relating thereto is regarded as sufficient to toll the statute, and the claim is allowed.

(2) *The Account of Dr. Anawalt.* The objection to this account was the statute of limitations. The objection is overruled on the ground that it is apparent from the face of the account itself that it is a record of mutual dealing between the parties.

(3) *The Hillis Judgment.* This judgment was assailed on the ground that it originally represented a debt of Hillis, who was alleged to have been the real purchaser of the Houser farm, while Fox, to whom the deed was made, was but a trustee to Hillis. The judgment was against Fox, and was for purchase money of the Houser farm. The main testimony relied upon to overthrow the assignment in favor of Hillis was that of Painter & Croushore. Whatever doubts may be entertained as to the competency of either to testify, the judgment has been sustained upon the independent ground that the whole of the evidence produced, even if competent, is deemed insufficient to overthrow the record in favor of Mr. Hillis, supported as it is by the positive testimony of Louisa Hillis, a daughter of the assignor, and whose testimony is unimpeached, and against interest, that her father had told her that Mr. Hillis had paid the purchase money of the Houser farm, in addition to the judgment, and was entitled to an assignment.

(4.) *The Hillis Note for \$1,365.* This note was attacked on the ground that the signature was not the handwriting of Fox. The evidence against it consisted of the testimony of a number of experts, who testified, from an examination of the paper, that in their opinion it was not a genuine signature. One or two witnesses also gave opinions from personal knowledge, and a large number of admittedly genuine signatures were submitted for comparison. The signature was supported by the opinion of many witnesses familiar with the handwriting of Fox. Harrison Wilson testified: "Six or nine months before Fox died he told me he owed Hillis. He could not tell the amount, but said that among others was a note for thirteen hundred and some dollars." Leonard Beck testified: "In my list of Fox's debts Hillis was put down at \$1,600 or \$1,800." Albert Hillis, who is a competent witness, and not contradicted, testifies: "Fox spoke to me of my father's note; could not tell exactly what that was. I told him I could fix that. I went and got the note, and showed it to him. He took the note, and looked at it, and said, 'That is the note I owed the old man.' He said he wanted him paid; that he had stuck to him, and had done what he could, when nobody else would risk him." We cannot regard the opinions of the expert witnesses as sufficient to control against such direct, positive, and satisfactory evidence, and the claim has therefore been allowed.

The remaining claims of Mr. Hillis were not seriously disputed, and are allowed.

The assignees filed the following exceptions to auditors' report, and their dismissal is assigned as error: "(1) The auditors erred in not allowing the sum of \$107.98 to the debt, interest, and costs of judgment No. 33, November term, 1884. *John Exton, for Use of C. Fox vs. Fox, Kifer & Co.*, the same being a judgment and a lien on the real estate of David Fox prior to the as-

signment. (2) The auditors erred in surcharging the accountants with the sum of four hundred and twenty-four dollars and fifteen cents, labor claims in the personal estate. The debtor side of said account shows that the said personal estate was made up in part of the sum of \$317 derived from the management of the works upon which these labor claims were a lien. (3) The auditors erred in surcharging the accountants with the sum of \$4,311.47, labor claims on the real estate; said claims being a lien on part of the real estate, whose proceeds were charged in the debtor side of the account. (4) The auditors erred in allowing the sum of \$1,874.02 to debt, interest, costs, and commissions of judgment No. 182, November term, 1882, for the reason that the record clearly showed that the sum of \$800 was paid by the defendant, David Fox, on the twenty-fourth October, 1883, and the evidence produced before the auditors clearly showed that the entire judgment was the debt of William Hillis, who now claims to be the use plaintiff. (5) The auditors erred in allowing the claim of John Holtzer, No. 1, for the reason that the same was barred by the statute of limitations, and no sufficient evidence was produced before the auditors to remove the bar of the statute. (6) The auditors erred in allowing the claim of Dr. J. W. Anawalt, No. 2, for the reason that all items prior to the twelfth March, 1880, are clearly barred by the statute of limitations; and all items from March 12, 1880, up to the time of making the assignment, appear, by the credits of cash items, to have been paid in full, and overpaid; and the items from June 9, 1886, being for services rendered since the assignment, cannot participate in the present distribution. (7) The auditors erred in allowing the claim of William Hillis, No. 14, upon the note dated twelfth February, 1879, for \$1,335, the preponderance of legal evidence being against the validity and genuineness of said claim, and the evidence offered in support of said claim being incompetent. And, further, the auditors failed to take proper notice of the receipt offered in evidence showing that Hillis had received \$1,500 on account of any claim which he had against the estate. The latter part of this exception to apply also to claims Nos. 15 and 16 of William Hillis."

The evidence before the auditors showed that at the November term, 1884, a judgment was rendered in favor of John Exton, and against Kifer, Fox & Co., but there was nothing in the record to show that David Fox was one of the members of that firm, and appellees contend that the prothonotary had no authority, under the circumstances, to enter in the judgment docket a judgment against David Fox individually. It is contended on the part of the appellee that the auditors properly rejected the labor claims. These judgments were obtained against the firm some time after Kifer's interest had been sold, and also after the assignment of Fox's interest, and were therefore not a lien upon the firm property, nor a lien upon the individual property of David Fox, as against his individual creditors.

In regard to the William Hillis judgment, the evidence showed that it had been regularly entered on a note given by David Fox to Col. I. Painter, as part of the purchase money of certain realty; that it had been assigned by the administrators of Painter's estate to William Hillis, who had paid nearly all that had been paid on the judgment. The testimony of Louisa Hillis, the daughter of David Fox, showed that she had had a talk with her father in which he had said that Hillis had bought the place of him, and was afterwards compelled to pay the judgment. Her testimony was objected to as incompetent. Hillis produced before the auditors the record of the court of common pleas, showing a judgment in favor of the administrators against Fox, duly assigned by the plaintiffs to him. There was no evidence in support of the theory that Hillis was the real purchaser, and Fox simply a nominal one. The defense to the claim founded on the William Hillis note was that of forgery, and it was supported only by the evidence of experts, who testified that the signature to the note did not look like the signature of David

Fox, while others testified as positively that it was his signature. Albert Hillis, son of William Hillis and son-in-law of Fox, testified that he had shown the note to Fox after the assignment, and the latter had said that it was the note he owed William Hillis, and that he wanted him paid, as he had stuck by him when nobody else would. This evidence was objected to by appellants as incompetent, though it was not shown that the witness had any interest in the money. A disinterested witness testified that Fox told him at one time that he owed Hillis a note of the same amount as the one in suit.

In regard to the claim of John Holtzer, several witnesses testified to admissions made by Fox that he owed Holtzer on a note. A son of the latter testified to selling wool to Holtzer to be credited on the note within a few years, and the note showed an indorsement made in 1883 of a certain sum paid for wool. The auditors held this evidence sufficient to remove the bar of the statute of limitations, the note being dated September 7, 1877, and due in one year.

Dr. J. W. Anawalt's claim dates back to 1859, and shows a continuous account down to June, 1886, with various credit items made in 1859, 1860, 1872, 1877, and 1882.

**PER CURIAM.** None of the exceptions in this case can be sustained. The report of the auditors, so far as we have it before us, is clear, direct, and conclusive; nor can we perceive that they made any mistake in the application of the law to the facts which were developed during the progress of the cause. Appeal dismissed, and decree affirmed, at the costs of the appellants.

#### NOTE.

Part payment of a debt, whether made before or after the statute of limitations has run, is sufficient evidence of a new promise, to suspend the bar of the statute for another period of limitation. *Engman v. Estate of Immiel*, (Wis.) 18 N. W. Rep. 182. So, under the Michigan statute, where part payment has been made, it is not necessary that there should be a written promise to make further payment, to keep the claim alive. *Miner v. Lorman*, 28 N. W. Rep. 678. Part payment is an implied acknowledgment of the existence of the claim upon which the payment is made from which a promise is implied to pay the balance, unless such implication is rebutted by something that transpired when the payment was made. *Corliss v. Grow*, (Vt.) 2 Atl. Rep. 388. But mere part payment of a debt, without words or acts to indicate its character, is not a sufficient acknowledgment as to the residue of the debt so as to take it out of the statute. *Chadwick v. Cornish*, (Minn.) 1 N. W. Rep. 55. See note in the case of *Willey v. State*, (Ind.) 5 N. E. Rep. 884.

#### Appeal of AMES and others.

(*Supreme Court of Pennsylvania*. October Term, 1887.)

##### 1. PARENT AND CHILD—GIFT OF MONEY TO SON—PAYMENT OF INTEREST DURING LIFE—LIABILITY FOR PRINCIPAL.

A father gave money to his son, in return for which the son was to give an obligation binding himself to pay his father interest on the money as long as the father lived. *Held*, that the son was not required, and did not obligate himself, to repay any part of the principal.

##### 2. REFERENCE—AUDITOR'S FINDINGS OF FACT.

An auditor found the fact that a decedent gave his son money to pay for a farm on condition that the son was to pay interest on the money during the father's life, and that the son was not required to repay any part of the principal. *Held*, that the conclusion of the auditor was a finding of fact, and not a mere inference from a fact found.

Appeal from orphans' court, Washington county.

John Ames died testate, leaving Arthamer Ames, Demas Ames, and Erastus Ames, his sons, his executors. Letters testamentary were issued to the three. They disagreed, and severed in the settlement of their accounts; the substance of the disagreement being that Arthamer Ames refused to charge

h \$1,200 received by him from his father. It was not disputed whether he had received the money, and the only question was whether it was for a loan. Arthamer Ames filed his account, and Demas Ames, and the other heirs of the testator filed as exceptions to it that he had charged himself with this \$1,200. The auditor overruled the exceptions and found that "John Ames had arranged with his son Arthamer to give him \$1,200 to make a payment on his farm; that Arthamer was to give a note or obligation binding himself to pay the interest on the \$1,200 to his father as long as the latter lived; and that Arthamer was not required, and did not obligate himself, to repay any part of the principal." The orphans' court decreed sustaining the auditor, on the ground that the finding of the auditor is conclusive. From that decree this appeal was taken.

*Hughes and McCracken & Stevenson*, for appellants. *J. F. McCracken*, for appellee.

**OPINION.** The learned auditor has found the fact "that John Ames had arranged with his son Arthamer to give him \$1,200 to make a payment on his farm; that Arthamer was to give a note or obligation binding himself to pay the interest on \$1,200 to his father as long as the latter lived; and that Arthamer was not required, and did not obligate himself, to repay any part of the principal." The auditor states this as his "conclusion drawn from the facts." This is a finding of the fact. It is a conclusion of fact found by the auditor; not a mere inference from a fact found. We make these facts correct a misapprehension into which the learned auditor appears to have fallen as to the effect of his finding. *Hindman's Appeal*, 85 Pa. St. 401. In point. With the controlling fact in the case thus found, the conclusion of the auditor follows of necessity. There is nothing else in the case.

The appeal is affirmed, and the appeal dismissed, at the costs of the appellants.

### Appeal of VAN VOORHIS, Ex'r, etc.

(*Supreme Court of Pennsylvania*. October Term, 1887.)

**JOINT ADMINISTRATORS—PAYMENT OF NOTE TO ONE OF JOINT PAYEES.**

A note payable to the order of two persons was presented for payment by the administrator of one of the payees to the executor of the maker of the note. The auditor allowed the claim, and the whole amount was paid by the executor to the administrator. *Held*, that the executor should pay the other payee one-half of the amount.

From decree of orphans' court, Washington county.

J. Hazelbaker, afterwards Margaret J. Guffey, and Sarah A. Hazeworth, were the daughters of George Hazelbaker, deceased. On the seventh of February, 1865, Hazelbaker made his note, under seal, for the sum of \$131, payable to the order of Margaret and Sarah Ann Hazelbaker. After the death of Hazelbaker, his estate was administered by Dr. J. S. Van Voorhis, whose accounts having been settled, he was appointed an auditor for distribution. Margaret J. Guffey died after the death of her father, and letters of administration were granted to Isaac S. Van Voorhis, Esq., by the register of wills of Washington county. Among the papers of Mrs. Guffey, her administrator presented a note in controversy, and before the auditor, appointed to report a distribution of the estate of the father, presented the note as a claim against the estate. The auditor's notes attached to his report show that the note was presented by the administrator alone. Subsequently, the other administrator, Mrs. Cummins, appeared by counsel before the auditor and in support of the claim was being taken. The claim was al-

lowed by the auditor, who, in his schedule of distribution, referred to it as follows: "I. S. Van Voorhis, administrator Margaret Guffey, and Sarah A. Cummins, \$252.32." The amount of this note, as ascertained by the auditor, was demanded by Mrs. Guffey's administrator, and, upon the surrender of the note and giving of a receipt, was paid to him by the executor of George Hazelbaker. The executor having made answer to this effect, when cited to show cause why he should not pay to Mrs. Cummins the half of the sum awarded, his answer was demurred to as "not sufficient in law." The administrator of Margaret Guffey claimed that Sarah A. Cummins was indebted to Margaret Guffey for more than one-half of the amount of the note. The court below made the rule upon the executor absolute. The executor appeals.

*John H. Murdoch*, for appellant. *A. W. & M. C. Acheson*, for appellee.

**PER CURIAM.** We need not discuss the right of one co-payee to receive the whole of the money due upon a note or other obligation. In this case we have the report of an auditor awarding the sum of \$252.32 to "I. S. Van Voorhis, adm'r of Margaret Guffey, and Sarah A. Cummins." The executor of George Hazelbaker paid the whole of the money to the administrator of Margaret Guffey, instead of paying one-half to him and one-half to Sarah A. Cummins. For this mispayment he may be liable to the latter. But the law avoids circuity of action whenever practicable, and we can see no reason why the appellant may not in this proceeding be compelled to pay it back to the appellee.

The decree is affirmed, and the appeal dismissed at the costs of the appellants.

#### DOUGHERTY v. MORTLAND.

(*Supreme Court of Pennsylvania. October Term, 1887.*)

##### FRAUDULENT CONVEYANCES—TRUST—RIGHT OF CREDITOR OF VENDEE TO ATTACK.

Defendant acquired from his father, in fraud of the latter's creditors, and in trust for the latter and his heirs, a farm, to be divided among the heirs after the father's death. The father died, and defendant continued to hold the farm as his own until after a judgment had been obtained by one of his creditors against him, and the land sold thereunder. Between the time of the judgment and that of the sale, he had the land divided between himself and his co-heirs. *Held*, that the purchaser at the sheriff's sale has no standing to prevent the execution of the trust.

Error to court of common pleas, Butler county.

**Ejectment.** James Mortland, being involved, was induced to deed, in 1859, his farm to Elias, one of his four living sons, nominally for \$2,500, no part of which was paid. In 1875 the Kittanning Insurance Company obtained judgment against Elias Mortland and others for \$5,200. In 1879 the farm was divided into four parts, by a surveyor and two others agreed upon by Elias and his brothers, and one of these parts allotted to each. In 1880 the farm was sold under the judgment against Elias to the plaintiff, Ezekiel Dougherty, for \$2,100. In 1882 Dougherty brought his action of ejectment against Elias Mortland for the farm. On motion, Stephen Mortland, his brother, was made co-defendant. Elias acknowledged the validity of the sale as against the part of the farm allotted him as his share by the distribution of 1879, but claimed with his brother that as to the rest he was only trustee for his brothers, the co-heirs of his father, the sale of 1859 to him being fraudulent, and it was made to him only in trust for the grantor and his wife to prevent certain creditors of the grantor from recovering their claims, and that after the death of the grantor it was to be divided among the four brothers. The jury found for the defendants. On a motion for a new trial, *BREDIN, J.*, rendered the following opinion:

"The evidence clearly establishes that the deed to Elias Mortland from his father was without consideration, and would have been held to be a fraud on

s of James Mortland if a question as to its validity, so far as they ned, had arisen, and that neither James Mortland, being a party , nor his heirs claiming under him, could, by proving that the tirely without consideration, have recovered the land from Elias, es or mortgagees. It is very likely, too, that if Elias Mortland d solvent, he never would have recognized the rights of his brother s to claim any share of the land so conveyed to him by his father creditors. Be this as it may, judgment creditors are never con- urchasers, and are not allowed to hold against the *cestui que trust*, had no notice of such trust. *Schryock v. Waggoner*, 28 Pa. St. a creditor has no right to the land; he has neither *jus in re* nor . He has a lien on the land, but *non constat* that he will ever it. *Cover v. Black*, 1 Pa. St. 495. However fraudulent, there- nsaction may have been as to the creditors of James Mortland, ing to prevent Elias, at any time prior to a sale by the sheriff or rom recognizing the claim of the other children and heirs of James a share of the land, and admitting that the deed to him was with- ration, and that he merely held in trust for his parents during ne, and for the heirs of James Mortland after his death. In other act that Elias was a party to a fraud on the creditors of James d not compel him to add fraud to fraud, and to defraud his father s and sisters by setting up, for the benefit of his own judgment at the consideration of the deed could not be inquired into. The ing a fraud, the jury, not the court, are to judge of and weigh not satisfy us; but if it satisfies the jury, that is sufficient. We ew trial would be of no use to plaintiff unless he had new facts is suit, as the chances are that another jury would render the same plaintiff can bring another suit if he discovers any such. The mo- ruled.

riting the foregoing we have read the case of *Sill v. Swackham-* tab. Leg. J. 501, which we think sustains the views expressed

orings error.

chell and David Barclay, for plaintiff in error. J. C. Vanderlin, tion, and John M. Thompson, for defendant in error.

AM. The charge of the learned judge below was an accurate and ent of the law of this case. Nor do we see any error in his rule- es offers of evidence. It may be that the deed from James Mort- on Elias was a fraud upon the creditors of the former, and that have refused to execute the trust in favor of his brothers and he creditors of James are not here to complain, and, as to the ufficient to say that the sheriff's vendee of Elias's real estate, who lunteer, has no standing to compel him to be a rogue, and cheat and sisters out of their share of the farm. If Elias chooses to be execute the trust, we know of no law to prevent him. Judg- ed.

### CRITCHLOW v. CRITCHLOW.

(Supreme Court of Pennsylvania. October Term, 1887.)

ALLES—IRREGULARITIES—ESTOPPEL BY ACQUIESCENCE.

suit was commenced to set aside an execution sale of land for certain ir- es in the sale. The evidence showed that in 1873 a judgment was entered aintiff, upon which execution was issued, the land levied upon, inquisi- and the land extended. Subsequently a *venditioni exponas* was issued, the , the deed acknowledged in open court, and delivered to the sheriff's ho subsequently conveyed to defendant, C., who leased to the other de-

pendants. They were improving the land by putting down an oil well at the time suit was brought. *Held*, that plaintiff was estopped by his long acquiescence, and by the changed circumstances.

2. SAME—IRREGULARITIES CURED BY ACKNOWLEDGMENT OF SHERIFF'S DEED.

In a complaint to set aside an execution sale of land, it was alleged that no notice of the extension of plaintiff's land was given to plaintiff, and also that no affidavit was made that the rental had fallen due and remained unpaid before the *venditioni exponas* was issued. *Held*, that these were mere irregularities which were cured by the acknowledgment of the sheriff's deed.

Error to common pleas, Butler county.

A judgment was entered against the plaintiff in 1867, and revived in 1873, when execution was issued, and the land in suit levied on, inquisition held, and the land extended at a yearly rental of \$12. The attorneys of the judgment creditor gave the sheriff the proper notice, which was returned *nil*. In 1874, more than eight months after the inquisition was held and the land extended at a rental and no rental paid, a *venditioni exponas* was issued without an affidavit that the rent had fallen due and remained unpaid having been filed, and the land was sold. The vendee sold the land to defendant, Critchlow, who leased it to the other defendants. They drilled an oil well, at great expense, to the depth of 1,000 feet, before any claim was made by the plaintiff in this suit. He brought suit for the land in October, 1886. Defendant had judgment, and plaintiff brings error.

*E. McJunkin, R. P. Scott, and McJunkin & Galbreath*, for plaintiff in error. *Charles McCandless, Thompson & Son, and S. F. Bowser*, for defendant in error.

PER CURIAM. If there were any irregularities in the sheriff's sale of plaintiff's land in 1874, he has been a long time in finding it out. He allowed the sheriff's deed to be acknowledged without objection; went out of possession, and remained out until the present time; allowed the purchase money to be applied to the payment of his debts; made no objection to the possession of the defendants until he brought this suit in 1876, when the premises had enormously increased in value by reason of a productive oil well thereon. His long acquiescence, and the changed circumstances, forbid us to be astute in discovering technical defects in the defendant's title. At most, they are trivial, mere irregularities, which should have been taken advantage of before the acknowledgment of the sheriff's deed. That is a panacea for irregularities. Judgment affirmed.

REYNOLDS and others v. CRISPIN and others.

(Supreme Court of Pennsylvania. October Term, 1887.)

1. WILL—CONSTRUCTION—DISPOSITION OF ENTIRE ESTATE.

A testator in his will declared, "As to such worldly estate wherewith it hath pleased God to intrust me I dispose of the same as follows;" and, "If there is anything omitted relative to my worldly affairs or estate, I leave it to be conducted by and at the discretion of my executors." *Held*, that such clauses reinforce the presumption that the testator did not wish to die intestate of any part of his property, and antagonize a construction that would give the legatees a life-estate with the remainder in fee undisposed of.

2. SAME—DEVISE—CONDITION AGAINST ALIENATION.

After devising land to his three daughters in fee, the testator proceeded as follows: "At the decease of any of my daughters, their portion of the mansion farm is to belong to the surviving sisters or sister during their lives or life." "If \* \* \* any of my children should become destitute of house or home, they are to have the privilege of making the mansion house and farm their home and residence with those there upon good behavior. It is intended by me as a home or asylum for my wife, sons, and daughters, and not to belong or go into the possession of any other person or persons while any of them live, and necessity require it, without the consent of those living." *Held*, that he did not intend to limit the estate or interest of his daughters in the land before devised to them in fee, but to restrain them

ating the place while of any of his children might by necessity become and that it did not prevent the survivor of the three daughters from dis-her interest in the farm, by will or otherwise.

**WILLS.**  
 or devised by will his farm to his three daughters, with the further pro-at at the decease of any of them their portion should go to the survivors during their lives or life. Two of them died. *Held*, that the survivor, heirs under her will were entitled, as owners in fee, to an undivided one-est in the farm, and (there being four other heirs at law of the deceased e-fifth of the other two-thirds.

common pleas, Washington county.

Reynolds, Sr., died testate about the year 1848, seized in fee of 110 acres of land in South Strabane township, said county, the controversy in this suit. His last will and testament was duly pro-estator left surviving him seven children, who, with the heirs presentatives of those since deceased, are as follows: *First*. Intestate, unmarried, without issue, before Sarah, hereinafter *second*. Susannah, died intestate, unmarried, without issue, before after named. *Third*. Sarah, died testate. Her last will and testa-ly probated in the proper office of this county, and under it de-no are in exclusive possession, claim. She also survived all her einafter named. *Fourth*. Henry, died intestate, leaving no lawful issue as follows: (1) Isaiah; (2) Benedict, one of the (3) Sarah, one of the plaintiffs; (4) Belinda; (5) Margaret, now w; (6) Elizabeth, died intestate, unmarried, without issue; (7) intestate, unmarried, without issue; (8) Rebecca, died intestate, without issue; (9) Emma, died intestate, unmarried, without is-eph, died intestate, unmarried, without issue. *Fifth*. Zachariah, a widow, Mary Reynolds, and lawful issue as follows: (1) David (2) George H., a plaintiff; (3) Seth H., a plaintiff; (4) Eliz-of William Weir, a plaintiff. *Sixth*. Benedict, died leaving a h R., and lawful issue as follows: (1) Margaret, a plaintiff; (2) wife of — Frankbner, a plaintiff; (3) Edith, wife of J. a plaintiff; (4) Erastus, a plaintiff; (5) Benedict, a plaintiff. yd, died leaving no widow, but lawful issue as follows: (1) tiff; (2) Andrew J., a plaintiff; (3) Lucretia, wife of — Mc-ntiff; (4) Louisa, died leaving her husband, Silas Crispin, and William and Mary, (Mary being one of the defendants.)

that prior to the death of Sarah Reynolds, two of the children of Reynolds, Sr., had died intestate, leaving as heirs at law the five sisters and the children of those deceased; and the several rights hereto depend upon a proper construction of the will of Bene-s, Sr., deceased. The annual value of the land, clear of all charges, the defendants have been in possession since June 27, 1886.

J. A. McILVAINE, P. J., rendered the following opinion:  
 rmination of the question as to what judgment should be entered upon the facts presented to us in the nature of a special verdict construction of the will of Benedict Reynolds, deceased. And ng upon an analysis of this will it would be well to lay down a rules by which we must be guided and which we must not disre-*first*. 'No presumption of an intent, on the part of the testator, to of any part of his property, is to be made, when his words, as e will, can fairly be construed to dispose of the whole of it.' *Sec-*aw leans against a construction which converts a fee-simple into *Third*. 'The main intent of the testator is not to be overcome uous direction in a subsequent part of the will; the latter will be subordination to the original bequest or devise.' *Fourth*. 'The testator must be gathered from the four corners of the will, taken

as a whole, and to this intent, if lawful, all technical rules of construction must yield.'

"In the will before us the testator evidently intended to dispose of all his property. The introductory clause: 'As to such worldly estate wherewith it hath pleased God to intrust me, I dispose of the same as follows;' as well as the final clause: 'If there is anything omitted relative to my worldly affairs or estate, I leave it to be conducted by and at the discretion of my executors,'—clearly reinforces the presumption that the testator did not wish to die intestate of any part of his property, and antagonizes the construction that would give the daughters a life-estate in the land in dispute, with the remainder in fee undisposed of.

"The daughters, Mary, Susannah, and Sarah, are named by the father as the first beneficiaries under his will, and the farm now in possession of the defendants is devised to them in fee, in the following words: 'I give and bequeath unto my three daughters, Mary, Susannah, and Sarah, the mansion house and the farm, with the appurtenances, (with an exception, if necessary, hereafter mentioned,) containing one hundred and ten acres and fourteen perches, agreeably to a late survey and plot made by D. Roberts.'

"Thus far the intention of the testator is clear; but it is claimed that subsequent clauses in his will change the character of the devise to these daughters. These clauses are as follows: 'At the decease of any of my daughters, their portion of the mansion farm is to belong to the surviving sisters or sister during their lives or life.' 'If, in the dispensation of God's providence, any of my children should become destitute of house or home, they are to have the privilege of making the mansion house and farm their home and residence with those there upon good behavior. It is intended by me as a home or asylum for my wife, sons, and daughters, and not to belong or go into the possession of any other person or persons while any of them live, and necessity require it, without the consent of those living.'

"In order to arrive at the intention of the testator, these words must be construed in view of the fact that he has already given to the daughters a fee in this mansion farm. By these words he did not, in our opinion, intend to limit the estate or interest of his daughters in this land before devised to them in fee, but rather to restrain them and their heirs from alienating and leaving the place while any of his children might 'by necessity,' and 'in the dispensation of God's providence,' become houseless or homeless. As long as either of the daughters lived, the heirs of those deceased were postponed in their enjoyment of the place, and it was to remain in the possession of the survivor until the possibility of any of his children becoming destitute had passed. The three daughters took a fee in the land, charged, under certain contingencies, with the support of his wife and of the destitute children of the testator, if any there might be; and this was the 'exception, if necessary,' referred to by the testator in making the devise of the farm to the daughters, as appears in paragraph first of the will hereinbefore quoted. At all events, the clause in the will which provides that, 'at the decease of any of my daughters, their portion of the mansion farm is to belong to the *surviving sisters or sister* during their lives or life,' could in no way affect the devise that Sarah took under the first clause of the will, as she survived all her brothers and sisters; and neither could the last clause in the will, providing that the farm should be a home or asylum for the destitute children 'while any of them lived, and necessity required it,' any longer stand in the way of her disposing of her interest in said farm by will or otherwise. Any construction of this will other than what we have given it, would be in the teeth of the cardinal canons of interpretation already cited.

"We are therefore of the opinion that under the will of Benedict Reynolds, deceased, Sarah Reynolds, at the time of her death, was the owner in fee of an undivided one-third interest in the tract of land in dispute, and described

tated, and as heir at law of her sisters Mary and Susannah she was in fee of one-fifth of two-thirds of said tract of land, or in all she was in fee of seven-fifteenths thereof; and that the defendants, Mary and Susannah Reynolds, are the owners of her title thereto; and that the other heirs of said land, and \$71.40 as their share of the mesne profit thereof defendants went into possession."

judgment both parties bring error.

*M. C. Acheson*, for plaintiffs in error. *Irwin & Hughes*, for defendants in error.

**JUDGMENT.** This case has been so well discussed by the learned judge below that we affirm the judgment on the reasons given by him. Affirmed.

### Appeal of ATKINSON and others.

(*Supreme Court of Pennsylvania*. October Term, 1887.)

**ISSUES—ADVANCES BY DIRECTORS—REIMBURSEMENT FROM COLLATERALS—PREFERENCE OF CREDITORS—ATTORNEY'S FEE.**

A wool dealer applied to the Wool Growers' Exchange for an advance of money to purchase wool. The exchange not being able to raise the money on its credit, the directors discounted their individual notes for the amount, and the dealer gave as collateral. The directors paid their notes without receiving money from the exchange for that purpose. The exchange made an assignment for the benefit of its creditors. An attorney employed, succeeded in collecting some of the money on the dealer's collateral. *Held*, that the attorney's fees should first be paid out of this money, and that the balance should be distributed among the directors in preference to the creditors, of the exchange.

**—AUDITOR'S FINDINGS OF FACT.**

The auditor's finding of fact must be accepted, unless error clearly appears.

From common pleas, Washington county.

In the spring of 1882, C. M. Stephenson, a wool dealer of Washington county, Pennsylvania, who had, prior to that time, made numerous consignments of wool to the Wool Growers' Exchange, desired to purchase a large quantity of wool amounting to about 121,000 pounds, from J. F. Evans, of Boliver, Ohio. To purchase he could only make by paying for the wool before its delivery. To secure this wool he applied to the exchange for a special advance of \$10,000, and at a meeting of its board of directors held in Steubenville on the fourth of April, 1882, it was agreed that this advance should be made, upon Stephenson giving his note, with sufficient security, of \$10,000, as a collateral indemnity for the money so advanced. This action was taken by the board of directors, the corporation having no money in its treasury, and it was understood that the whole amount so advanced should have to be borrowed from the Steubenville banks, upon the notes of the directors, as the money could not be raised upon the assets of the corporation. To carry out this arrangement, John Medill, Jr., Lee, Benjamin Griffith, D. S. Gault, and A. C. Ault, directors of the corporation, left their individual notes in the hands of Benjamin Griffith, Jr., drawn at 30, 60, and 90 days, to be handed over by him for discount. When Stephenson presented satisfactory collateral security for the advance, the note was accepted by Mr. Griffith, and the individual notes of the directors were then discounted by the Steubenville banks, Stephenson receiving the discount, and the proceeds placed in the hands of T. W. Evans, agent of both the exchange and Stephenson, by whom it was paid out on account of the wool purchased by Stephenson. This wool was consigned for sale to the Wool Growers' Exchange at Philadelphia.

The auditor found that, at the time this collateral note was given, it was intended to secure the payment of any balance of the loan obtained from the Steubenville banks upon the individual notes given by the directors, which might not be paid from the sale of the Boliver wool. When the negotiation took place, it was expected that the wool would all be sold, and the notes lifted from the proceeds of sale as they fell due, and, if sufficient was not realized from these sales, the collateral bond was the security upon which the directors relied to make up the deficiency for the payment of these notes. On account of the failure to realize upon this wool as rapidly as had been expected, these notes were, at Stephenson's request, renewed from time to time, until the early part of 1883, he paying the discount. Since that time they have been lifted by the directors. The exchange received from the sale of the wool at Philadelphia sufficient to have paid all but \$3,229.46 of the amount borrowed from the banks; but no part of the sum realized was ever applied to the payment of these notes. The Wool Growers' Exchange afterwards made an assignment for the benefit of its creditors.

The referee appointed, on the defendants' petition, to open the judgment entered on the note for \$10,000, found \$3,229.46 to be due from Stephenson and his sureties in the note, and judgment was entered therefor, and, execution thereon having been issued, the sum of \$1,533.54 was realized from some of the defendants, and the same was claimed as follows: *First*, by John Medill and others, who were the directors of the exchange when the note was given, on the ground that the security was given by Stephenson to protect the money borrowed by them from the banks, and paid by them; *second*, by the assignee for the benefit of creditors of the exchange; *third*, by Atkinson and others, attaching creditors of the exchange, who are the appellants in this case; *fourth*, by J. H. S. Trainer, Esq., so far as the same was necessary for his fees and expenses in the contest before the referee.

An auditor was appointed to distribute the money so raised by execution and paid into court. He, in his report, rejected both the claims of the assignee of the exchange for the benefit of creditors, and of the attaching creditors, and awarded the fund, as far as he adjudged proper, to J. H. S. Trainer, Esq., for his fees and expenses, for the reason that the directors had agreed that he should be paid out of what was realized on the judgment, and the remainder he directed should be paid to the directors. The attaching creditors filed exceptions to the auditor's report, and the same were overruled, and the report confirmed, by the court below, J. A. McILVAINE, P. J., rendering the following opinion and decree:

"Fifteen hundred and thirty-three 54-100 dollars of the money recovered on the judgment entered to the above number and term having been paid into court, John W. Donnan, Esq., was appointed auditor to make distribution thereof among the persons entitled to the same. After having examined a large number of witnesses, whose testimony covers 153 pages of type-writing, the auditor, in an able and elaborate report, finds, after paying costs of audit, etc., amounting to \$376.71, that J. H. S. Trainer, Esq., is entitled to \$1,037.16, and John Medill *et. al.* are entitled to \$119.67 of the money in court. To this report Wm. Atkinson and others, foreign attachment creditors of the plaintiff, filed exceptions. These exceptions, 12 in number, may be considered in two classes: *First*, exceptions to the finding of facts; and, *second*, exceptions to the conclusions of law.

"Touching the first class of exceptions, it is hardly necessary to say that the auditor's disposition of the questions of fact involved is final and conclusive, unless there was flagrant mistake. 'A fact found by an auditor is to be taken as true, unless the error be palpable.' *Whiteside's Appeal*, 23 Pa. St. 114. 'A decision of an auditor as to facts will not be reversed in this court, unless in case of palpable and clear mistake.' *Loomis' Appeal*, 22 Pa. St. 312. 'The finding of facts by an auditor will not be set aside unless for

or, or for reasons which would induce a court to set aside a verdict.' *Appeal*, 87 Pa. St. 510; *Thompson's Appeal*, 103 Pa. St. 603.

a careful and patient reading of the testimony, and a due consideration of the arguments of the counsel for the exceptants made thereon, we are convinced that the auditor has made any serious mistake in his findings of facts material to the matter submitted for his consideration. And the facts in the case must be taken as found by him. Taking the case as found, are the auditor's conclusions of law correct?

First, let us consider the claim of J. H. S. Trainer, Esq. It appears that Trainer was employed by the plaintiff company to collect the judgment which it held against the defendants. And after a long and tedious litigation, a history of which is given in the auditor's report, he succeeded in obtaining from the defendants the sum of \$3,229.46. And Mr. Trainer, not having been paid, now asks the court to award to him, out of the money in the fund, enough to pay his fees and expenses, which the auditor has found to be \$716. There can be no dispute as to the fact that Mr. Trainer was employed by the 'Wool Growers' Exchange' in this protracted litigation, and in how much was due on the note on which judgment had been entered against the defendants; and the auditor has found that, 'at the time of payment, no retainer was paid, and it was agreed that the counsel should pay his fees, and take his fees out of the claim.' Under this state of facts, the auditor, having control of the funds, could not, on any principles of equity, turn the money over to the plaintiff, and compel the attorney to resort to a writ against an insolvent client for the collection of his fees. *McKelvey's Appeal*, 108 Pa. St. 620, makes clear the duty of the court in such a case.

When the money in court should not be turned over to the plaintiff, seeing that the attorney is first paid, on what ground can the exceptants, who are attaching creditors, claim all the fund? They surely have no higher rights, in the premises, than their debtor, the plaintiff in the fund. If the fund in court is to be paid to them by virtue of their attachments, no more can be paid than would have been paid to the plaintiff if he were the only claimant. The plaintiff having agreed that Mr. Trainer should pay his fees, and take his fees out of the claim, no creditor of the plaintiff can object to that agreement by proceedings in foreign attachments. *Noble v. Noble*, 79 Pa. St. 367. 'An attaching creditor occupies no higher position than his debtor.' *Good v. Grant*, 76 Pa. St. 52.

Therefore, these attaching creditors standing in the attitude of assignees, cannot claim the fund, if at all, subject to the prior equities of the attorney, who has agreed with the plaintiff that he was to take his fees out of the claim.

2d. Are the attaching creditors entitled to the balance of the fund in the hands of the attorney? We think not. The auditor finds as a fact that, when this collateral note was given, it was intended to secure the payment of the balance of the loan obtained from the Steubenville banks upon the individual notes given by the directors, which might not be paid from the proceeds of the sale of the Boliver wool. When the negotiation took place, it was expected that the wool would all be sold, and the notes lifted from the proceeds of sale. If the wool was not sold, and if sufficient was not realized from these sales, the collateral note was the security upon which the directors relied to make up the deficiency for the payment of these notes.' Under this finding, it is unnecessary to assume that there was a mistake in drawing the \$10,000 note payable to the Wood Growers' Exchange. For although the loan to Mr. Stephen was formally made by the exchange, and although this \$10,000 note was in his name, yet we must look at the transaction as a whole; and the fact that the directors individually raised the money that was advanced to Stephen in setting their notes in bank, and the further fact that this \$10,000 note was given as a collateral to secure the repayment of the debt that the directors

thus incurred for his benefit, in equity make an appropriation of this note for that specific purpose, and it is the duty of the court to see that the money realized thereon goes where it was intended to go.

"As the Boliver wool, consigned to the exchange, was the primary source from which these notes in bank were to be paid, so the collateral note, taken in the name of the exchange, was the secondary source to be drawn upon for their payment. And as the directors individually had to pay the notes given to the banks, and have not been repaid, they are entitled to the collateral as an indemnity. The fact that John Medill and his co-claimants were directors of the Wool Growers' Exchange does not affect their individual rights. As individuals, they are entitled to protection, and to be reimbursed for the money they are out on account of this transaction, the same as though they were strangers to this corporation; the fact that they acted in good faith having been established.

"And now, March 31, 1887, the exceptions filed to the 'Auditor's Report' are dismissed, at the costs of the exceptants, and the report is confirmed absolutely; and it is ordered, adjudged, and decreed that the money in court be paid out and distributed in accordance with said report, and the schedule thereto attached."

The attaching creditors bring error.

*J. P. Miller*, for appellants. *Braden & Miller* and *Aiken & Duncan*, for appellees.

PER CURIAM. There are two classes of assignments here, viz.: *First*, those which allege error in the auditor's finding of facts; and, *second*, those which allege that he has erred in his conclusion of law. It is sufficient to say, in regard to the first, that the alleged errors are not manifest. We must accept his finding of fact, unless the error clearly appears. *Loomis' Appeal*, 22 Pa. St. 312; *Whiteside's Appeal*, 23 Pa. St. 114; *Bedell's Appeal*, 87 Pa. St. 510; *Thompson's Appeal*, 103 Pa. St. 608. Nor are we satisfied that his conclusions of law are erroneous. On the contrary, we think they necessarily follow from the facts as found. The amount awarded to Mr. Trainer for his expenses and services was clearly right. His entire compensation was to come out of the fund when realized. It would have been gross injustice to turn over the entire fund, the result in large measure of his professional labor and skill, to an insolvent party, and leave him to an action against him. The attaching creditors have no cause to complain of this. They have no higher standing than their debtor. *Good v. Grant*, 76 Pa. St. 52. Nor are the attaching creditors entitled to the balance of the fund. As the directors individually had to pay the notes given to the banks, and have not been repaid, they were entitled to the collateral notes as an indemnity.

The decree is affirmed, and the appeal dismissed, at the costs of the appellants.

#### POOR DISTRICT OF SUMMIT TP. v. BYERS.

(*Supreme Court of Pennsylvania*. October Term, 1887.)

#### POOR AND POOR LAWS — LIABILITY OF POOR DISTRICT FOR MEDICAL SERVICES TO PAUPER.

A physician attended a boy who had been injured by a railroad train. The boy was unable to pay, and the railroad company refused to pay the physician's bill. The bill was approved as correct by two justices of the peace, and the physician sued the poor district. *Held*, that the physician was entitled to recover from the district compensation for his services.

Error to court of common pleas, Butler county.

About the last of January, 1882, Mrs. Mayes, who resided in Oakland township, Butler county, Pennsylvania, went to the house of George Bartley, in Summit township, said county, to do general housework for Bartley, her son

about two years old, accompanying her. She was to receive fifty cents per week part of the time, one dollar part of the time, and one dollar and fifty cents part of the time, and Bartley to keep the child. Under this arrangement Mrs. Mayes continued at the house of Bartley, in Summit township, until the latter part of December, 1882, or January, 1883, when she left and to live with her father in another township, taking her child with her. Back of the Karns City & Butler Railroad passes near the house of Bartley. On March 6, 1882, the child was struck by a passing train, and the *tibia* and one of his legs fractured. Mr. Stephenson, who was near by at the time of the accident, went to Butler and brought out Dr. Byers, the plaintiff, to reduce the fracture, and attended the child until his recovery, counting for his off and on from March 6, 1882, to April 19 of the same year. The accident occurred about 3 o'clock in the afternoon. The surgeon of that part of the road, by direction of Dr. Huselton, the chief surgeon, arrived at Bartley's house shortly after the accident, and finding the fracture had been reduced, went away. Dr. J. E. Byers had been the surgeon of that part of the road the previous year, and from his testimony, and that of Mrs. Mayes, ex-plaintiff, the railroad would pay him for his services. He afterwards presented his bill to the railroad company, and the company refused to pay it. On the twenty-ninth of December, 1882, Byers obtained from the justices of the peace an order of approval. Suit was brought before KECK, J. P., and judgment of \$50 rendered for plaintiff. From this defendant appealed to the circuit court, where the case was tried before MCJUNKIN, J. A number of questions were presented, raising the legal questions involved, and the court resolved these points, and directed the jury to find on certain questions of facts. The jury, under the instructions of the court, found for the plaintiff \$48.16. MCJUNKIN did not dispose of the legal questions during his term of office, and the reserved questions were argued before HAZEN, J., who, May 22, 1886, in his opinion, deciding that the order of approval was sufficient in form, directing judgment to be entered on the verdict. Judgment was entered on the verdict August 3, 1887, whereupon defendants sued out this writ of

*Writ of Habeas Corpus*. *Bowser and Fleegee & Moore*, for plaintiff in error. *W. D. Brandon* and *C. Campbell*, for defendant in error.

**CURIAM.** This case is ruled by *Directors v. Donally*, 1 Sup. Dig. 236, which was a suit brought by two physicians against a poor district to recover compensation for professional services rendered paupers. One of the plaintiffs was employed by a railroad company for a specific sum per month to attend to personal injury for which the company might be responsible. Plaintiff attended numerous persons injured, some by accidents upon the property of the railroad company and others by accidents received elsewhere. The persons injured on the railroad were chiefly trespassers, and all were paupers and the defendant. After the services were rendered, the plaintiff presented his bill to the railroad company, which declined to pay. He then brought suit against the county, and it was held that he was entitled to recover as to emergency claims, but not as to the others.

The verdict in the case in hand establishes the following facts: (1) That the plaintiff was a poor person, without the means to satisfy the plaintiff's claim; (2) that the services were rendered; (3) that it was a case of emergency; (4) that the value of said services; and (5) that said services have not been paid. We also have the certificate of two justices of the peace that the bill of plaintiff is correct, and that they approved of the same. They also "find that the plaintiff is a poor person, unable to pay the same; that the illness was sudden, and the emergency great." We are unable to see any serious error in the rulings of the learned court, and, upon the facts, the case was affirmed with the plaintiff. Judgment affirmed.

KELLY, Adm'x, etc., v. DUFFY.

(*Supreme Court of Pennsylvania.* October Term, 1887.)

1. LANDLORD AND TENANT—DESTRUCTION OF BUILDING BY FIRE—LIABILITY OF TENANT—PROVINCE OF JURY.

Defendant was surety for a lessee of a lot, who covenanted to build on the lot, and not to remove or impair the building, but surrender it to the lessor at the expiration of the lease in as good condition as it was at any time during the lease, ordinary decay and inevitable casualty excepted. Defendant afterwards became the owner of the lease. The house was destroyed by fire, and not replaced. The lessor brought suit at the expiration of the lease on the covenant. At the trial, his counsel asked the judge to charge the jury "that the burden of proof is upon defendant to show that the fire could not have reasonably been prevented. He has failed to do so, and the verdict of the jury must be for the plaintiff." *Held*, that it was properly refused, on the ground that it was for the jury to determine from all the evidence whether the fire could have been reasonably prevented.

2. SAME—AMOUNT DUE—PROVINCE OF JURY.

Plaintiff's counsel also asked the judge to charge the jury: "Under all the evidence in the case, the verdict should be for plaintiff for the value of the building at the time of the expiration of the lease and the rentals unpaid, less the credits." *Held*, that it was properly refused, on the ground that it was for the jury to decide from the evidence whether the plaintiff was entitled to recover, and how much.

3. SAME—DILIGENCE OF LESSOR TO SAVE BUILDING.

Defendant's counsel asked the judge to charge the jury: "If the jury are satisfied from the evidence that the building was destroyed by fire, without any negligence or fault on the part of the lessee, and that the usual and ordinary effort was made to save the building, this is all that is required by law of the defendant, and the verdict should be for defendant." The court answered: "This point is affirmed, if by the expression, 'that the usual and ordinary effort was made to save the building,' is understood to mean all the efforts which were practicable under the circumstances were made to save the building." *Held*, that the point of defendant was properly answered.

Error to court of common pleas, Butler county.

Patrick Kelly was the owner of the lot, and leased it to John F. Hackett for five years from the twenty-second of June, 1875, for building purposes, on an annual ground rent of \$300, and built thereon a frame or balloon-frame hotel according to the plans, specifications, and in the manner provided in the lease. Duffy, the defendant, was his bail in the lease, and finally became the owner of the lease. In 1878, while Hackett was in the house, the house and its contents were burned. The jury found that it was without fault of defendant or Hackett. Plaintiffs seek to hold defendant for the loss of the building on the following clause in the lease: "That he will not during the term nor at any time remove, destroy, or impair the house so to be erected by him on the premises, but that he will take good care of the same, and of the premises, and that at the expiration of the term he will, without any order from the said Patrick Kelly, his heirs or assignees, immediately move away from the premises, and surrender the same to him or them in as good order and condition as they were at any time during the term, ordinary decay and inevitable casualty only excepted."

The following points were submitted by the parties, and were read and answered by the judge: "Plaintiff's counsel asked the court to charge the jury—*First*. That the burden of proof is upon the defendant to show that the fire could not have reasonably been prevented. He has failed to do so, and the verdict of the jury must be for the plaintiff. *Answer*. This point is refused. It is for the jury to determine from all the evidence whether the fire could have been reasonably prevented. There was evidence given by both the plaintiff and defendant relating to the question of whether the fire could have been reasonably prevented, and all this evidence must be considered in determining this question. *Second*. Under all the evidence in the case the verdict of the jury should be for the plaintiff for the value of the building at the time of the expiration of the lease from Kelly to Hackett, and the rentals un-

paid, less the credits. *Answer.* This point is refused. It is for the jury to decide, from the evidence, under the instructions given you, whether the plaintiff is entitled to recover, and if so, how much.

"Defendant's point: *First.* That if the jury are satisfied from the evidence that the building was destroyed by fire without any negligence or fault on the part of Hackett or Duffy, and that the usual and ordinary effort was made to save the building, this is all that is required by law of the defendant or Hackett, and the verdict should be for the defendant. *Answer.* This point is affirmed, if by the expression, 'that the usual and ordinary effort was made to save the building,' is understood to mean all the efforts which were practicable under the circumstances were made to save the building. You understand, gentlemen, that the point uses the expression, 'all the usual and ordinary effort was made to save the building.' I do not know what that is, but every practicable effort under the circumstances ought to have been made to save the building when it was discovered to be on fire; but, really, upon that subject there does not seem to be very much dispute in this case; that is, that the building was of that character that, when once on fire, it was very difficult to save it. Of course, you should take into consideration all the circumstances,—what the opportunities were to extinguish the fire, and everything of that character in connection with that question."

The jury found a verdict for the defendant, and plaintiff brings error.

*C. Walker and T. C. Campbell*, for plaintiff. *L. Z. Mitchell and Chas. McCandless*, for defendant.

**PER CURIAM.** We find no error in the rulings of the learned judge below in his answers to the points. Those presented by the plaintiff asked the learned judge to withdraw the facts from the jury, which, under the evidence, he could not do. The single point of the defendant was properly answered. It was a case for a jury, and it went to them under correct instructions. Judgment affirmed.

### Appeal of BOROUGH OF SOUTH WAVERLY.

(*Supreme Court of Pennsylvania.* October 3, 1887.)

#### 1. RAILROAD COMPANIES—POWER TO CROSS STREETS OF BOROUGH.

A railroad company, incorporated under the Pennsylvania general railroad act of April 4, 1868, (P. L. 62,) has full power to carry its tracks across the streets of a borough, and in so doing it is not a trespasser, nor are its acts unlawful.

#### 2. SAME—MANNER OF CROSSING—EQUITABLE INTERFERENCE.

The manner of crossing the streets of a borough, incorporated under the Pennsylvania general borough act, rests within the discretion of the railroad company, when so incorporated, and after the road is built and in operation nothing less than a gross abuse of that discretion will justify the interference of a chancellor.

#### 3. SAME—CONTRACT, BREACH—ACTION AT LAW.

A railroad, incorporated under the general railroad law, carried its tracks across certain streets of a borough, incorporated under the general borough act. After the road was built and in operation, the borough filed a bill in equity, averring that the streets crossed were not properly bridged, that the crossings were now dangerous to the public, and detrimental to the business interests of the community, and praying relief in the premises. A master was appointed, who reported (1) that, at two crossings, the company had built wagon-bridges; that at both there was much travel both on foot and in teams; that horses were frequently frightened by the noise of moving trains, rendering the bridge unsafe for foot passengers; (2) that at another crossing, used necessarily by nearly all the inhabitants and many school children, the company had numerous tracks; that there the noise of moving trains was almost constant; that this crossing was dangerous; and that parties were frequently delayed here waiting for the tracks to be cleared, as there was no bridge. The master further reported that the common council of the borough had passed a resolution requiring a bridge at these three crossings, the provisions of which had been accepted by the railroad company. *Held*, (1) that the company had the right to construct its road over the streets in question;

(2) that the facts of the case did not show such a gross abuse of that right as would authorize the interference of a court of chancery; and (3) if the borough had the right to make the contract with the railroad company, their only remedy for a breach thereof was an action at law for damages.

Appeal of borough of South Waverly from decree of the common pleas, Bradford county, dismissing a bill in equity filed by it against the New York, Lackawanna & Western Railway Company.

The bill in equity, filed July 2, 1881, alleged, substantially, that the railroad company was so constructing its road as to cause a permanent obstruction in the streets of the borough and prayed (1) that the defendant be restrained from taking possession of said public streets, or from building the abutments for said railroad in the said public streets; (2) that so far as the defendant has occupied said streets by its abutments, it be compelled to remove the same out of the public street by the order and decree of this court; (3) general relief. On October 2, 1892, the complainant filed an amended bill, setting forth, *inter alia*, that the common council of said borough had, on July 5, 1881, passed a resolution providing, *inter alia*, as follows: "Resolved, that the N. Y., L. & W. R. R. Co. have the privilege of crossing the other streets of this borough, according to their present location, bridging Fulton, Loder, and Chemung streets, and that at Center and Ulster streets to be made proper grade crossings by said company." That the conditions of the resolution were formally accepted in writing by the railway company, but that, although more than a reasonable time had elapsed since the occupancy of said street, the said company had wholly neglected the proper performance of its duty in the premises. The amended bill then prayed relief, as follows: "And your orators, in addition to the relief already prayed, pray that the defendant company, by the decree and under the direction of this honorable court, be compelled to properly discharge their duties and liabilities with regard to the subject-matter of this bill."

Defendant's answers denied that they were obstructing any of the streets further than was necessary, and that they were authorized to do in the construction of their railroad, and further denied any liability in the premises. They further answered, admitting the resolution and acceptance, but denied that the same constituted a contract, and averred that at a meeting of the common council, held January 2, 1882, the resolution was rescinded, and a good iron foot-bridge only required to be built and maintained at Fulton-street crossing.

The case was referred on bills and answers to S. R. Payne, Esq., as examiner and master, who found, substantially, the following facts: The complainant is a municipal corporation, incorporated under the general borough law. The defendant is a Pennsylvania corporation, chartered November 23, 1880, under the general railroad act of April 4, 1868. About June, 1881, defendant commenced the construction of a railroad through the complainant borough, in the construction of which defendant crossed certain streets and obstructed them in the following manner: (1) The defendant had built a wagon-bridge across Chemung, and another across Loder street. Neither was provided with a foot-bridge. Both streets had much travel, both on foot and in teams. The noise made by locomotives and moving trains tended to frighten horses, and rendered the bridge unsafe for foot passengers. A foot-bridge was both practicable and necessary at both bridges. (2) The south approach to Chemung-street bridge holds the water back on both sides of it in the spring of the year. A culvert under it was necessary for the removal of the water. (3) A better guard was necessary to the safety of travel on the west side of the south approach to the Loder-street bridge. (4) The sidewalks at both Loder and Chemung streets have not been extended up to the approaches to these bridges. (5) The defendant also crossed Fulton street. This street is the main thoroughfare between this borough and the town of

Waverly, New York. South Waverly has no post-office, no store, but one church, (Catholic,) no hall or place of amusement. Three-fourths of the inhabitants of South Waverly live south of the defendant's road. They go to Waverly, New York, to attend amusements and church, and to send off their letters and receive their mail. The public school of South Waverly is south of the defendant's road. Many of the scholars attending that school live north of the defendant's road, and of these 25 or 30 live on or near Fulton street, and that is the natural and most convenient street for them to use on their way to and from school. At this (Fulton-street) crossing the defendant's tracks are four in number. The distance across these tracks is  $46\frac{1}{2}$  feet. The yard of the Erie road extends across Fulton street, and there the tracks and switches are far more numerous than on the defendant's road across the same street. At the intersection of the defendant's road with Fulton street, and in that vicinity, the din, clatter, and uproar proceeding from the engines on the numerous tracks and switches of both railroads, while, perhaps, not quite incessant, are nearly so. The railroad here runs in a cut, and forms a grade crossing; and to one approaching the track, the view is so obstructed by buildings, fences, trees, and their foliage that cars coming from the west through this cut cannot be seen till the traveler gets within 10 or 15 feet of the track. Foot passengers and teams are frequently delayed here waiting for the tracks to be cleared. The crossing is not only a dangerous one, but also an impediment and hinderance to public travel, and needed both a wagon and foot bridge. (6) The resolution of July 5, 1881, was not repealed or rescinded by the council on January 2, 1882, or at any other time. (7) Warren street was also bridged by defendant. The width of this street was 45 feet. The defendant left a space of only 27 feet between the abutments of their bridge, so that the east abutment at that crossing stands, about eight feet of it, within the lines of Warren street projected north. No necessity is shown by the defendant for thus narrowing Warren street, or for placing the east abutment in it so as to occupy eight feet of its width. This is so great an encroachment upon the street that it cannot be considered immaterial or unimportant. It is an obstruction of the street to that extent. The space from the bottom of the bridge to the road-bed is about nine feet. It should be at least 11.

The master on these facts recommended the following decree: That defendant shall (1) attach good and substantial foot-bridges to the east side of each of the wagon-bridges already constructed over their railroad track at Chemung and Loder streets; (2) build a substantial stone culvert or drain under the south approach to Chemung-street bridge, in such manner as to drain off the water which accumulates at that approach; (3) place a proper and substantial guard on the west side of the south approach to Loder-street bridge; (4) restore the sidewalks of Loder and Chemung streets; (5) erect a suitable wagon and foot bridge at the Fulton-street crossing; (6) remove the east abutment of Warren-street bridge out of the street; (7) increase the space between the top of the highway and the bottom of the bridge at Warren-street crossing to 11 feet.

To the above decree the defendant filed exceptions, which, after argument, were sustained by the court, in an opinion by MORROW, P. J., wherein he said, *inter alia*:

"1. There is no question as to the right of the defendant to construct its road over the streets in question. The tenth section of the act of 1849 gives the right and it provides that, 'whenever any company shall locate its road in or before any street or alley in any city or borough, ample compensation shall be made,' etc. The streets exist by force of the commonwealth's authority, and to the commonwealth belongs the franchise of every highway within its limits as trustee of the public, (*Railroad Co. v. Com.*, 73 Pa. St. 38,) and the defendant, in locating and constructing its road over the streets, exercised the power of eminent domain belonging to the sovereignty of the state. It is a liberty granted by the sovereign, and cannot be disturbed except by the sov-

foreign power. It clearly does not belong to individual right. *Railroad Co. v. Speer*, 56 Pa. St. 334. Any violation of the law, such as creating and maintaining a public nuisance or unreasonably impeding or obstructing travel, is an injury to the public and must be redressed by proceedings in behalf of the commonwealth; that is to say, the commonwealth alone can maintain the bill. If the obstruction is of such a character as to be a public nuisance, it may be abated upon conviction in the quarter sessions. *Railway Co. v. Com.*, 90 Pa. St. 300. Taking a street for the purpose of a railroad is taking it for public use, (*People v. Law*, 34 Barb. 502; *Railroad v. Com.*, *supra.*) and a private party, in the absence of a specific right or authority, cannot maintain a bill in equity, to enforce specific performance of a public duty. *Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co.*, 50 Pa. St. 91; *Railroad Co.'s Appeal*, 62 Pa. St. 218.

"2. The resolutions of July 5, 1881, were adopted after the railroad had been located and substantially graded. The abutment was in Warren street. Since their adoption, the bridges have been built over Loder and Chemung streets, but none over Fulton street. The master has found the travel at this crossing is dangerous; but he has not found as a fact whether the resolutions were or were not rescinded, but the evidence shows the defendant constructed portions of its road (after an effort to rescind) under the directions of certain persons, who claimed to act for the borough, but, it afterwards turned out, no record was made of any such authority. This may explain why no bridge was built at Fulton street. Without any contract, the defendant had the unquestioned right to construct its road 'in and upon these streets,' being liable only for an abuse of that right. As long as there was no violation of law, there was no nuisance, and the company was liable only for damages to owners of lots fronting on the streets. The resolutions as a contract were inoperative unless the borough was authorized to make the contract under the act of June 9, 1874, (P. L. 282.)

"Admitting that the word 'town' in the act must be construed 'borough,' then the plaintiff had authority to contract with the defendant, 'whereby said railroad company may *relocate, change, or elevate* their railroad in such a manner as, in the judgment of such authorities, respectively, may be best adapted to secure the safety of lives and property, and promote the interest of said county, city, town, or township.' The defendant did not relocate its road, nor do the resolutions show in express terms any agreement on the part of the defendant to change or elevate its road; and we are asked to hold that the alleged contract was unauthorized and inoperative; but, conceding it was authorized, the public had an interest in the subject-matter of the contract, and a bill for specific performance cannot be sustained. The remedy is by action for damages. *Railroad Co. v. Lippincott*, 86 Pa. St. 481; *Whitney v. City of New Haven*, 23 Conn. 624. The case of *Com. v. Railroad*, 27 Pa. St. 339, is not in point, because, by its charter, the railroad was not to impede or obstruct the free use of the streets. The bill was in the name of the commonwealth; and there was no contract between the railroad company and the borough of Erie. In *Pusey v. Wright*, 31 Pa. St. 387, there was a contract to construct a lateral railroad in a certain manner; and, on failure to so construct it, it was held there was a common-law remedy, and the bill was dismissed. The same rule is recognized in *Gallagher v. Railroad*, 38 Pa. St. 102, and *Smaltz's Appeal*, 99 Pa. St. 310.

"Again, prayers 1 and 2 in the original bill are not for relief against any infringement of the contract. The third prayer was for an injunction, (which was refused,) and the fourth for general relief; and I think the prayer in the amended bill, to-wit, that the defendant be compelled by the decree of this court to properly discharge its duties and liabilities 'with regard to the subject-matter of this bill,' is also for general relief, or, at most, for specific performance of the contract. The whole matter, therefore, is an attempt to have

the court direct and superintend the overhauling and reconstruction of the road, (including the building of a bridge over Fulton street,) according to the terms of the contract. This we are not inclined to undertake for the reason the contract, except as to the Fulton-street bridge, is vague and uncertain, and, if it is valid, there is an adequate remedy at law. If it is not valid, and the defendant has violated the law, we think the remedy is either by indictment, or by bill in the name of the commonwealth."

The court then dismissed the bill; whereupon complainant took this appeal.

*Edward Overton and John F. Sanderson*, for appellant.

A town has such an interest in its highways and bridges that it can maintain an action against a wrong-doer for a wrong done to them. *Hooksett v. Manufacturing Co.*, 44 N. H. 105; *Town of Troy v. Railroad*, 28 N. H. 83; *Township v. Railroad*, 24 N. J. Eq. 217; *Stats v. Inhabitants of Gorham*, 37 Me. 451; *Town of Hamden v. Railroad Co.*, 27 Conn. 158; *Philadelphia v. Friday*, 6 Phila. 275; *City of Philadelphia's Appeal*, 78 Pa. St. 33. Where the encroachment is on a principal avenue, the injury to the whole community may quite equal that of the inhabitants of the immediate vicinity, which latter are admitted to be competent parties to ask relief in equity against the nuisance. *Sampson v. Smith*, 8 Sim. 277; *Moyamensing v. Long*, 1 Pars. Eq. Cas. 143; *Smith v. Cummings*, 2 Pars. Eq. Cas. 92; *Freeholders of Monmouth Co. v. Turnpike Co.*, 18 N. J. Eq. 91; *Hart v. Albany*, 9 Wend. 571; *Borough of Frankford v. Lennig*, 2 Phila. 403; *City v. Railroad Co.*, 8 Grant, Cas. 403; *Railroad Co. v. Elevator Co.*, 50 Pa. St. 499; *Railroad Co. v. Irwin Borough*, 85 Pa. St. 336; *Woodring v. Forks Tp.*, 28 Pa. St. 355; *Railway Co. v. Com.*, 101 Pa. St. 192; 1 Ror. R. R. 504, 505; *Railway v. Com.*, 90 Pa. St. 300; *Schwenk v. Railroad Co.*, 2 Chest. Co. R. 177; *Pierce, R. R.* 251; *Railroad Co. v. Philadelphia*, 89 Pa. St. 210; Act June 19, 1871, (P. L. 1361); *Railroad Co.'s Appeal*, 79 Pa. St. 257; *McCandless' Appeal*, 70 Pa. St. 210; *St. Louis v. Knapp Co.*, 104 U. S. 658. Equity will interfere in such cases as the present. 2 Story, Eq. § 1563; 2 Redf. Rys. 352, § 208; *Attorney General v. Railway Co.*, 8 De Gex & S. 439; *Attorney General v. Railway Co.*, 9 Wkly. Rep. 180, 8 L. T. (N. S.) 608; *Attorney General v. Railway Co.*, 1 De Gex, J. & S. 423, 9 Jur. (N. S.) 951. The decree recommended by the master is fully sustained by *Pierce, R. R.* 251; *People v. Railroad Co.*, 70 N. Y. 569; *Com. v. Railroad Co.*, 27 Pa. St. 339; *Railroad Co.'s Appeal*, 93 Pa. St. 150.

*Willard & Warren and Peck & Overton*, for appellee.

Appellee had the right to cross these streets. *Com. v. Railroad Co.*, 27 Pa. St. 339; *Faust v. Railway Co.*, 3 Phila. 164; *Railroad Co. v. Com.*, 73 Pa. St. 29. The proviso not to impede the passage or transportation of persons or property along the streets, in the grant from the commonwealth, must be liberally construed so as not to destroy the grant. *Bacon v. Arthur*, 4 Watts, 440; *Ensworth v. Com.*, 52 Pa. St. 320; *Bridge Co. v. Kirk*, 46 Pa. St. 112. That a municipality has no right to impose terms upon a railroad company occupying its streets by authority of the sovereign is too well settled to be doubted, unless that power is expressly delegated. *Pierce, R. R.* 247; *Ror. R. R.* 507; *Wood, Ry. Law*, 985; *Mercer v. Railroad Co.*, 86 Pa. St. 99; *Railroad Co. v. Philadelphia*, 89 Pa. St. 210; *Railroad Co. v. Speer*, 56 Pa. St. 325; *City of Georgetown v. Canal Co.*, 12 Pet. 91; *City of Milwaukee v. Railroad Co.*, 7 Wis. 76; *Mechling v. Bridge Co.*, 1 Grant, Cas. 416. In *Flanagan v. City of Philadelphia*, 8 Phila. 110, Judge SHARSWOOD decides that, for a nuisance that is of a public nature, only a public action can be brought, and that by the proper public functionary. A bill for specific performance will not lie where the public has an interest in the non-performance of the covenant. On refusal to perform, the only remedy is a recovery of

damages for the breach. *Railroad Co. v. Lippincott*, 86 Pa. St. 468; *Railroad Co. v. Philadelphia*, 8 Phila. 112.

PAXSON, J. A careful examination of this record, aided by an able argument at bar, and an exhaustive discussion of the case in the paper books, has failed to satisfy us that the learned judge of the court below erred in dismissing the plaintiff's bill. It is true, he differed from the master in his view of the case, but the difference was not upon the facts, but upon the law applicable to the facts. It must be borne in mind that the railroad company had the undoubted right to construct its road over the streets in question. It was not a trespasser, nor were its acts unlawful. It had the right to cross the street in question under the provisions of the act of 1849, upon making ample compensation to property owners injured. The manner of crossing is a matter resting in the sound discretion of the company. Nothing less than a gross abuse of that discretion would justify the interference of a chancellor, after the road is built and in operation. The case as presented fails to satisfy us that there has been any abuse of discretion. As to the alleged contract between the borough and the railroad company, of date of July 5, 1881, we have only to say that if the borough regards it as a valid contract and believes it has been violated, it has a remedy at law thereon. As was well observed by the court below, "the whole matter, therefore, is an attempt to have the court direct and superintend the overhauling and reconstruction of the road, including the building of a bridge over Fulton street, according to the terms of the contract. This we are not inclined to undertake, for the reason the contract, except as to the Fulton-street bridge, is vague and uncertain, and, if it is valid, there is an adequate remedy at law."

The decree is affirmed, and the appeal dismissed at the costs of the appellant.

### ERIE & W. VAL. R. CO. v. KNOWLES.

(*Supreme Court of Pennsylvania*. October 3, 1887.)

#### 1. PARENT AND CHILD—PAROL GIFT OR SALE OF REAL ESTATE—EVIDENCE TO ESTABLISH.

To establish a parol gift or sale of land between parent and child, the evidence must be direct, positive, express, and unambiguous; the terms of the sale or gift must be clearly defined; and all the acts necessary to its validity must have special reference to it, and to nothing else.

#### 2. SAME—FRAUDS, STATUTE OF.

To take such a contract out of the statute of frauds, the evidence as to the terms of the contract, its performance, and the change of possession must be, not only credible, but of such weight and directness as to make out the facts alleged beyond a doubt.

#### 3. SAME—DECLARATIONS OF GRANTOR.

The declarations and admissions of the grantor are admissible in evidence to prove such a sale or gift, but should have but little weight attached to them as against any act of such grantor inconsistent therewith.

#### 4. SAME—EVIDENCE CONSIDERED.

A. sued a railroad company in trespass for entering upon her land and tearing down a house thereon. Plaintiff claimed the property by a parol gift from her mother, made in 1866. Her testimony was that "she [her mother] gave me this lot, and told me to build on it. She gave me it to use to build on, and I thought it belonged to me, and we had paid the taxes on it." That, in pursuance of this gift, she and her husband had taken possession of the land, and built a home upon it at their own expense. There was also some evidence of admissions and declarations by the grantor that she had so given the property. Defendants proved a conveyance to them of the property by the plaintiff's mother, in 1883, at which time plaintiff's husband contracted in writing to remove the house in question on 60 days' notice; in the contract referring to the sale of the land to the railroad company by plaintiff's mother, "the owner of the premises." Also that, at the time of the alleged gift, the lot was part of a larger tract, not improved or inclosed or in any way identified; that the taxes had been assessed against plaintiff's husband, but were paid by her mother; and that, when the sale to the railroad company was

being negotiated, and when it was finally consummated, plaintiff was present, and never claimed any interest in the property. This plaintiff denied, but admitted that she knew all about the sale and her husband's contract. Plaintiff's mother, though living, was not called by either party. The court submitted the case to the jury, who found for plaintiff. *Held*, that the court should have charged the jury, as requested by defendant, that, under all the evidence, plaintiff could not recover.

Error to common pleas, Luzerne county.

Trespass, by Joseph Knowles, and Amelia, his wife, in right of the wife, against the Erie & Wyoming Valley Railroad Company, to recover damages for injuries to the plaintiff's lot, caused by the construction of the defendant's railroad. Joseph Knowles died after suit brought, but before trial, and his death was suggested on the record.

On the trial before WOODWARD, J., the following facts appeared: Before the first occupation of this lot by the defendant company, the agent of the company, J. B. Shiffer, ascertained that a Mrs. Elizabeth Evans, the mother of the plaintiff, claimed to own this lot and one adjoining it, both lots being within a door or two of her own house. Upon the one in dispute stood a frame house, occupied by the plaintiff and her husband, Joseph Knowles; upon the other, a house occupied by Mrs. Jane Evans, a granddaughter of Elizabeth Evans. Mr. Shiffer went to see Mrs. Elizabeth Evans for the purpose of ascertaining, (1) as to the ownership, and (2) whether he could make an arrangement to buy either the land, or a right of way over it, for the railroad company. Mrs. Evans declared herself to be the owner of these lots under an adverse holding of upwards of 21 years, and produced receipts for taxes and on account of purchase money. She declined, however, to fix a price until she had seen her friend, Mr. Evan J. Evans, who was her business adviser, and was unwilling to sell at all, giving as her reason that she was getting "rent for those two houses at the rate of five dollars a month." After this interview, Mr. Shiffer, having ascertained from the representatives of the legal titles to the lots, W. W. Amesbury and S. T. Lippincott, that they would release to the company, made an offer of \$800 for the surface of these two lots, (the coal not being owned or claimed by Mrs. Evans,) with the understanding that the occupants of the two houses, Knowles and Evans, might move their houses off the lots, and would move them when requested to do so by the company. After repeated interviews and negotiations, which continued for a couple of weeks, the bargain was concluded. Mrs. Elizabeth Evans executed, and on July 5, 1883, acknowledged, her deed for the surface of the two lots, with a clause of general warranty, and received the full purchase money in cash; Joseph Knowles having, on the twenty-sixth day of June, 1883, executed an agreement, reciting the conveyance from Elizabeth Evans, her ownership, and his possession as tenant under her, and agreeing to remove the house occupied by the plaintiff and himself, upon 60 days' notice, and the company went upon the land, and laid their first main and one side track.

According to the testimony of Mr. Shiffer, of A. J. Griffith, a disinterested witness, and of Evan J. Evans, who was the general business adviser of Elizabeth Evans, and acted for her in this and other matters, the plaintiff, Amelia Knowles, was present and assisted at these interviews with her mother. She was aware of the negotiations, and took part in them. She knew the price her mother was to receive. She was present when the purchase money was paid and the deed executed, and was acquainted with its contents. She was present when her husband executed the agreement of June 26, 1883, and knew its contents, and never claimed any title to, or interest in, the land. Mrs. Knowles, however, denied that she was present when either the deed of her mother or the agreement of her husband was executed, and testified that before the completion of the sale she told Mr. Shiffer, that "she [her mother] gave us that place to build on, and we had paid the taxes on it." But she ad-

mitted that she knew her mother was selling the land as her own, and the price she was to get, and that she knew of her husband's signing the agreement of June 26, 1883. There was no evidence of the payment of any taxes by either Amelia Knowles or her husband, except her unsupported statement, and, on the contrary, it was shown that the former had not at any time been assessed for either lands or houses, while her husband was assessed for one house from 1872 down. The taxes on the land were paid by Elizabeth Evans down to the date of the sale.

The plaintiff set up as her title to the land in question a parol gift from her mother, Elizabeth Evans, in 1866, at which time it was admitted that the land was part of a larger tract, not improved or inclosed or in any way identified. The only direct evidence to prove this gift was the testimony of Mrs. Knowles herself, the material portions of which are quoted at length in the opinion of the supreme court. Her son testified that he had frequently heard his grandmother say that she had given this lot to his mother, and a sister of the plaintiff to the same effect. A niece of the plaintiff, a granddaughter of Mrs. Evans, corroborated these witnesses, and also testified that Mrs. Evans had herself told Mr. Shiffer, before the sale was effected, that she did not own the lot in dispute. Mr. Shiffer, however, testified that this language was used with reference to another lot than the one in controversy. Mrs. Evans, though living, was not called by either party. No one was present when the alleged gift was made; and there is no evidence in corroboration of the *fact* of such gift. The house erected by Knowles and his wife was built with the proceeds, amounting to \$140, of the sale of a house of a former husband of the plaintiff, (also named Knowles,) and the general labor of Mrs. Knowles and her children by her first and second husbands.

By the uncontradicted testimony in the case, it appears that the defendant peaceably and with the assent of all parties went into possession shortly after the execution of the deed, and built one main and one side track. As this did not require any portion of the land covered by the house, Knowles and his wife continued to occupy it until 1885. In that year the company desired to lay their second main track. In doing so it became necessary to move the frame addition or back building to Knowles' house. This structure was an unplastered one-story frame building 16 feet 4 inches by 12 feet 4 inches, and 12 feet high to the eaves. Knowles was duly notified to move the house, and, upon his failure to do so, the company defendant caused one end of this structure to be pushed around, leaving between it, on the exposed side, and the main building, an open space of some 11 feet. The plaintiff testified that it cost her \$24 to have the space thus opened built up. In addition to this, she had "about \$25 worth of carpets and clothes and potatoes froze."

Defendants requested the court to charge, *inter alia*, as follows: (4) Under all the evidence, the plaintiff cannot recover. This request was refused by the court, who referred the whole case upon the evidence to the jury, who rendered a verdict in favor of plaintiff for \$550. Judgment having been entered thereupon, defendants took this writ.

*E. P. & J. V. Darling*, for plaintiffs in error.

The lot by plaintiff's own testimony was not given to her absolutely, but only "to build upon." Conceding the doctrine of *Graham v. Craig*, 81\* Pa. St. 459, and *Campbell v. Braden*, 96 Pa. St. 388, that the possession of a donee under a parol gift of land may found a title under the statute of limitations, the authority is obviously inapplicable to the case at bar, since here the possession of the plaintiff had not exceeded 18 years. There is no such indubitable proof in this case as will take it out of the statute of frauds, this being an alleged parol sale or gift from parent to child. *Hart v. Carroll*, 85 Pa. St. 510; *Edwards v. Morgan*, 100 Pa. St. 330; *Poorman v. Kilgore*, 26 Pa. St. 372; *Ackerman v. Fisher*, 57 Pa. St. 457; *Moore v. Small*, 19 Pa. St. 469;

*Sower v. Weaver*, 78 Pa. St. 443; *Shellhammer v. Ashbaugh*, 83 Pa. St. 24; *Allison v. Burns*, 107 Pa. St. 50. Plaintiff's declarations were not admissible to establish her interest. *Riddle v. Dixon*, 2 Pa. St. 372. Nor are those of Elizabeth Evans sufficient to establish a gift, particularly in view of the fact that she was not called, and of her solemn assertion of title as contained in her conveyance. *Robertson v. Robertson*, 9 Watts, 42; *Moore v. Small*, 19 Pa. St. 469; *Hugus v. Walker*, 12 Pa. St. 173. Even the improvements were not made by plaintiff out of any separate estate. Her possession was that of her husband. *Robertson v. Robertson*, *supra*; *Aitkin's Heirs v. Young*, 12 Pa. St. 15; *Moss v. Culver*, 64 Pa. St. 424. Every parol contract is within the statute of frauds, except when there has been such part performance as cannot be compensated in damages. *Moore v. Small*, 19 Pa. St. 467; *Ackerman v. Fisher*, 57 Pa. St. 460; *Postlethwait v. Frease*, 31 Pa. St. 472; *McKown v. McDonald*, 43 Pa. St. 441; *Irwin v. Irwin*, 34 Pa. St. 525; *Overmyer v. Koerner*, 2 Wkly. Notes Cas. 6. If there was but a license to build, it was determined by the act of Elizabeth Evans and her deed to the company, and, therefore, this action will not lie. 1 Add. Torts, § 385; Tayl. Landl. & Ten. (6th Ed.) 531; *Kellam v. Janson*, 17 Pa. St. 467; *Rich v. Keyser*, 54 Pa. St. 86.

Q. A. Gates, for defendants in error.

Mrs. Knowles' possession was notice to all the world of her title. *Hottenstein v. Lerch*, 104 Pa. St. 454; *Bean v. Howe*, 85 Pa. St. 263. The evidence was sufficient to prove the gift. *Sower's Adm'r v. Weaver*, 84 Pa. St. 262. It is conceded by the plaintiff in error that Elizabeth Evans, from whom both parties claim, had no record or written title. What title she had, and all that is shown she had in 1866, was a possession for five or six years. This she transferred to Mrs. Knowles. The two terms of peaceable possession together make more than 21 years of continuous, open, adverse, and notorious possession against the whole world. *Overfield v. Christie*, 7 Serg. & R. 173; *Irwin v. Cooper*, 92 Pa. St. 298. Plaintiff was not estopped by any facts proved in this case. *Glidden v. Strupler*, 52 Pa. St. 400; *Buchanan v. Hazard*, 95 Pa. St. 240; *Keen v. Coleman*, 39 Pa. St. 299; *Stoolfoos v. Jenkins*, 12 Serg. & R. 399.

GREEN, J. In the case of *Shellhammer v. Ashbaugh*, 83 Pa. St. 24, we said: "The rule is settled, therefore, that, as between father and child, the evidence of a gift or sale must be direct, positive, express, and unambiguous; that its terms must be clearly defined; and that all the acts necessary to its validity must have special reference to it and nothing else."

In *Moore v. Small*, 19 Pa. St. 468, Mr. Justice WOODWARD thus speaks of parol gifts of lands: "A class of cases commonly called 'parol gifts' from father to son is found in our books, the origin of which was in *Syler v. Eckhart*, 1 Bin. 378, very thoroughly reviewed by Judge KENNEDY in *Eckhart v. Eckhart*, 3 Pen. & W. 362. The case before us belongs to this family. Now, let it be observed that the legislature of Pennsylvania have made no provision, either in the act of 1818, or that of 1834, or any other act of assembly, for the conveyance of title in pursuance of a *parol gift* of land. \* \* \* There is no such thing as the execution of a parol gift of lands under the statute of frauds, even between father and son. Gift is, indeed, a common-law mode of assurance; but it is a contract executed. \* \* \* And if it be said that a son who goes upon land under a promise of a conveyance from his father, and expends his labor and money in making valuable improvements which cannot reasonably be compensated, is entitled to a decree of conveyance, it is because he is a purchaser for a valuable consideration. \* \* \* If the contract were ever made, it must have had a time and place and terms, and it would be reasonable to expect a witness to speak of these; but declarations

and confessions of the father have been so frequently received in evidence as proof of a contract, it is impossible to say they are unfit to go to the jury; but they should go, characterized by the language of Judge ROGERS in *Robertson v. Robertson*, 9 Watts, 42, as the most unsatisfactory species of evidence, on account of the facility with which they may be fabricated, the impossibility of contradicting them, and the mistakes and failure of recollection. Parental declarations are often made with reference to experimental arrangements or testamentary intentions for the benefit of a son, which are sadly misapplied when brought into court as evidential of a contract of sale. The posthumous recollections of a neighborhood as to the words of a testator should weigh but little when set against his written will."

In *Poorman v. Kilgore*, 26 Pa. St. 365, LOWRIE, J., said: "The very nature of the relation, therefore, requires the contracts between parents and children to be proved by a kind of evidence that is very different from that which may be sufficient between strangers. It must be direct, positive, express, and unambiguous. The terms must be clearly defined, and all the acts necessary for its validity must have especial reference to it, and nothing else."

In *Sower v. Weaver*, 78 Pa. St. 443, we held that, to establish a parol gift of land, the evidence must be direct, positive, express, and unambiguous. Sower brought ejectment on his legal title against Weaver, who set up a parol gift. The evidence of it was the testimony of himself and his wife. Sower, by his testimony, contradicted theirs. Held, that Weaver and wife being but as one witness, the testimony of another witness or its equivalent was necessary to establish the defense.

In *Hart v. Carroll*, 85 Pa. St. 510, we said: "In order to take a parol contract for the sale of lands out of the operation of the statute of frauds, its terms must be shown by full, complete, satisfactory, and indubitable proof. The evidence must define the boundaries and indicate the quantity of the land. It must fix the amount of the consideration. It must establish the fact that possession was taken in pursuance of the contract, and at or immediately after the time it was made, that the change of possession was notorious, and the fact that it has been exclusive, continuous, and maintained, and it must show performance or part performance by the vendee, which could not be compensated in damages. These rules have been settled by a long series of authorities." Indubitable proof was explained to be "evidence that should not only be found credible, but of such weight and directness as to make out the facts alleged beyond a doubt." The language of the last case was literally repeated in the case of an alleged parol gift of land in the case of *Allison v. Burns*, 107 Pa. St. 50.

The foregoing are but a portion of the utterances of this court upon the controlling question of the present case. They have not only never been questioned or impaired, but are the undoubted law of this commonwealth to-day, approved, sanctioned, justified by the ever recurring teachings of experience, which constantly instruct us of their wisdom, and demanded now more than ever before, by reason of the enlarged competency of witnesses, which permits the interested party himself to testify in his own favor in support of this most dubious, questionable, dangerous, and vexatious title to real estate by parol gift. There could scarcely be conceived a more perfect illustration of the dangers of this species of title to land than is afforded by this case. It is entirely undisputed, indeed, admitted, by the plaintiff, that she knew that her mother was selling this very land as her own, and that the full price for it was paid, without the slightest effort on her part to prevent the sale, or to assert her own title or claim of title in such a way as to make it manifest to the company that she really did claim the land. She says she told Shiffer, the defendant's agent, that it was hers; that her mother gave it to her to build on; but this statement he most positively and emphatically denies, and says that he had never heard of her claim until a few weeks before the trial of the case. It is

also entirely undisputed that she knew all about the original occupation of the land by the company, and their laying a track upon it; yet she made no claim for damages, or sought in any manner to prevent their occupancy, or to assert her title to it. These vital facts are so entirely hostile to the idea of any real ownership of the land in the plaintiff, that they destroy any theory that the evidence in support of her title is indubitable; but there are many other facts in the case entirely undisputed also, which demonstrate the utter lack of conformity of the plaintiff's claim with the requirements of the decisions above quoted.

Thus, she is the only direct witness to the alleged gift of the land. Yet the story she tells is so confused and uncertain as to the character of her title it is impossible to determine whether it is a fee-simple, a tenancy for life, a tenancy at will, or a mere license to erect a dwelling on the land, and occupy it during the pleasure of her mother, the real owner. She was asked by her own counsel: "*Question.* How did you get that lot? *Answer.* From my mother. *Q.* What was your mother's name? *A.* Elizabeth Evans. *Q.* How did you get this lot of your mother? *A.* She gave it. She gave me this lot, and told me to build on it. \* \* \* *Q.* (On cross-examination.) I want to have no misunderstanding about this. Did you say you claimed this frame house was yours, or that the land was yours? *A.* She gave me this ground to build on." In reply to a question as to whether she objected when the company laid their first track she said: "*A.* I told them that the place belonged to me. *Q.* To whom did you tell that? *A.* I told Mr. Shiffer that she gave me this lot to build on. \* \* \* *Q.* I want you to say when it was and to whom you claimed that this land was yours? *A.* I told Mr. Shiffer that we had that lot, and we paid the taxes on it. *Q.* Did you claim to Mr. Shiffer that the land was yours, and that he ought to buy it from you, and not from your mother? *A.* I told him that she gave us that place to build on, and we had paid the taxes on it. *Q.* Was that all you told him? *A.* Yes, sir. *Q.* You did not claim then that your mother had not a right to sell this land? *A.* I told him that it was ours; that she gave it to me to build on, and I thought it belonged to me." She was asked whether she had ever told Evan J. Evans that she claimed the land, and said she did. "*What did you tell him? A.* I told him the same thing,—that we had paid the taxes on the place, and that mother gave it to us to build on." She also said several times that her mother gave her the lot, and that she told Shiffer and Evans so; but both of them deny this most positively, and say they never heard of any claim of title by her until long afterwards. It will be seen, then, that, upon her own testimony, it is entirely uncertain whether the lot was given to her in fee-simple or only to build a house upon it, and, if the latter, whether she was privileged to occupy it during her life or during the pleasure of her mother. Of course, there was no fixing of boundaries or of the quantity of land to be taken, or statement of any terms. The ground was open, not fenced, unoccupied, and without any marked boundaries, and from anything that was said by the owner, as was testified by the plaintiff, it would be utterly impossible to tell either the boundaries or the quantity of land given.

But again, the alleged donor was alive and competent to testify; and if she had really made the gift, it was of the utmost importance to the plaintiff's case to examine her, and prove the fact. This was not done, and the case is left without any verbal testimony of the grantor, but with her solemn deed to the defendant for the whole property, made long after the alleged gift, and after all the declarations said to have been made by her as to the gift to her daughter. She was the plaintiff's own mother, and naturally would have testified in her daughter's favor if she could. But she did not. The defendant did not need her testimony, because they had her deed, which was the strongest possible assertion of her own ownership. This circumstance, then, makes

most strongly against the allegation of a previous gift to the plaintiff, and of itself is sufficient to cast so much doubt upon the validity of the plaintiff's claim of title as to bring it within the operation of the rule which requires such titles to be supported by indubitable proof.

Then, as to the plaintiff's credibility, she is absolutely contradicted by the two persons, one the agent of the defendant in making the purchase from the plaintiff's mother, and the other the agent of the mother in making the sale, both of whom testify most positively that the plaintiff, knowing all about the occupancy of the ground by the defendant, and also the sale by the mother, never once asserted any claim of title to the land. As they are entirely disinterested witnesses, it cannot be said that her testimony upon this most important, indeed vital, part of the case is indubitable. On the contrary, it can only be justly designated as of the most doubtful and unreliable character.

But damaging as these facts are, there is another far more serious and fatal to the truthfulness of her claim. Her husband, though living with her at that time and for many years before, and being entitled to his curtesy in the land, if it was hers, made no kind of claim of title, either for her or himself, to the land, but, on the contrary, entered into a written sealed agreement with the company to deliver up the possession of the premises within 60 days after notice to do so, and also to remove the buildings from the land. This agreement recites that "the said J. Knowles is in possession of part of certain premises conveyed to the said company by Elizabeth Evans, the owner of said premises," and that he is willing that the company shall have possession. Here is a distinct recognition of the ownership of Mrs. Evans, and an agreement to give up possession, which are simply fatal to the plaintiff's claim of title. It is a useless task, because it is impossible, to try to reconcile this entirely undisputed fact with any theory of title in the plaintiff. It was testified by Shiffer and Evans that both Mr. and Mrs. Knowles were present when this paper was signed. It was also testified by Griffiths that Mrs. Knowles was present when Shiffer and Mrs. Evans were bargaining for the lot, and that Mrs. Evans said that she was the owner of both the lots, but that the back building was put up by Mr. Knowles. It was testified by Shiffer that Mrs. Knowles was present, and took part in the conversation between himself and Mrs. Evans when they were contracting for the sale of the property to the company; that she wanted him to agree to give her mother \$1,000, instead of \$800, for the property; and that, when he notified her they wanted possession, she refused to leave unless they would give her some money. Griffiths testified that both Mrs. Jenkins (plaintiff's sister) and the plaintiff said that Mrs. Evans owned the property. Many other facts almost equally damaging were proved on the trial; but it is not necessary to review them.

It is no answer to say that the credibility of witnesses is for the jury, and they may disbelieve the testimony if they see fit to do so. That argument will not avail in this class of cases, for the question here is as to the character of the proof, because it is offered for the purpose of creating title to land by parol. It must conform to certain requirements, and, if it does not, it will not suffice to create such a title; and of this the court must judge. The evidence of a parol gift in this case is of the weakest and flimsiest character, far more so than in several of the cases cited above, when the court below was reversed for not taking the case from the jury by a binding instruction. We are clearly of opinion that this is what should have been done in the present case, and we reverse the judgment for that reason. The defendant's fourth point should have been affirmed. These views render it unnecessary to consider the other assignments of error. Judgment reversed.

## SCHEIFELE and another v. SCHMITZ.

(Court of Errors and Appeals of New Jersey. March Term, 1887.)

## FIXTURES—AS BETWEEN MORTGAGEE AND CREDITORS—MACHINEERY IN BREWERY.

The following machinery in a brewery held to be fixtures as between the mortgagee of the land and a subsequent judgment creditor of the mortgagor: Engine and boiler, copper beer kettle, and all the copper and iron pipes connected therewith; iron flat cooler, malt-mill, wash-tub, two pumps and appurtenances, wind-mill and attachments, plunger and iron elevator; also, all gearing and shafting and all machinery immediately connected therewith and operated thereby and not operated by belting. Affirming 1 Atl. Rep. 698.<sup>1</sup>

Appeal from court of chancery.

Bill for injunction. The case was argued before BIRD, V. C., whose conclusions are reported in 1 Atl. Rep. 698.

*S. E. Perry*, for appellants. *Slope & Stephany*, for respondent.

PER CURIAM. This decree unanimously affirmed, for the reasons given by the vice-chancellor.

## NEILSON, Adm'r, v. WILLIAMS and Wife.

(Court of Chancery of New Jersey. October Term, 1886.)

## 1. CONTRIBUTION—VOLUNTARY PAYMENT BY SURETY—JUDGMENT AT LAW NOT NECESSARY—DISCOVERY—RELIEF AGAINST FRAUDULENT CONVEYANCE.

One of two sureties on the bond of an insolvent guardian voluntarily paid half the amount found due the ward by the orphans' court. Judgment went against him for the balance in a suit subsequently brought against him by the ward, and he paid that. *Held*, that he might proceed against his co-surety for contribution without first reducing his claim to a judgment, and that, as incidental to such relief, he might compel discovery as to an alleged fraudulent transfer of property by the co-surety, since the liability on the bond accrued, and be relieved upon proof of such fraud.

## 2. FRAUDULENT CONVEYANCES—FROM HUSBAND TO WIFE—ANTENUPTIAL CONTRACT.

In a suit to set aside a conveyance by the defendant to his wife on the ground of fraud, the grantor set up as a defense an antenuptial verbal agreement upon his part to give his wife all he had or might have, if she would marry him. The wife testified that she would perhaps have married defendant without the agreement. No deed passed until 18 years after the marriage, and then only upon the default of a guardian upon whose bond the husband was surety. *Held*, that the evidence was insufficient to establish a valuable consideration.

*R. S. Clymer*, for complainant. *C. G. Garrison*, for defendants.

BIRD, V. C. Mathews was appointed guardian of infants, and John Neilson and Ira D. Williams became his sureties. Mathews became insolvent. The orphans' court, upon an accounting, found that there were in his hands, and due to the wards, \$829.99, which he failed to pay. The complainant's intestate offered to pay his half of the amount so found due to the infants, and there is some proof that Williams, the other bondsman, agreed with Neilson to pay the other half. This, however, is denied by Williams, which, in my judgment, is not decisive of the case. The bond was prosecuted, and judgment recovered thereon against the obligors. Execution was issued, the prop-

<sup>1</sup>In *Case Manufg Co. v. Garver*, (Ohio,) 13 N. E. Rep. 493, the court, in discussing the doctrine of fixtures as applied to machinery in a factory, makes a distinction between the machinery which supplies the motive power of the factory and that which is propelled by it, on the ground that the former is generally more closely annexed to the freehold, and of a more permanent character than the latter. Articles of machinery which are only attached to the building to keep them steady in their places, so that they may be more serviceable when in use, and which may be removed without any essential injury to the freehold or the articles themselves, are personal property, while steam-engines and boilers with their appliances, which for purposes of use are generally stably attached to the realty, pass by a conveyance or mortgage of the land.

erty of Neilson levied upon, when he paid the whole amount that remained due. Thus it will be observed that Neilson, one of the sureties, discharged the entire obligation by paying the \$829.99, the amount which was adjudged to be due from the guardian by the judgment of the orphans' court, together with the interest and costs of the judgment at law.

Neilson's administratrix brings this suit to recover from Williams, his co-surety, the one-half of the amount of money which he has so paid; as well the one-half which he voluntarily paid after the judgment of the orphans' court against his principal, as the one-half of what he was compelled to pay after the judgment at law against him and his co-surety. In order to success in this direction, she found it necessary to compel discovery by the defendants. This she attempted to do by leave of Mr. Justice PARKER, in the circuit court, under which such discovery was made as to induce her to file this bill. In the bill she alleges that Williams was possessed of real estate, and that after this liability was incurred and the inability of the guardian to pay had been made certain, he conveyed his lands to his wife for the purpose of preventing the complainant's collecting the amount equitably due from him.

As I understood the counsel for the defendants, three objections are made to any decree against them: *First*, the complainant has no standing in court; *second*, the conveyance was not fraudulent, but *bona fide*, and for a valuable consideration; and, *third*, a tender was made for the one-half of the judgment at law, including costs and interests, and the cost of these proceedings up to the time of the tender, which was refused. The propositions thus involved we will consider.

Has the complainant a right to institute these proceedings? In other words, has the court jurisdiction of the case made by the bill? It is urged that the want of jurisdiction arises from the absence of any judgment at law in favor of the complainant against the defendant. This objection, I think, beyond question, must fail so far as concerns the judgment at law on the bond against all the obligors. Surely this court would not require the idle process of establishing again by a judgment in a court of law the obligation which one of these parties is under to the other, since the statute authorizes a court at law to proceed without any such additional adjudication. And the force of this, I think, is conceded in the fact that a tender was made. I conclude that the court has jurisdiction of the case made by the bill.

Other things being established, can this court in this proceeding compel the defendants to make disclosure of their transactions which are alleged to be fraudulent, in order to secure the payment of the amount which was voluntarily paid by Neilson after the judgment of the orphans' court finding the amount due, without also obtaining a judgment of a court of law determining the amount due as between the sureties? It seems to me this should be answered in the affirmative. A judgment is not always necessary. It was so determined by the chancellor in *Haston v. Castner*, 29 N. J. Eq. 536, and by the court of errors and appeals in the same case, 31 N. J. Eq. 697. In that case the complainants had filed their claims under the statute with an executor. The estate in the hands of the executor proving insufficient to discharge all the debts for which the testator was liable in his life-time, the complainants filed their bill to set aside certain conveyances which had been made by the testator in his life-time to two of his children. No judgment was obtained upon the claims presented by the creditors, who were afterwards complainants in this court. Under the circumstances it was held that a judgment at law was not necessary. Without more, I think the spirit of the rule thus established ought to control this case.

But we have a case decided by the chancellor, and reviewed by the court of errors and appeals, more nearly like the one in hand. I refer to the case of *Shurts v. Howell*, 30 N. J. Eq. 418, and 31 N. J. Eq. 796. That case came before the chancellor after the case of *Haston v. Castner*, and was reviewed

by the court of errors and appeals at the same time at which they disposed of *Haston v. Castner*. Shurts was the executor of Aller, and Aller and Howell were sureties to Wilcox on his bond as guardian. Wilcox became insolvent. The orphans' court found and adjudged that he had in his hands \$3,285. Aller's administrator paid the whole amount with interest. Howell refused to contribute in his life-time, and after his death his administrator refused to contribute. Howell in his life-time had made an assignment of a bond and mortgage to his daughter. Aller's administrator filed a bill asking the court to declare that assignment fraudulent. The assignee of the mortgage and the administrator were made parties. There was a demurrer to the bill; one of the points urged was the absence of a judgment at law. The demurrer was overruled. In that case the proceedings show that the orphans' court had fixed by its judgment the extent of the liability of the guardian. The court of errors adopted the views of the chancellor. It seems to me the rule there laid down is reasonable and just, and that any other would impose unnecessary hardships, risks, and delays.

Looking at the case in hand, the judgment of the orphans' court fixed the amount due from the guardian. The judgment was not appealed from, and so long as it is not attacked for fraud or mistake I think it should be accepted as conclusive upon the sureties of the guardian. Hence, a judgment at law was unnecessary before the complainant filed this bill in order to compel his co-surety to pay one-half of the amount which the complainant had voluntarily paid, and to make disclosures respecting the conveyance of his property.

Look now at the question respecting the consideration. It is said that, prior to the marriage of Williams and his wife, he promised all he had, or that all he had or might have, was to be hers. I think this must go for naught. The marriage took place in 1866, but there was no conveyance until after the emergency created by the failure of Mathews in 1880. To my mind this removes all doubt. But besides, Mrs. Williams says she did not know but that she would have married Mr. Williams anyhow. To accept of such an allegation, sustained only by the verbal testimony of the parties themselves, after the lapse of 18 years, I think would be most dangerous, and wholly contrary to the policy of the law.

If I am correct in the foregoing views, the question of tender need not be considered; for, manifestly, the whole amount due was not tendered. I think it is my plain duty to advise a decree for the complainant, in accordance with the prayer of her bill, with costs.

#### LOGUE, Adm'r, etc., v. BATEMAN and others.

(Court of Chancery of New Jersey. November 9, 1887.)

#### WILL—BEQUEST OF PERSONAL PROPERTY DURING LIFE—RIGHT TO DISPOSE OF.

A person, by will, left certain real estate and personal property to his wife, to have it, "both real and personal, during her natural life, to use as she may think best. My will further is that at her death the house and lot, and all the personal property that may remain unused or undisposed of by her, shall go to" the testator's grandchildren. *Held*, that the wife had the right of disposition of the personal property, but no unqualified title in it.

Bill for construction of will.

*William E. Potter*, for complainant. *Edward A. Armstrong*, for defendants.

BIRD, V. C. I am called upon to give construction to the will of Eli E. Bateman, who died in July, 1886. The question is whether a gift to his wife was absolute or otherwise. To determine this the whole will must be considered; but especially the item which I quote: "I give, devise, and bequeath to my wife, Sarah, the house and lot where I now live, which I purchased of

Daniel C. Pierson and wife, containing about twelve acres; all the furniture in said house; also all the flour, pork, lard, ham, and all the vegetables that I may have at my decease, cow, and all the firewood she may want from any of my wood land. \* \* \* I also give to her the sum of five thousand dollars in cash, or in bonds and mortgages, she having the privilege of selecting them. To have all the before-mentioned property, both real and personal, during her natural life, to use as she may think best. My will further is that at her death the house and lot, and all the personal property that may remain unused or undisposed of by her, shall go to my grandsons Eliston R. Bateman, Robert M., and granddaughter Sarah H., to be equally divided between them."

In the next item he gives to his grandson Eliston R. Bateman a lot of wood land, a lot of marsh land, a gold watch, surgical instruments, and other personal property, and "also four thousand dollars in cash, or bonds and mortgages; and so much of the above property, both real and personal, that shall remain unused or undisposed of, by sale or otherwise, by him before his death, shall be equally divided between his brother Robert and sister Sarah, share and share alike. I also give to him my gun, cane, and pistol. If he should leave lawful heirs, child or children, of his own, then they each to have an equal share with Robert and Sarah."

In the next item he gives to his grandson Robert M. Bateman a lot of wood land, a salt marsh, all his wearing apparel, gold pencil; "also the sum of four thousand dollars in cash, (to be put out by my executrix hereinafter named,) on good and sufficient security, and the interest collected annually, and used for his maintenance and support, as he may need, until he arrives at the age of twenty-one years; to remain, both principal and interest, under the control of my executrix until that time; then the principal, and so much of the interest as may remain unused for him, shall be paid to him. My will further is that whatsoever of the above-mentioned estate, both real and personal, that shall remain unused or not disposed of by him during his natural life shall be equally divided between his brother Eliston and sister Sarah. Should he leave child or children of his own, then each to have an equal share with Eliston and Sarah."

He gave to his granddaughter Sarah certain articles of personal property, a tract of wood land, and the sum of four thousand dollars in cash, to be put out at interest by his executrix, under whose care it was to remain until she should arrive at age of 21 years, when she was to be entitled to the principal. To each gift these words are added: "Should Sarah, my granddaughter, die before using or disposing of the above-mentioned personal and real estate, then what remains to be equally divided between her two brothers, Eliston and Robert. Should she have a child or children of her own, in that case it shall go to them." And then, by a residuary clause, all of his estate remaining, real, personal, or mixed, he gives to his wife, Sarah, and the said three grandchildren, Eliston, Robert, and Sarah, to be equally divided between them, share and share alike.

It is not contended that the widow, Sarah, took more than a life-estate in the house and lot. But it is insisted that she took an absolute estate in all the personal property. The language of the will, under which this claim is made, is found in the clause first above recited. In this clause the testator says: "To have all the above-mentioned property, both real and personal, during her natural life, to use as she may think best." Here, evidently, is the gift of a life-estate only; but the testator adds these words: "My will further is that at her death the house and lot, and all the personal property that may remain unused or undisposed of by her, shall go to my grandsons," etc.; upon which the argument that the absolute estate passed to her is founded.

It is urged that the phrase "undisposed of" signifies, necessarily, an unqualified gift; that there can be no such absolute right of disposition as is here

implied without an unqualified title. But it seems to me that this question has been set at rest in New Jersey in the case of *Borden v. Downey*, 35 N. J. Law, 74. The chief justice declared the rule to be "that where an estate for life is expressly given, and power of disposition is annexed to it, in such case the fee does not pass under such devise, but the naked power of disposition of the fee. But it is otherwise when there is a gift generally of the estate, with a power of disposition annexed. In this latter case the property itself is transferred,"—referring to a number of authorities. On appeal, Justice DEPUE said: "As a rule of construction, the rule is entirely settled that where lands are devised in the first instance in language indeterminate as to the quantity of the estate for which an estate for life would result by implication, and words adapted to the creation of a power of disposal without restriction as to the mode of execution are added, the construction will be that an estate in fee is given; but, where the quantity of the estate of the taker is expressly defined to be for life, the superadded words will be construed to be the mere gift of a power of disposition." 36 N. J. Law, 460-466,—sustaining the views of the chief justice in the court below. The same experienced judge considered the effect of similar words in the case of *Pratt v. Douglass*, 38 N. J. Eq. 516, with a reference to the case of *Downey v. Borden*, and said: "It was held by this court, on a devise of lands expressly for life, that superadded words granting a power to sell in fee would not enlarge the life-estate to a fee. The same rule of construction is applicable to bequests of personal estate."

In the case under consideration, both real and personal property are given to the widow during her natural life, to use as she may think best, with the direction that the real estate, and all the personal property that may remain unused or undisposed of, shall go over to others. It seems to me that, beyond dispute, the estate thus given is controlled by the authorities above referred to, and that the life-estate is not enlarged into an absolute and unqualified property by the use of the words "unused or undisposed of." If the question were to be considered under any of the other clauses in the will which I have quoted and referred to, a different rule might prevail, because in each of them the testator has omitted to say that the gift was for life, or to use any words by which the implication might arise that he intended to place his grandchildren in this particular upon the same footing that he did his widow. It seems to me that it would be a useless expenditure of time and effort to examine all the cases, both English and American, which have been referred to by counsel. Other authorities have been referred to in *Rhodes v. Shaw*, *ante*, 116, (decided at this term.)

A decree in accordance with these views should be advised.

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### *In re* Petition for Receiver of the DELAWARE BAY & C. M. R. CO.

(Court of Chancery of New Jersey. November 16, 1887.)

#### 1. CONSTITUTIONAL LAW—EXCLUSIVE PRIVILEGES—RAILROAD AT SEA-SIDE RESORT—RECEIVER.

Const. N. J. art. 4, § 7, provides that the legislature shall not pass any private, special, or local law "granting to any corporation, association, or individual any exclusive privilege, immunity, or franchise whatever." The New Jersey act of May 3, 1880, provides that any railroad company whose road is constructed at any sea-side resort not exceeding four miles in length, etc., shall be exempted from the provision of the act of February 12, 1874, (Revision, p. 943, § 160;) that if any company fail to run its trains on any part of its road for 10 days, the chancellor may appoint a receiver, etc. *Held*, that the act of May 3, 1880, is unconstitutional.

#### 2. RAILROAD COMPANIES—FAILURE TO RUN TRAINS—RECEIVER—SEA-SIDE RESORTS.

The Delaware Bay & Cape May Railroad Company was organized under the general railroad law passed in 1873. Revision, 925. It ran from Cape May city to the steam-boat landing, a distance of less than four miles. The petition showed that it had not run for more than 10 days, and asked for the appointment of a receiver.

Revision N. J. 943, § 160, provides "that if any railroad company in this state has or may hereafter fail or neglect to run daily trains on any part of its road for the space of ten days, then the chancellor of this state, upon petition of any citizen of this state, and due proof of the facts, shall speedily appoint a receiver," etc. The defendant relied on the provision of the act of March 3, 1880, (Supp. Revision, 834.) which provides that "any railroad company whose road is constructed at any sea-side resort not exceeding four miles in length, and which was built and intended merely for the transportation of summer travelers and tourists," shall be excepted from the operation of section 160, above recited. Many people live at Cape May the whole year, and not merely during the summer season. *Held*, that Cape May is not a sea-side resort, within the meaning of the act.

Petition for receiver.

*Wm. T. Hulliard*, for petitioner. *H. W. Edmunds*, *contra*.

BIRD, V. C. This company was organized under the general railroad law passed in 1873, Revision, p. 925, §§ 89, 90. It declared its purpose to be doing general business in the transportation of passengers and freight. It constructed its road from Cape May city to the steam-boat landing, in all less than four miles in length. It passed through the village of Cape May, where 200 or 300 inhabitants reside permanently, and where several hundreds more reside in the summer. Whether many or few, cannot be material. This village is commonly called a summer or sea-side resort, although it is not entirely deserted or abandoned in the winter season, any more than many other places on the coast of New Jersey. One great object, certainly the main object, in building the road was to carry the passengers which should be brought to the steam-boat landing by the steamer Republic from Philadelphia. This steamer only runs during the summer season. While to receive and carry these passengers was the chief object, its declared purpose was not only to carry freight, but it has actually carried freight from Cape May city to Cape May. It commenced operations in the year 1879, and continued to run its trains over the entire length of the route until 1883, during the entire year. At times since then it has not been operated all the year. The petition shows that the road has not been operated for more than 10 days, and asks for the appointment of a receiver to take possession of said road, and to transact the ordinary business thereof in the transportation of freight and passengers for such time as the court may direct, according to the act of February 12, 1874. Revision, p. 943, § 160.

In resisting this application, the defendant relies upon the provisions of the act of March 3, 1880, (Supp. Revision, 834,) which provides that "any railroad company whose road is constructed at any sea-side resort not exceeding four miles in length, and which was built and intended merely for the transportation of summer travelers and tourists," shall be excepted from the operation of the act of February 12, 1874, *supra*, and also upon the allegation that it was never intended to be a general freight and passenger road, but only a passenger road to be operated during the summer season. With great respect to the counsel who pressed the latter point, I must remark that it seems to me to be of no consequence what the secret motive and intention of the corporators was. The law declared the conditions upon which they should or could build a railroad. In form and in such articles as the law prescribes, those corporators accepted the conditions, and declared their intentions, which were in harmony with the conditions. Now, if under a pressure of any nature whatever they can so far forget their solemn obligations to the public which has granted to them these peculiar privileges, and guaranteed to protect them in the right use of them, as to insist that the law of 1873 is not binding, and that their own declared intentions are not binding beyond their own mere will, they certainly ought not to expect any court to concur with them in such insistent. As the law stood when this road commenced operations, it was the duty of the company to transport passengers and freight by running trains over its road daily. It strikes me that any other conclusion,

if acted upon, would lead to the most dangerous and destructive consequences; thousands of, hundreds of thousands of, even millions of, dollars worth of property might be involved at the option of a company.

But the act of February 12, 1874, was amended by an act of March 3, 1880, (Supp. Revision, p. 834, § 42,) which provides that the act directing the appointment of a receiver shall not apply to roads built at sea-side resorts, (set out fully above.) Can this provision be claimed as a protection to the defendant company? I think not. It was not enacted until after the road had been built and operated. There is nothing in the language of the act indicating the slightest intention of the legislature to bring within its provisions any of the numerous roads which had then been constructed between Cape May and Sandy Hook; and the only facts in connection with this road that seem to have any relation to the law are that it is less than four miles in length, and that there are two towns, one at one end, and one through which it passes, properly called "summer resorts," and that tourists visit them; all of which, except the first, *i. e.*, the length, may be said of many others. I do not feel myself at liberty to give this provision any retrospective operation. I am sustained in this view by the case of *Williamson v. Railroad Co.*, 29 N. J. Eq. 311; *Elizabeth v. Hill*, 39 N. J. Law, 555; *Berdan v. Van Riper*, 16 N. J. Law, 14; *McGovern v. Connell*, 43 N. J. Law, 107. See the explicit language of the court of errors in *Gas Co. v. Alden*, 44 N. J. Law, 648, 653, 654.

These railroads are made lawful, and have extraordinary privileges as well for the benefit and convenience of the public as for the profit of the corporations or their assigns. And if by the construction of them the company acquire vested rights, so too do the public acquire vested interests. Therefore, when individuals avail themselves of the inducements offered by these railroads to invest their capital in homes, or land for improvement, or in business, they have as high and sacred a claim to the consideration of this court as the railroad company. This observation is applicable to this case; for money has been invested in homes for residences the year through (not simply for the summer season) at Cape May, and the owners and others reside there the entire year, and they and others carry on business there. Hence, it is very obvious that Cape May is no more a sea-side resort or a resort for summer than is a score of other places on our coast.

The views thus expressed make it unnecessary for me to dwell at length upon the constitutionality of the law under which the defendant seeks favor. It is urged that the proviso of the act in question is prohibited by that clause of the constitution in article 4, § 7, which declares that the legislature shall not pass any private, special, or local law "granting to any corporation, association, or individual any exclusive privilege, immunity, or franchise whatever." Without fully discussing the question, I cannot but ask what general principle is involved in the idea of a road less than four miles in length? What general good would such an enactment promote? If such a law is not in conflict with the constitution, then any railroad company can secure to itself such rights and immunities, whatever its length may be; for if the power exists in case the road is less than four miles, it certainly exists in every conceivable case when distance only is concerned.

But it is said that another fact is to be noticed, *i. e.*, that the law under consideration provides that it shall apply to roads built "at sea-side resorts," and "merely for the transportation of summer travelers and tourists," and that these are such general phrases as fairly to avoid the prohibition of the constitution. The first phrase quoted may well enough be construed to apply to all sea-side resorts, but leaving the court to define what is or is not comprehended therein—whether a place wholly or only partially abandoned during a part of the year. I cannot but think that every court would say that it must appear affirmatively in every such case that the place was wholly abandoned at the time the company ceased its operations. But it seems to me that it is enough

to say that the road in question was not established or organized on any principles, for when so organized there was no law authorizing such a corporation.

Unless the company commence operations and run their trains to carry freight and passengers within five days from the time a copy of the order be made in this case shall have been served upon one of its officers, I shall advise the appointment of a receiver to operate the said road under the said order.

### SLOCUM v. WOOLEY and others.

(Court of Chancery of New Jersey. November 21, 1887.)

1. CONTRACTS—PUBLIC POLICY—AGREEMENT TO OPPOSE PUBLIC ENTERPRISE.  
Complainant conveyed property to his father-in-law for no other consideration than that the latter was to use his influence in opposition to an extension of the street across the property, with an understanding that it was to be reconveyed to the original owner. The influence was used successfully, but the father-in-law refused to reconvey the property. *Held* that, as the object of the contract was the defeat of a public enterprise, the court would not enforce it.
2. TRUSTS—AGREEMENT TO RECONVEY—PAROL EVIDENCE—STATUTE OF FRAUDS.  
Parol evidence is not admissible, under the statute of frauds, to prove a trust, where the grantee to reconvey the property to the grantor. Particularly is this true where the elements of fraud or illegality are present in the agreement.

Bill for specific performance.

*Mr. Heisley* and *Mr. Hartshorne*, for complainant. *Applegate & Hays*, for defendants.

**BIRD, V. C.** The bill in this case is filed to compel the defendants to reconvey to the complainant a tract of land. He was the owner of this land in 1876. The commissioners of Long Branch were then about to extend a street across this land, to which he was opposed. Fearing his inability to succeed in his opposition, and knowing that Jordon Wooley, the husband of one of the defendants, and the father of the others, was a man of considerable influence in that locality, he conveyed the title to the said land to Jordon Wooley, who was his father-in-law. The allegation is, and it is very distinctly proved, that no other consideration passed than that the father-in-law, the grantor, was to use his influence in opposition to the extension of said street, which he did successfully. It is also equally well proved that the father-in-law intended to reconvey the said land to the complainant. These things accomplished to my entire satisfaction. But Jordon Wooley died before such reconveyance was made. Can the defendants be compelled to make such reconveyance? It is said in their behalf that the transaction between the complainant and Jordon Wooley was illegal, because contrary to public policy, and therefore cannot be enforced. The complainant shows that he made the conveyance in order the more effectually to have the benefit of the personal influence of the father-in-law, it was known his father-in-law, the grantee, would be able to exert upon the commissioners. He proved that the grantee had held several important offices, and largely enjoyed the confidence of the citizens. It was to bring about the extension of such a one to bear against the extension of the street, that induced the making of the conveyance, and of the alleged parol agreement to reconvey. The courts will not aid in the enforcement of any contract which has for its object the defeat of a public enterprise, nor will the courts aid any contract which involves his property in peril for a like purpose, in his effort to reconvey the property; whether it appertain to the carrying of the mails, (*Gulick v. Board of Commissioners*, 10 N. J. Law, 87;) or to the laying out of a highway, (*Smith v. Appleton*, 10 N. J. Law, 352;) or to the carrying of freights, (*Union Locomotive Works v. Board of Commissioners*, 37 N. J. Law, 23;) or to marry when a divorce shall have been obtained, (*Noice v. Brown*, 39 N. J. Law, 133;) or to renounce an executory contract, (*Ellicott v. Chamberlin*, 38 N. J. Eq. 604;) or to the procuring of

tract from the government to furnish supplies, (*Tool Co. v. Norris*, 2 Wall. 45;) or to the discharge of an insolvent debtor, (*Sharp v. Teese*, 9 N. J. Law, 352;) or to protecting the property of a debtor against his creditors, (*Church v. Muir*, 33 N. J. Law, 318.)

But, in addition to this, it is insisted upon the part of the defendants that there is not, and cannot be, any legal proof that Jordon Wooley held the title to this property for the complainant. The complainant insists that Mr. Wooley held this in trust for him, and that he was obliged in his life-time, in fulfillment of that trust, to make a conveyance to him, and that his heirs-at-law are, since his death, under the same obligations. The defendants say that such trust can only be established by writing, of which it is admitted there is none. Parol evidence is inadmissible for such purpose. The provisions of the statute of frauds are imperative. *Whyte v. Arthur*, 17 N. J. Eq. 521; *McVay v. McVay*, 10 Atl. Rep. 178; *Smith v. Howell*, 11 N. J. Eq. 349, 352; *Eaton v. Eaton*, 35 N. J. Law, 290. If the rule be thus stringent when free from the taint of fraud or illegality, much more will it apply where either or both of these obnoxious ingredients is or are present. *Perry, Trusts*, § 165.

It is proper that I should say that the effort, on the part of the defendants, to prove that the grantee paid any money, goods, accounts, or other valuable thing for the deed, utterly failed.

I will advise that the bill be dismissed, with costs.

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STATE (ESTELL and another, Prosecutors) v. HAWKINS, Collector.

(*Supreme Court of New Jersey. November 16, 1887.*)

1. TAXATION—SALE—DESCRIPTION—ASSESSOR'S DUPLICATE.

Delinquent tax-payers claimed that the description of their lands in the warrant and notice of sale was insufficient to identify the lands, or ascertain their extent or location. The tax was upon the lands, but the warrant was to make the taxes by a sale of personal property, and contained no description of the lands whatever. In the assessor's duplicate the description of the lands was correct. *Held*, that the description in the duplicate was enough to maintain the tax, and no description of the lands was necessary in the tax warrant.

2. SAME—AUTHORITY OF COLLECTOR TO SELL REALTY—VALIDITY OF TAX WARRANT.

A tax warrant was regularly and legally issued, and commanded the collector to make the taxes by a sale of the goods and chattels of the delinquents. Under the warrant the collector advertised for sale the lands of the delinquents. *Held* that, though this proceeding was unwarranted on the part of the collector, and might have been entirely disregarded by the delinquents, it did not render the tax warrant void.

3. SAME—ASSESSMENT—VALUATION.

Delinquent tax-payers alleged as a defense to their tax that their lands were overvalued for taxation. The evidence as to the value of their lands was that they were worth from \$10,500, the lowest estimate, to \$22,000, the highest estimate. The assessor valued them at \$14,000. *Held*, that the evidence was not sufficient to overthrow the presumption in favor of the correctness of the assessor's valuation.

On *certiorari* to review tax.

The prosecutors were returned by the collector of Weymouth township, Atlantic county, in December, 1885, as delinquent tax-payers. They were in arrears for taxes levied upon their real estate in said township for the years 1884 and 1885. A tax warrant was regularly issued to the collector, commanding him to make their taxes by sale of their goods and chattels. This warrant was returned to the justice who issued it, with the taxes uncollected, and on August 28, 1886, an *alias* tax warrant was issued by the justice to the collector, again commanding him to make the tax by distress and sale of delinquents' personal property. Another warrant was issued on August 17, 1886, commanding the tax to be made by a sale of the lands. On October 21, 1886, the collector, with the warrants of August 17th and Au-

gust 28th in his hands, advertised to sell the lands and real estate of the prosecutors under the warrant of August 28, 1886. The description of lands in the notice of sale was the same as that contained in the assessor's duplicate; namely, Etna tract, farm at Estelleville, the homestead farm where they lived, and meadow on Middle river. Before the date fixed in the notice for the sale this writ of *certiorari* issued.

*Leaming & Black*, for prosecutors. *E. I. P. Abbott, contra.*

KNAPP, J. This writ removes into this court the taxes assessed against the prosecutors for the years 1884 and 1885. By an amendment to the writ the warrants issued for the collection of these taxes were brought in.

Of the several reasons assigned for holding the taxes and proceedings for their collection to be invalid, three only are relied upon by the prosecutors. The first is: "Because the tax warrant, issued on the twenty-sixth day of August, 1886, under which warrant the land of the prosecutors was advertised to be sold, was illegal and void." The warrant thus objected to was an *alias* tax warrant issued by a justice of the peace upon the return of the original, with the names of tax-payers whose assessments had not been collected under such original, among whom the prosecutors were included. It was, therefore, within the power of the justice, and it was made his duty, on such return to issue an *alias* warrant to enforce payment of the taxes which the first had failed to secure. The supplements of April 1, 1868, and March 24, 1869, to the act concerning taxes, (Revision, 1161,) are authority for such official action of the justice, and the precept issued by him, in substance and form appears to be in strict compliance with legal requirement. We fail to see any ground for holding it to be illegal. The special complaint urged under this reason was that the defendant to whom the *alias* warrant was directed for execution had, without any authority in the warrants so to do, advertised to sell the lands of the prosecutors for their unpaid taxes. It is entirely manifest that such action on his part could have no countenance under a precept for the sale of goods and chattels. Any interference with prosecutors' land in virtue of its command to the defendant was entirely unwarranted, and the prosecutors might have wholly disregarded his action. But it is equally plain that such proceeding on his part could not render the warrant void or illegal.

The second reason relied upon complains "that the description of the prosecutors' lands in the warrant of August 28, 1886, and in the collector's notice of sale, was insufficient to identify the land, or to ascertain the location or extent thereof." The particularity in description indicated in this reason is not essential to the validity of a tax on lands. It is required in the duplicate warrant to sell, and notices of sale, only when the liens upon lands for taxes given by the statute is intended to be enforced by sale. *State v. Miles*, 48 N. J. Law, 450. No description of lands is required in a warrant like this to make taxes by distress and sale of personal property. In the warrant complained of no description whatever of the lands of the prosecutors, or others, is to be found. From what has been already said of the notice of sale, its contents will appear to be of little consequence. The terms in which the prosecutors' lands are described in the duplicate fully suffices to maintain the tax, and although attention is called to the fact that the same description runs into the warrant of August 17, 1886, to sell lands, we are not called upon to determine the sufficiency of description for that purpose. It does not appear that any steps had been taken to sell under that warrant, and no reason is directed against its legality. If the question were before us of the sufficiency of the description in the duplicate and warrant for the sale of lands, and such descriptions were considered as not possessing that definiteness required by the tax law, it is now clearly settled that this court may amend the description so as to bring it into compliance with the law. *Conover v. Honce*, 46 N. J. Law,

347. The prosecutors, although not raising the question by their reasons, have, nevertheless, by bringing the assessment here, made it apparent that the design of the authorities in assessing this tax was to make it a lien upon the lands. Although no amendment is made necessary to meet any objections of the prosecutors, the assessment is so far brought within the power of the court that, if doubt exists as to the sufficiency of description, it may hear on the part of the respondent an application to make any desired amendment. *State v. Miles, supra.*

The last reason relied upon is that the lands are overvalued for taxation. In this line of fact the presumption is in favor of the correctness of the estimation made by the assessor, the sworn officer, and before a tax can be disturbed on the ground alleged, the burden is put upon the objector to show by his proofs a clear error in such estimation. When the testimony does not decidedly bear against the correctness of the assessor's action, the court cannot disturb it.

The prosecutors were assessed for 10,618 acres of land. It consisted of 28 different tracts, some wooded, some meadow and swamp lands. It embraced the homestead of the prosecutors of about 70 acres in extent, upon which was a stone mansion of large size, and several out-buildings for laborers. There was also a saw-mill and water-power included. Some of the land, doubtless, had very little value. The valuation placed upon the entire property by the assessor was \$14,000, or an average of about \$1.30 per acre. While it seems almost incredible that in any township in the state that quantity of lands of so varied a character as this appears to be, should be worth so little, yet the testimony on the part of the prosecutors inclines to a lower valuation than that adopted by the assessor. But we think that, upon a careful examination of all the testimony taken, we are not justified in concluding that an error was made by him to the prejudice of the prosecutors. A comparison of the testimony of the various witnesses will show estimations upon the entire property ranging from about \$10,500, as the lowest, to about \$22,000 as the highest. From so wide a diversity of opinion, among experts, as is thus indicated, it would seem impossible to conclude that the estimate of the assessor was above its true value. There is evidence in the case, too persuasive to be overlooked, that the prosecutors, before the assessment was made, had either given to the assessor, or assented to, an estimate of values beyond that which he ultimately placed the property at in the duplicate. The evidence has failed to satisfy us of over-taxation.

The tax should be affirmed, but because of the vexation to prosecutors in advertising their lands for sale, under the tax warrant against their goods, costs should be denied.

#### INHABITANTS OF TOWNSHIP OF BORDENTOWN v. WALLACE and others.

(*Supreme Court of New Jersey.* November 16, 1887.)

##### 1. BASTARDY—PLEA OF INFANCY.

A joint plea of the infancy of one defendant in an action on a joint and several bastardy bond is bad on demurrer.

##### 2. SAME—INFANCY NO DEFENSE.

It is also bad in substance, as in proceedings under the bastardy act the infancy of the reputed father is no defense, when he is legally chargeable in exoneration of the public.

##### 3. SAME—PLEA OF DURESS—AVERMENT OF RELATIONSHIP.

On like bond a joint plea of duress of unlawful imprisonment of one defendant is bad where the relationship, such as father, son, etc., is not averred in the plea.

##### 4. BONDS—NOT LEGALLY DEMANDABLE—VOLUNTARY.

Bonds not demandable by law, if given for the discharge of a public duty, and without unlawful compulsion, have been held good in many cases as voluntary bonds.

## 5. SAME.—IRREGULARITIES IN STATUTORY PROCEEDINGS.

Where it is charged that a voluntary bond has been given, irregularities in proceedings under the statute are irrelevant in an action on the bond.

(*Syllabus by the Court.*)

On demurrer to defendant's pleas.

This action is brought on a joint and several bond given by the defendant to the plaintiff, in the penal sum of \$2,500, with the condition that, if the defendants "shall pay unto the said the inhabitants of the township of Bordertown, or to its successors and assigns, the sum of two and a half dollars, each and every week, to the overseer of the poor for the time being of the said township of Bordertown, to be applied to and for the support of a certain female bastard child, of whom William Wallace, one of the parties hereby bound, the father, for and during such period of time as the said bastard child shall or may be chargeable to the said township, then the said obligation is to be void, otherwise to be and remain in full force and virtue."

The declaration is in the usual form. After praying over, and setting out the bond, the defendants plead jointly six several pleas: (1) *Non est factum*. (2) Infancy of William Wallace. (3) Duress of imprisonment of William Wallace. (4) Bond given before and without hearing of two justices, and when held before one justice of the peace until the bond was given. (5) Bond given to comply with order of filiation when no notice was given of such order. (6) That no order of filiation was made by two justices of the peace according to law.

The plaintiff joins issue on the first plea, and files a demurrer to each of the five succeeding pleas.

*Hutchinson & Belden*, for plaintiffs. *Gilbert & Atkinson*, for defendant.

SCUDDER, J. The defense of the infancy of one of the defendants contained in the joint plea of all is informal and bad. Infancy is a personal privilege of which no one can take advantage but himself. *Voorhees v. Wait*, 15 N. J. Law, 343; *Patterson v. Lippincott*, 47 N. J. Law, 457, 1 A. Rep. 506.

It is also a rule of pleading that personal defenses, as coverture, infancy, etc., shall be pleaded separately; that only when the defense is in its nature joint may several defendants join in the same plea; and that where a plea is bad in part, it is bad *in toto*; if, therefore, two or more defendants join in a plea which is sufficient but for one, and not for the other, the plea is bad as to both. 1 Chit. Pl. 565-567. But it must not be conceded that in a proper case, under our statute for the maintenance of bastard children, the father of a bastard child can escape his obligation, or liability to indemnify the township or municipal body, for the support of such child, if it become chargeable by a plea of infancy, however formally it may be pleaded. Co. Litt. 172 gives the rule of an infant's general liability as follows: "An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physicians and such other necessities, and likewise for his good teaching or instruction whereby he may profit himself afterwards; but if he bind himself in an obligation or other writing with a penalty, for the payment of any of these, the obligation shall not bind him." He adds: "And generally whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit at law." Lord MANSFIELD quotes and applies this last expression in *Zouch v. Parsons*, 3 Burrows, 1794, and adds: "If an infant does a right act, which he ought to do, which he was compellable to do, it shall bind him." This general principle has been used in bastardy cases to bind infants, under statutes passed to protect the public against the support of bastard children that may become chargeable. *People v. Moores*, 4 Denio, 518; *McCall v. Parker*, 13 Metc. 372. In this latter case, in an action on a bond given un-

der the statute, for appearance, etc., it was decided that the infancy of the accused is no defense, either for him or his surety. Prof. Parsons in 1 Pars. Cont. 334, says that there is no principle of law that binds infants when they enter into contracts which owe their validity, and the means of their enforcement, to statutes, because in all statutes containing general words there is an implied or virtual exception in favor of persons whose liability the common law recognizes. He proceeds to illustrate this position by referring to cases where infants have been held exempt from liability to pay calls to shares in incorporated companies, wherein it has been held that there are implied exceptions, in favor of infants, in statutes containing general words. But the words in our bastardy statute requiring the reputed father of a bastard child, who may in some cases be an infant, to give a bond for security, are not so general as to exempt infants from its operation. They are fairly within the words of the act, and its purpose to protect the public against those who would impose the support of their illegitimate offspring on others. Tyler on Infancy, c. 9, p. 139, cites the above principle of liability in its application to bastardy cases with approval.

This second plea is defective in form, being a joint plea of the infancy of one defendant; it is also bad in substance, as in proceedings under the bastardy act the infancy of the reputed father is no defense when he is legally chargeable in exoneration of the public.

The third plea is that the defendant William Wallace was unlawfully imprisoned, and he and the other defendants made and delivered the bond by duress of imprisonment of the said William Wallace. This is also in the same form of pleading as the former plea. A defense which is personal to one defendant is pleaded by all, as if all were equally under duress at the time of making the bond. It is said that the imprisonment was unlawful, and this is well averred, for where he is imprisoned or held under process of a court that has jurisdiction to grant such process, there is no duress; the constraint put upon him must be tortious and unlawful. The same rule is found in the civil law. "The violence which leads to the rescission of a contract should be an unjust violation, *adversus honos mores*, and the exercise of a legal right can never be allowed as a violence of this description; therefore a debtor can have no redress against a contract which he enters into with his creditor, upon the mere pretext that he was intimidated by the threat of being arrested, or even of his being actually under arrest, when he made the contract, provided the creditor had the right to arrest him." 1 Poth. Obl. 26.

But can one defendant to an action on a joint and several bond plead that his co-defendant signed the bond by duress, and therefore he who is bound with him is discharged? 2 Bac. Abr. "Duress," B, gives this statement of the law: "The duress that will avoid a deed must be done to the party himself; therefore, if A. and B. enter into an obligation by reason of duress done to A., B. shall not avoid this obligation, though A. may, because he shall not avoid it by duress to a stranger. But a son shall avoid his deed by duress to his father; so shall the father his deed by reason of duress to his son." This plea does not show the relationship, if any exist between the parties; therefore, on this demurrer, they must stand as strangers to each other, and not entitled to the joint defense of duress to one of the joint and several obligors. There is no express recital on the face of the bond that William Wallace is principal, and the other defendants sureties, but it appears in the condition that he is the father of the bastard child, and it is averred in the third plea that he is the principal in the writing obligatory. Admitting that the relation of principal and sureties between the parties sufficiently appears on the face of the pleading, yet, in cases depending on the rules of common law, the plea of duress, in an action on a joint and several bond, may be good for the principal, while it is not any plea as to the surety. *Hufcombe v. Standing*, Cro. Jac. 187.

In some cases a plea of duress as to all the defendants has been used, when it has been made to appear that there was no jurisdiction in the court or officer to demand or receive a bond as security, and it has been held that both principal and sureties were discharged. *Thompson v. Lockwood*, 15 Johns. Cas. 256; *Fisher v. Shattuck*, 17 Pick. 252. This result is undoubtedly sound in principle, for where there is no jurisdiction, the bond cannot have a legal existence; it is voidable by all; and in such cases the defense is available to both the principal and the surety under the plea of *non est factum*, according to our rules of pleading. It is not, therefore, necessary or permissible to alter what appears to have been so long established, to give the defendants any relief to which they may be legally entitled, by giving another effect to the special plea of duress as to one defendant, which, like infancy and coverture, is a personal defense. This plea does not aver a want of jurisdiction in the court or officer to whom the bond was given, in avoidance of the bond as to all the defendants. Duress is a matter of strict defense, and is carefully treated in our courts. Bonds not demandable by law, if given for the discharge of a public duty, and without illegal compulsion, have been held good in many cases as voluntary bonds. *Sooy v. State*, 38 N. J. Law, 324; *Smilie v. Smith*, 32 N. J. Eq. 51, and notes of reporter.

It was not illegal to arrest the reputed father by warrant issued on a proper complaint by a justice of the peace having jurisdiction to issue such warrant. My conclusion is that this third plea of duress by imprisonment of one of the defendants is bad.

The fourth, fifth, and sixth pleas relate to the forms of procedure, and tend to show that they were erroneous, and reviewable by *certiorari*, if the bond was intended to be one strictly within the statute, although it does not purport to have been founded on an order of filiation. See *McCall v. Parker*, 13 Metc. 372, above cited. But if it was given on the original warrant, arrest, and appearance before a single justice of the peace, as appears on the face of some of the pleadings, and a recovery is claimed on it as a voluntary bond given by the parties to indemnify the township, without suit, then the matters contained in these pleas are irrelevant and immaterial.

All of the pleas will be overruled, as illegally pleaded in this action, excepting the plea of *non est factum*, in answer to which a replication has been filed on admission of liability, and bond of indemnity might be given without further proof or proceedings in the case, if there was no illegal compulsion used to obtain it.

#### STATE v. PEACOCK.

(*Supreme Court of New Jersey. November 6, 1887.*)

##### 1. INSANITY—AS GROUND FOR POSTPONING TRIAL—MODE OF INQUIRY.

No person can be tried for a crime while so mentally deranged as not to be able to conduct his defense. The mode of determining the existence of this mental state may be by an inquiry by the trial court, or by a jury specially impaneled. The trial court should not arrest the course of a trial for the purpose of entering upon such an inquiry upon a mere suggestion of defendant's counsel, without any substantial evidence of the existence of insanity.

##### 2. SAME—EVIDENCE.

When a defendant upon bail was present at the opening of the trial, but afterwards absented himself, evidence that his absence was the result of mental disorder was relevant; but a ruling of the court that insanity could not be shown, but the acts and conversation of the defendant about the time of his leaving could be proved, was not injuriously erroneous.

##### 3. CRIMINAL PRACTICE—PRESENCE OF ACCUSED.

The trial of any indictment (except for a capital offense) commenced in the presence of a defendant may be continued in his voluntary absence.

(*Syllabus by the Court.*)

This writ brings up a judgment of the court of quarter sessions of Burlington county; LEE, BLACK, and GLASGOW, Judges. The defendant, George H. Peacock, was indicted for an assault with intent to commit a rape, and the trial resulted in a verdict of guilty. The defendant at the time of the beginning of the trial was at large upon bail. He was present during the first day of the trial, but absent thereafter during its progress. The trial was conducted by his attorneys, one of whom consented that the verdict should be taken in the absence of the defendant and his counsel. On the last day of the trial an offer was made by his counsel to prove by a brother of the defendant the insanity of the defendant at the time of his disappearance, to rebut the presumption that defendant's absence was from a sense of guilt. This offer the court overruled, but stated that they might prove on behalf of the defendant his acts and conversation to show his excited state and condition at or about the time of his leaving.

*Jacob C. Hendrickson*, for plaintiff in error. *Charles E. Hendrickson, C. H. Bergen*, Prosecutor of the Pleas, and *M. R. Sooy*, for defendant.

REED, J. In the argument addressed to the court the counsel presented three points as their grounds for reversal. *First*, that defendant was shown to the court at a certain stage of the trial, in an aspect that demanded a suspension of the trial till the question of his present sanity was settled. *Second*, that the court erred in rejecting the offer of testimony to prove his then condition of insanity, which proof was relevant as a part of the case of the defense. *Third*, that the trial could not proceed, nor the verdict be taken, in the absence of the defendant.

It is undoubtedly the law that a person who by reason of insanity is unable to comprehend his position, and to make his defense, cannot be placed upon trial for a crime. If the court either before or during the progress of such a trial, either from observation or upon the suggestion of counsel, have facts brought to its attention which raise a doubt of the condition of defendant's mind in this respect, the question should be settled before another step is taken. The method of settling this preliminary question, where it is not the subject of statutory regulation, is within the discretion of the trial court. The court can itself enter upon the inquiry, or submit the question to another jury impaneled for that purpose. *Freeman v. People*, 4 Denio, 9; *Bonds v. State*, Mart. & Y. 143; *Com. v. Braley*, 1 Mass. 103.

Whether the action of the court is the subject of exception, it is not now necessary to decide, for in the present case no objection was made to the action of the court in respect to a suspension of the proceedings, nor was there any request made by the counsel who defended him, that such an inquiry should be instituted. There was nothing proved that displayed such a condition of mental derangement that the court of its own motion was called upon to direct a further inquiry into the matter. No court would be bound to stop, or be justified in arresting, the progress of a trial by a mere suggestion of, but in the absence of any substantial evidence of, the existence of a degree of mental disorder which would unfit the defendant from conducting his cause, or instructing his counsel. There is nothing in the first position taken that calls for further remark.

In respect to the second point, namely, that the proffer of evidence that the defendant was insane was overruled, I also think there was no injurious error. This offer was not made as a defense to the charge in the way of proving that the defendant was incapable of a criminal intent, so far as concerned the commission of the act charged, by reason of insanity existing at the time of the commission of the act. The ground upon which the testimony was relevant was that it went to explain an act of the defendant from which, if unexplained, hurtful inferences might be drawn. Inasmuch as he was competent to go upon the stand in his own behalf, his absence (if it was volun-

tary) would give rise to conclusions that facts which he was at liberty to explain, and did not explain, he could not explain. Any reason why he could not be produced as a witness was relevant. To prove that his absence was involuntary the offer was made. The court gave the defense the privilege showing any act or declaration of the defendant bearing upon his mental condition. The restriction seemed to be against the introduction of expert testimony. Under the ruling of the court several witnesses were examined as to the conduct of the defendant. So far as appears, all the evidence that was producible was introduced.

While the opinions of the witnesses who detailed such facts as were within their knowledge were technically admissible by the weight of authority, yet as the expression of opinion must be preceded by a statement of the facts upon which it is based, and as a juror is as capable of drawing a conclusion from the facts as a witness who is not an expert, I do not think the defendant was prejudiced by the restriction, as none of these witnesses were experts. Nor was an offer of any expert testimony made, and the course of the proceedings shows conclusively that none of importance was producible. The notion that the defendant was deranged was obviously of sudden origin, arising from the fact of the defendant's unaccountable absence. No opportunity for professional observation had been afforded, and any statement by any expert upon the force of the facts detailed, that the defendant was insane, would be of no evidential importance whatever. There was no injurious error apparent upon this branch of the case.

It is in the third point insisted that the verdict was a nullity, because a party to the trial and the rendering of the verdict was in the absence of the defendant. In civil suits the rule is settled that the absence of a party, voluntarily, does not affect the legality of the verdict. In *Cooper v Morris*, 48 N. J. Law, 607, 7 Atl. Rep. 427, it was held by the court of errors that in contemplation of law the parties and their counsel remain in court until a verdict has been rendered, or the jury discharged. In criminal prosecutions the requirement of defendant's presence is dependent upon the grade of the crime, the character of the punishment. In the case of *West v. State*, 22 N. J. Law, 212, it was held that where the sentence of the court inflicts any corporal punishment, it is necessary that the prisoner should be present in person. The defendant was present when the judgment of imprisonment in the present cause was pronounced.

In respect to necessity of the defendant's presence before and after judgment, when action was taken, there exists elsewhere considerable controversy of opinion. In felonies the rule in England was that no writ of error could be conducted in the absence of the defendant, but the practice is settled in this state that his presence is not essential. *Donnelly v. State*, 26 N. J. Law, 463-471.

In felonies in England no verdict could be rendered in the absence of the defendant, but in the case of *State v. Jackson*, 49 N. J. Law, 252, 9 Atl. Rep. 740, it was held that by a long course of procedure the practice has become settled in this state to receive the verdict of the jury in all criminal cases except capital cases, without the presence of the accused. The reasoning which led to the vindication of the legality of this practice applies with equal force to the effect of defendant's absence during the trial. If a defendant, after the commencement of a trial in a criminal case, except a capital case, voluntarily absents himself from the place of trial, this places no legal obstacle in the way of a continuance of the trial in the usual way. As there was nothing to show that the defendant's acts were involuntary, he is not in a position to successfully complain.

The judgment is affirmed.

FOSTER v. SEARSPORT SPOOL & BLOCK CO.<sup>1</sup>

(Supreme Judicial Court of Maine. November 19, 1887.)

LOGGING—FLOATABLE STREAM—MILL-DAM—RIGHT OF PASSAGE—REASONABLE

l-owner, upon a non-tidal floatable stream, must furnish a log-driver with  
sufficiently convenient facilities for running his logs, but is under no legal obligation  
to furnish locks or sluices through which large and loosely constructed rafts  
can run without being broken or the logs displaced.

Verdict for new trial by defendant. From supreme judicial court, Penobscot  
County.

In the case to recover damages alleged to have been sustained by  
the plaintiff in passing the defendant's dam, because of an insufficient  
sluice. The verdict was in favor of the plaintiff, and the defendant  
sought a new trial, on the ground that it was against the law and  
equity.

*J. W. McCrellis* and *John A. Blanchard*, for plaintiff. *Wm. H. McCrellis*  
and *P. Stetson*, for defendant.

*J. W. McCrellis*. We regard this as a very important case; for if the law is as  
the plaintiff claims, it imposes upon mill-owners a duty which it will be  
difficult indeed, if not impossible, for them to perform. It is claimed  
that the owner of a mill-dam upon a floatable stream is obliged to provide a  
sluice through which large and loosely constructed rafts of logs may be run-  
ning without being broken up. We doubt whether the construction of such a sluice  
is practicable. The evidence shows that when one of these rafts enters a  
more rapid current of the water in the sluice draws the front logs  
into the rear logs, and that when the front logs reach the less rapid cur-  
rent at the outlet of the sluice, their speed is suddenly checked, and the rear  
logs are then passing through the more rapid current of the sluice-  
driven against the front logs with such force that they will either  
run over them, and the raft be thus doubled up and broken to pieces.  
Whether it is practicable to construct a sluice that will avoid these  
difficulties is unquestionably, a lock may be so constructed. But how an ordi-  
nary sluice, open at both ends, can be constructed, that will avoid them, we  
do not understand. The water in the sluice must, inevitably, flow  
more rapidly than the water in the pond above. And when the front end of  
the raft enters this more rapid current, what can prevent its being pulled  
into that portion of the raft which still remains in the more sluggish  
water in the pond above? And when the front end of the raft strikes the  
rapid current at the outlet of the sluice, and its speed is thereby sud-  
denly checked, what can prevent the more rapidly moving logs behind from  
running under or over the logs in front? We fail to see. Certainly such  
a sluice can be constructed, if constructed at all, only at very great expense;  
and, we believe, out of all reasonable proportion to any benefit that  
could be conferred upon the log-driver. It has never been decided in this  
State that such a responsibility rests upon the mill-owner. It has been de-  
cided that he must furnish the log-driver with reasonably convenient facili-  
ties for running his logs. But it has never been decided that he is obliged to  
furnish locks or sluices through which large and loosely constructed rafts of  
logs can run without being broken up, or the logs displaced. And we de-  
cline to impose such an obligation upon him. We believe it would be unrea-  
sonable to do so. That to do so would place upon the mill-owner a burden  
out of all proportion to any benefit that would be conferred upon the log-

by *Leslie C. Cornish*, Esq., of the Augusta bar.

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The proof in this case is that, for the express purpose of accommodating log-drivers, the defendants had constructed in their dam a good and substantial sluice, 30 feet and 4 inches wide, and 61 feet and 9 inches long, the descent in its whole length being only three feet and three inches. And it is admitted that the facilities thus provided are legally sufficient for running unrafted logs. But the plaintiff undertook to run his logs in rafts. These rafts were from 20 to 22 feet wide, and from 100 to 115 feet long. And they were loosely constructed. Some of the logs had no fastenings, and were held in place only by the logs by which they were surrounded. The result was that in their passage the rafts were more or less broken up. The witnesses say that when the front logs entered the sluice, they would be pulled away from the hind logs; and that when the front logs reached the outlet of the sluice, they would be driven to the bottom of the river, and their speed being thus suddenly checked, the hind logs would be forced on top of them; and in this way the fastenings would be loosened, and the rafts more or less broken up. And it is for the delay, and the cost of reconstructing the rafts, that the plaintiff claims compensation from the defendants.

In support of this claim it is contended that a log-driver is entitled to the same facilities for running his logs after the erection of a dam as he had before; that if, before the erection of a dam, he could run rafts of logs without their being broken up, he is entitled to the same facilities after the dam is erected. We cannot sustain this proposition to its full extent. The right to erect a dam upon a non-tidal stream, and we are speaking of no others, is a clear statutory right. The legislature, in creating it, must have foreseen that its exercise would to some extent necessarily interfere with the use of such streams as highways. It is impossible to believe that the legislature intended that this newly-created right should be burdened with the expensive, if not the impossible, obligation of providing for log-drivers the same facilities for running their logs as they had before. If the legislature had so intended it would have said so. The statute imposes no such obligation. It is silent upon the subject. The court has, by judicial construction, engrafted upon the statute a condition in favor of log-drivers, to the extent of requiring mill-owners to furnish reasonable facilities for the passage of logs; but it has never determined that it would be reasonable to require them to furnish locks or sluices through which large and loosely constructed rafts of logs may be floated without being broken up. We do not mean to say that it was not the duty of the defendants to prepare a sluice through which the plaintiffs' rafts of logs could be run. What we mean to say is that, in the opinion of the court, the sluice prepared by the defendants was all that could reasonably be required of them, and that they were not responsible for the breaking up of the rafts; and that the verdict against them which holds otherwise is clearly wrong. In support of this conclusion, and for a more full discussion of the relative rights and duties of mill-owners and log-drivers, and the rules by which they are to be measured and adjusted, see *Pearson v. Rolfe*, 76 Me. 880.

Motion sustained, verdict set aside, and a new trial granted.

PETERS, C. J., DANFORTH, VIRGIN, FOSTER, and HASKELL, JJ., concurred.

#### STATE v. PHILLIPS.<sup>1</sup>

(Supreme Judicial Court of Maine. November 22, 1887.)

#### MUNICIPAL CORPORATIONS—ELECTION BY BALLOT—RECONSIDERATION.

When an assessor has been elected by ballot by a municipal body, and his election has been declared and entered of record, it cannot be reconsidered at an adjourned meeting on a subsequent day, and a new election had.

<sup>1</sup>Reported by Leslie C. Cornish, Esq., of the Augusta bar.

On exceptions by respondent from supreme judicial court, Hancock county. On information of the attorney general in the nature of *quo warranto*. Judgment of ouster was rendered at *nisi prius*, and the respondent alleged exceptions. For former report of this case, see 10 Atl. Rep. 447.

*Wiswell & King*, for the State. *John B. Redman*, for respondent.

**LIBBEY, J.** At a meeting of the aldermen of the city of Ellsworth, held on the fifteenth of March, 1887, for the purpose of electing city officers, a ballot was taken for second assessor of taxes, and Albert G. Blaisdell was declared elected, and his election was entered of record. The meeting then took a recess until the next day, March 16th, when, on motion therefor, it was voted to reconsider the election of second assessor, and a new ballot was taken, and the respondent was declared elected. Blaisdell took the necessary oath of office on the first day of April, 1887.

On the foregoing facts the court held that Blaisdell was duly elected, and that the election of Phillips, the respondent, was void, and ordered judgment of ouster against him. To which rulings exceptions were taken.

We think the rulings of the court below correct. The election of assessors was required to be by ballot. While a municipal body having the power of election may set aside a ballot by which it appears that an election is made, for some irregularity or illegality before the election is declared, (*Baker v. Cushman*, 127 Mass. 105,) we are aware of no authority which holds that, when the election by ballot is declared and entered of record, it may be reconsidered at an adjourned meeting on a subsequent day, and a new election had. When the aldermen balloted and declared the election of Blaisdell, and it was recorded, their power over the election to that office was exhausted, unless he should decline to accept it. He did not decline to accept, and the aldermen could not deprive him of the office, except by removal in the manner provided by law. There being no vacancy in the office when the respondent was elected, his election was void.

Exceptions overruled; judgment of ouster affirmed.

**PETERS, C. J., WALTON, DANFORTH, EMERY, and HASKELL, JJ., concurred.**

#### MESSER and another v. STORER and others.<sup>1</sup>

(Supreme Judicial Court of Maine. November 21, 1887.)

##### 1. INSOLVENCY—COMPOSITION—EXAMINATION OF DEBTOR.

When an insolvent debtor produces at a meeting of his creditors the affidavits and composition agreement required by Rev. St. c. 70, § 62, and they are duly filed in the insolvency court, a creditor, who is not a party to the agreement of composition, has not the right to examine the debtor upon all matters relating to his insolvency; but the examination must be limited to the questions whether the agreement was signed by the requisite proportion of the creditors, and whether the debtor had paid or secured to his creditors the percentage agreed upon.

##### 2. EQUITY—PLEADING—ALLEGATIONS IN BILL—INFORMATION AND BELIEF.

An allegation in a bill in equity that the complainant "had been informed and believed" the facts set out were true, is not sufficient; it should allege the facts on information and belief.

From supreme judicial court, Cumberland county.

Bill in equity brought by certain creditors against insolvent debtors, who had received their discharge under a composition agreement, praying that the discharge be annulled and the debtors be required to submit to a full examination in the court of insolvency. Heard on bill, answer, and proof.

*Holmes & Payson*, for plaintiffs. *Wm. L. Putnam*, for defendants.

<sup>1</sup>Reported by Leslie C. Cornish, Esq., of the Augusta bar.

**LIBBEY, J.** This is a bill in equity brought to set aside and annul the discharges granted to the defendants, who were insolvent debtors, as copartners and in their individual capacity, by the court of insolvency. Two grounds are relied upon in support of the bill: *First*, that the court of insolvency denied the petitioners, on their application therefor, the right to examine the insolvent debtors upon all matters relating to their insolvency as provided in section 42, c. 70, Rev. St.; *second*, that the respondents committed acts in fraud of the insolvency statute which renders their discharges invalid.

The first ground involves the construction of the insolvency act in cases of composition. The insolvent debtors produced, at a meeting of the creditors, the affidavit required by section 62, c. 70, and at the same time produced an agreement signed by a majority in number of their creditors, each of whose debts exceed \$50, and by creditors holding three-fourths of all their indebtedness, as required by said section; and the affidavit and agreement were duly filed in the court of insolvency. The debtors had been decreed insolvent, but their estate remained in the hands of the messenger, no proceedings for the choice and appointment of an assignee having been had. After these proceedings were had the plaintiffs in this bill, who were not parties to said agreement, claimed the right to examine the debtors generally upon all matters relating to their insolvency under said section 42. This claim of right was denied them by the judge of the court of insolvency, but they were permitted to examine them upon all matters embraced in the issue whether the "agreement was signed by said proportion of the creditors of the debtors, and that they had paid or secured to all the creditors whose names appeared in the schedules annexed to their affidavit, the percentage named in said composition agreement, and according to the terms thereof." The contention on the part of the plaintiffs is that the judge of the court of insolvency, having denied them their right of general examination, had no power to proceed and discharge the debtors; and that, as they had no right of appeal from his decree, they have the right to maintain this bill, and have the discharges annulled; and this raises directly, for the first time in this court, the question whether, after composition papers are filed in the court, a creditor has the right to examine the debtor generally as to his insolvency as claimed here.

Upon a careful examination of all the provisions of chapter 70 of the Revised Statutes relating to insolvency, we are of opinion that he has not such right, and that the ruling of the judge of the court of insolvency complained of is correct. Sections 1 to 61, inclusive, of said chapter define the jurisdiction of the court of insolvency, and prescribe and regulate the proceedings in insolvency, where the estate of the insolvent debtor is settled and distributed by the court of insolvency. Section 42, before referred to, gives to the creditor the right of general examination of the debtor upon all matters relating to his insolvency before a certificate of discharge shall be granted him. This relates to cases settled in insolvency. Section 62 gives to the debtors, and the requisite number of creditors, after the decree of insolvency has been made, by an agreement of composition for a discharge of their debts, the right to take the case out of the general provisions for the settlement of the estate in insolvency, and when that is accomplished, the debtor is entitled to his discharge, and his estate is to be restored to him upon the payment of all expenses incurred during the proceedings. This mode of the settlement of their estate appears to be independent of the general provisions before referred to, and rests upon contract between the debtor and his creditors. Under it, when "the judge is satisfied that such agreement is signed by said proportion of the creditors of such debtor, and that he has either paid or secured to all the creditors whose names appear in the schedules annexed to his affidavit, the percentage named in such composition agreement, and according to the terms thereof, he shall give to such debtor, under his hand and the seal of the court, a full discharge of all his debts and liabilities contracted prior to the commence-

insolvency proceedings, and named in the schedule annexed to it." These provisions raise no issue before the judge as to the facts stated in the debtor's affidavit, but the only questions presented are whether the agreement is really executed by the requirement of creditors, and the percentage has been paid or secured as required by this section. The statute contemplates that the proceedings shall be prompt and speedy, so that the creditors may receive without delay their share of the debtor's estate shall be restored to him that he may discharge his pleases and prevent loss by waste and deterioration. Hence, from the decree of the judge is given, but in lieu thereof, "a special remedy of another sort is provided. An action to recover his share of the estate to any creditor who deems himself defrauded. This privilege is given to creditors under any other provision of the insolvency law." *Wines*, 76 Me. 394.

General proceedings to be had where the estate of the debtor is set aside should be held to be applicable to composition proceedings, and an objection to be accomplished by composition would be defeated by the litigation which might follow. Then to show more clearly that it is the intention of the legislature that the general provisions of the statute referred to should not apply to composition proceedings, the facts established, will prevent the granting of a discharge to an insolvent under section 46, are not the same as are required to be set forth in the composition proceedings, which, if not true, will invalidate the composition. Inasmuch as there was no question before the court as to the acts of the debtors which would deprive them of their right to a discharge if their estates were settled in insolvency, the only effect of a prolonged examination would have been to delay the proceedings in insolvency.

This question was incidentally, but not directly, before this court in *parte Morgan*, 78 Me. 36, 2 Atl. Rep. 135, where the chief justice, in opinion of the court, says: "He," (the judge,) "could see no exception to the examination of the debtor after the composition agreement was made, and we see none." This, though a *dictum* in that case, we are supported by the law. The reasons for the rule are well stated in

the second ground upon which the plaintiffs claim to maintain their objection to the bill is fatally defective. It alleges merely that the plaintiffs do not believe the facts set out in that clause of the bill. It does not allege the facts upon information and belief. It alleges information and belief of the facts only. Such an allegation in equity is insufficient to support a bill sought to be raised. Again, while it alleges generally certain facts in violation of the insolvency act, it alleges no specific act or fact by which the fraud was committed. It should specify the acts, means, or omissions by which the fraud was committed. It should, at least, be required by section 49, in an application to the court to annul a discharge granted under section 44. It seeks to excuse this defect on the ground that the plaintiffs have no specific knowledge or information. But it is not a bill of discovery. It prays that the discharge may be annulled and that the debtors be required to submit to a full examination in insolvency. We have already held that the plaintiffs have no right to such examination.

Overcoming these objections, the plaintiffs have a clear, adequate, and complete remedy at law under the provisions of section 62. It is, at least, in this case they are entitled to relief in equity, if the bill contains necessary allegations. The costs are assessed with single costs.

C. J., WALTON, VIRGIN, EMERY, and HASKELL, JJ., concurred.

## CAHOON v. MIERS.

(Court of Appeals of Maryland. October Term, 1887.)

## CHATTEL MORTGAGES—RECORDING—TITLE TO INCREASE.

Code Md. art. 24, §§ 29, 39, provides that where a chattel mortgage has duly sworn to and recorded it has the same effect in transferring title, even though the mortgagor may remain in possession, as if the mortgagee had been put in possession of the mortgaged property. In this case the mortgage was duly sworn to and recorded. The mortgage included a lot of hogs, and, under an execution against the mortgagor, the sheriff levied on and sold a lot of shoats which were an increase of the mortgaged hogs. The mortgagee brought replevin for the shoats. *Held*, that the title to the shoats was in the mortgagee.<sup>1</sup>

## Appeal from circuit court, Kent county.

Replevin for "seven large shoats." One Pennington, who was tenant of a farm, executed on the nineteenth of January, 1877, to his landlord, Michael Miers, a chattel mortgage, including, among other personal property, "fifteen shoats," to secure the payment of \$967, with interest, on the nineteenth of January, 1879. The mortgage was duly recorded, and the mortgagor remained in possession of the property, and continued tenant of the farm, but never paid the mortgage debt, or any part of it. In 1886, Cahoon secured judgment against Pennington for \$111.15, and shortly thereafter issued execution thereon. The sheriff levied upon the hogs which he found on the farm. At and before the sale Miers gave notice to the sheriff and the bidders that he claimed the hogs under his mortgage, as the increase of the shoats mentioned therein. The court held that the increase was conceded. The proof was that the sow pigs which were included in the mortgage littered in 1878, and that Pennington kept some of his sows two years, and some three or four years. Four of the hogs sold on were 14 months old, and three were 11 months old, and all were to be following the sows for nurture. It thus appeared that these hogs must have been littered long after default had been made in payment of the mortgage debt, and were not the immediate increase of the original mortgaged stock. Notwithstanding the notice given by Miers, the sheriff proceeded to sell them "subject to all prior claims," and made a special return thereon. The judgment creditor, Cahoon, became the purchaser, and, relying upon the title thus acquired, replevied the hogs from Miers, the mortgagee.

*Hope H. Barroll*, for appellant. *Richard Hynson*, for appellee.

MILLER, J. Authorities are to be found in other states to the effect that a mortgage of domestic animals which makes no mention of the increase, even though made between the parties, so long only as it is necessary for the young to follow the mother for nurture, or at all events that a purchaser of such increase takes subject to the mortgagor who is left in possession thereof, without actual notice of the mortgagee's claim, will acquire a good title; and in one case the same title was held in regard to the title of an attaching creditor. *Jones v. Mortgagee*, 88 N. H. 150; *Winter v. Landphere*, 42 Iowa, 471; *Darling v. Wilson*, 60 N. H. 150. But the law has long been settled differently in this state. In the case of *Evans v. Merriken*, 8 Gill & J. 39, (decided in 1836,) there was a mortgage of several female negro slaves in which nothing was said as to their issue. The mortgagee brought replevin for the increase. One of them had a child, born after default in payment of the mortgage debt, and while the mother was in possession of the mortgaged property.

<sup>1</sup>In the case of *Funk v. Paul*, (Wis.) 24 N. W. Rep. 419, the court held that as between the parties to a mortgage given upon domestic animals during the period of gestation, and which is silent as to the increase, the mortgagee is entitled to the offspring born; and that the mortgage continues to be a valid lien after the young have ceased to follow the mother for their nurture; but that the mortgage is not good as against a third party who purchases the increase in good faith, and for a valuable consideration, after the period of nurture has passed away, and the young are separated from the mother. *also*, *Boggs v. Stankey*, (Neb.) 14 N. W. Rep. 392.

child was about two years old the mortgagor sold it to his son for consideration, who thus became a *bona fide* purchaser for value, and immediately took possession of the child, and raised it, with the knowledge of the mortgagees, and without any claim of title on their part. Eleven months after the date of the mortgage, the mortgagees filed their bill for the redemption of the mortgaged property, and the trustee appointed to make the sale of the child with its mother. The question then arose whether the proceeds of the sale of the child should go to the mortgagees towards payment of the mortgage debt, or to the purchaser from the mortgagor. The chancellor was in favor of the purchaser, but this was reversed by the court. The question was conceded to be a new one, was argued before the court, all the judges but one being present, and they gave it a very close consideration. In behalf of the appellee the argument was pressed that the mortgagor having made no mention of the issue the public had no knowledge where the title was, and they should be secured in dealing with the mortgagor as the legal proprietor; that when the boy was conveyed to the mortgagor, the appellee, who was an innocent third party, and a purchaser for value, did not and could not know that he was touched by the mortgage. But the court, putting aside this argument, rested their decision on the legal effect and operation of the mortgage as between mortgagor and mortgagee. They said, and upon ample authority, that a mortgage does more than merely create a lien for the debt; that upon its execution the legal estate becomes immediately vested in the mortgagee, and the right to redeem follows as a consequence, subject only to the occupancy of the mortgagor, which is only tacitly permitted until the will of the mortgagee is ascertained. That this legal estate is defeasible at law upon the payment of the debt at the time stipulated, but if this is not done, then it becomes absolute at law, and defeasible only in equity where the mortgagor, notwithstanding his default, is permitted to redeem. From this view of the effect of a mortgage, they say it results that the mortgagee must be treated as having an estate or interest in the subject-matter of the mortgage, not absolute, it is true, because such an estate is not imputed by the law of the instrument, but an interest commensurate with the object of the mortgage, and to be attained by it, as a security for the payment of the debt. They applied the rule that the owner of the mother is the owner of her child, and held that the mortgage covered the issue. For authority they cited the case of *Hughes v. Graves*, 1 Litt. (Ky.) 317, where the same question was decided, and where the same decision in regard to the offspring was made. But in the case before them the title of the mortgagee had become absolute at law when the issue was born, and therefore his title to the mother and child, and indefeasible at law, he must of course be entitled at law to the child, subject to the equitable right of the mortgagor to redeem in payment of the mortgage debt. In further support of their view they cited the analogous rule in case of a pledge, and cite from Story, Bailin. &c. it is said: "By the pledge of a thing, not only the thing itself, but the accessories, the natural increase thereof; as, if a flock of sheep are pledged, the young afterwards born are also pledged." And from this they infer that such is the principle in the case of a pledge, where only a special interest passes, *a fortiori* ought the rule to obtain in the case of a mortgage, where the whole legal title passes conditionally to the mortgagee, and more so where, by forfeiture, the title has become absolute at law. Inference thus made to the law of pledges, the court unquestionably applied the rule of the civil law on that subject, and placed a duly sworn to mortgage of personal property upon the same footing in regard to the increase of the property mortgaged. The whole tenor and their reasoning is to this effect. The citation they make from Story is founded on the civil law, and in the same section from which

they cite, the extent to which the doctrine is carried by the Roman law is stated: "*Grege pignori obligato quæ postea nascuntur tenentur, sed ex capilibus decedentibus totus grex fuerit renovatus, pignori tenebitur.*" also, Domat, in giving us the civil-law doctrine as to mortgages and power and the privileges of creditors thereunder, says: "Although the mortgage is restricted to certain things, yet it will nevertheless extend to all that shall arise or proceed from that thing which is mortgaged, or that shall augment or make part of it. Thus when a stud of horses, a herd of cattle, or a flock of sheep is put in pawn, into the creditor's hands, the foals, the lambs, and other beasts which they bring forth, and which augment their number, are likewise engaged for the creditor's security, and if the herd or flock be entirely changed, the heads which have renewed it are engaged in the same manner as the old stock." Domat, Civil Law, (by Strahan,) § 1663.

By our statute law, where the mortgage has been duly sworn to and recorded, as in the case here, it has the same effect in transferring the title, even though the mortgagor may remain in possession, as if the mortgagee had been put in possession of the mortgaged property. Code, art. 24, §§ 29, 30. When thus sworn to and recorded, the law presumes notice of it and of its legal effect, and all persons dealing with the mortgagor with respect to such property, whether as purchasers or creditors, are affected with such notice. Unquestionably, a judgment creditor of the mortgagor may levy upon the mortgaged property, and then file a bill in equity to redeem, and thus secure for his claim what may remain of the proceeds of sale after satisfying the claim due the mortgagee. But at law the title all the while is in the mortgagor, and, this being an action at law involving simply the legal title, we are constrained to hold, under the decision referred to, that the title to the horse in controversy was in the mortgagee. That decision has been acquiesced in, and is recognized as the law of the state, for more than half a century, and we see no good reason for overruling it now. Judgment affirmed.

### BAILEY v. LOVE. (Two Cases)

(Court of Appeals of Maryland. October Term, 1887.)

#### WILL—DEVISE—LIFE-ESTATE—VESTED REMAINDER.

Alexander Lorman died in 1872. After disposing of a part of his property, he gave the rest and residue of his estate to two trustees, to divide into two equal parts. One-half he gave to his executors, in trust, first to pay his aunt Anne Chance \$600 per annum during her life; the remainder of the income of this part was to be divided equally among her children (his cousins) and their heirs, share and share alike, after the death of his aunt the whole of the income was to be divided among the children; after the death of any child of his aunt, then he gave the share which such child (his cousin) was entitled to, to the child or children (his second cousins) of such deceased child absolutely. If any of his cousins had no child, then he gave their share to "Blind Asylum." Mrs. Chancellor (his aunt) had two daughters, one of whom, Margaret Bailey, had two children, a son named Chancellor Bailey, the appellant, and a daughter. Mrs. Love, the latter, died before her mother. Her husband, the appellee, claimed one-half of the estate his wife was supposed to be entitled to under Lorman's will, as his wife had died intestate without issue, and as her husband, he claimed he was entitled to one-half of the estate. Held, that Mrs. Bailey was not entitled to a vested estate in remainder under the will, but was only entitled to a life estate; and that on her death the appellant, her then only surviving child, took the whole share which she would represent.

Two appeals in one record, from circuit court of Baltimore city

*E. Otis Hinkley and St. Geo. R. Fitzhugh*, for appellant. *Charles A. Hall and Thomas Hughes*, for appellee.

IRVING, J. The questions arising on these appeals depend for their decision upon the proper construction to be given to the residuary clause of the will of Alexander Lorman, who died in 1872. The testator gave all the rest and residue "of his estate to two persons, in trust, to divide the same

parts, and then to hold one part in trust for certain persons who are concerned in this appeal, and in certain contingencies to pay the same to the trustees of the Baltimore Asylum for the Blind." Then follows this "The other one-half of the said rest and residue of my estate I do hereby bequeath to my executor, Edward Roberts, and to Major George S. Chancellor, of Spottsylvania county, Virginia, residing at Forest Hill, to the survivor of them, and the executors and administrators of either of them, in trust and confidence nevertheless; that is to say: In trust that the said trustees, collect and receive the rents, profits, and income of the said real estate, and, after paying all taxes, ground-rents, and repairs accruing from the same, to pay to my aunt Anne Chancellor, widow of the late George S. Chancellor, of Chancellorville, Spottsylvania county, Virginia, the amount and sum of \$600, in semi-annual payments, for and during her natural life, and the balance to distribute among the children of my said aunt, and the said share and share alike; the descendants of any deceased child of my said aunt, to take the share or shares to which their or its parent would have been entitled; and from and after the death of my said aunt to distribute the said net income among the children, for and during their natural lives, and from and after the death of any child of my said aunt, to bequeath the share to which such child was entitled to the children of such deceased child, their heirs and assigns, absolutely; and should so happen that any or all of my said cousins, the children of my said aunt, should die without issue, or the descendants of such issue, then I do hereby devise that the part or portion of my estate to which the one so deceased would have been entitled to, to be paid over to the trustees of the Baltimore Asylum for the Blind, heretofore mentioned. And I hereby authorize and empower the said trustees, and the survivor of them, and their successors, in case they survive, in their opinion at any time that it is necessary, for the purpose of making the said part among those entitled under this my will, or in case they may deem it necessary or advantageous to the parties interested in the same, to sell all the whole or any part of my estate, real, personal, or mixed, as they may deem most beneficial to the parties interested; the trusts and trusts, and the rights of the parties in relation to my estate or property so sold, to be charged thereby; but the proceeds of any such sales are to be paid to the said trustees and their successors, in trust, in the same manner as the said real estate, and to the same extent, as they are heretofore, in this my will, to be held the estate or property sold. And I also authorize and empower the said trustees and their successors to invest the proceeds of such sales, or money which may come into their possession under this my will, in any safe and productive manner, either in ground-rents, or other real estate, or in stocks, or funds, or loaned out on mortgage, as the said trustees or their successors may deem most beneficial and advantageous. Any investment may be made from time to time by the said trustees or their successors, and such investments, stocks, funds, so acquired, may be sold, transferred, and assigned from time to time, and the proceeds thereof reinvested as my said trustees or their successors may see fit and proper; but all the estate, property, or other debts acquired or created by any such investment, or interest, shall be held by the said trustees and their successors, in trust, for the said parties, in the same manner in all respects, and to the same extent, as the said real estate, heretofore, in this my will, directed to hold the original estate, or money, or funds so invested, and to be subject to all the trusts, conditions, and restrictions, in every respect, and to the same extent, as the said real estate, shall be held, and go in the same manner, as in this will heretofore

which give rise to the controversy are as follows: Margaret L. Love, one of the daughters of Anne Chancellor, to whom the will gives \$600. Mrs. Bailey had two children: Chancellor Bailey, the

appellant, and Mrs. Love, the wife of the appellee. Mrs. Love died in the life-time of her mother. Upon the death of Mrs. Bailey, Thomas S. Love filed a petition for a division of the property that Mrs. Bailey was supposed to have under the will, and claimed that, as his wife had died intestate and without issue, he was entitled, as surviving husband, to the one-half of the estate. Chancellor Bailey denies this right in his answer, and claimed the whole. The question turns upon whether there was a vested remainder under the will in the children of Margaret L. Bailey, so that Mrs. Love's right was not dependent upon her surviving her mother. The court below decided that the remainder was vested, and awarded Love one-half the estate in right of his wife. From that decree appeal was taken.

In the construction of wills, "the intention is certainly the object of ascertainment in every case." If that can be ascertained, it is to be implicitly obeyed, unless some settled and fixed rule of law and construction prevents. Where the intention cannot be reached with reasonable certainty, and there is doubt and difficulty, it will be solved by the application of some rule of established authority. The law favors the vesting of estates. This court, in *Taylor v. Mosher*, 29 Md. 444, distinctly so declares; but still, whether the testator intended to give a vested estate, or to make it to depend upon a future contingency, depends upon what he says; and if that, with reasonable clearness, indicates a desire that it shall not vest, the intention must control; and this court said most truly, in *Taylor's Case*, "that each will must depend for its construction, in great measure, upon its own peculiar language, phraseology, and circumstances." Inasmuch as every will must be construed by itself, decisions in other will cases can only assist by showing how principles have been applied in cases somewhat analogous. The case of *Taylor v. Mosher*, 29 Md. 444, unquestionably announced the law correctly, and properly solved the doubt arising in that case by holding the estate involved to be a vested estate. But that case is not conclusive of this, as has been insisted by the counsel for the appellee. It is not exactly analogous to this. That case decided that an estate would be held to be vested when it could be done without doing violence to the language of the will or the plainly indicated intent of the testator. In that case the question arose because of the future period named for distribution of the estate; there was no limitation over, in the event of certain future contingencies, as there is in this case; which in our opinion makes the intention of the testator transparent. After making a number of bequests absolutely, to friends and a maternal cousin, he directs certain trustees whom he names to divide the residue of the estate into two equal parts, and creates a trust for the management of each, and the payment of the income to certain persons, and in certain contingencies directing that the estate shall go to the Baltimore Asylum for the Blind. "The evident purpose of the testator was to provide first for certain persons who were blood kin to him, and, upon failure of issue of any of those persons, that the blind asylum should take the share of such person so dying without issue or descendants. It was certainly the purpose of the testator, clearly indicated by his will, that the blind asylum, in certain events which he names, should be the recipient of his bounty; and no construction ought to be given the will which entirely defeats that desire and manifested intention, unless some imperative rule of law or construction requires it. In this case we think it is plain, from the language used, what the testator intended, and the language is not such as to necessarily create a vested estate. The words of futurity employed are not such as point merely to deferred possession or enjoyment." The rule favoring the vesting of estates was adopted, this court says, to prevent possible intestacy. *Taylor's Case*, 29 Md. 451. Where the provision is being made in a will for children, courts enforce the rule with more strictness and readiness than where the provision is made for collaterals; because in the one case it is regarded as "a debt of nature," and in the other, as to collaterals, "it is a mere bounty only." Lord

HARDWICKE in *Billingsley v. Willa*, 3 Atk. 222. This case of *Billingsley v. Willa* is made more analogous to the case now under consideration than that of *Wyllie v. Mosher*, already cited. In *Billingsley's Case*, the interest only, £1,500, was bequeathed to the testator's brother for life. "Therefrom and after the decease of my brother, I give the said sum of fifteen hundred pounds to my said brother and among all and every the younger son or sons, in case there be any younger sons, and all and every daughter and daughters of my brother Copel Billingsley now lawfully begotten or to be begotten, share and share alike; and in case he shall only have daughters lawfully begotten, then only unto among the younger daughter or daughters, and to be paid to them all, and each of them, at and when they shall have attained to their respective ages of one and twenty years." "But in case all the children of my said brother Copel Billingsley except one either son or daughter shall happen to die before their respective ages of twenty-one, then I give one thousand pounds, of the fifteen hundred pounds, to such surviving only child, whether son or daughter, and to be paid him or her at their age of twenty-one years." Copel Billingsley had then children, a son and two daughters, at the time that the will was made, and one son born after testator's death. Letitia, one of Copel Billingsley's daughters, attained the age of 21, and died before her father. After he died, the husband of Letitia claimed, as her representative, a share of the £1,500. The question was then, as here, dependent on whether there was a vested interest in the wife under that will. It was decided the interest was not a vested one, and that Letitia's husband was not entitled.

HARDWICKE laid great stress on the fact that the interest of the fund was given in the first place to the testator's brother, Copel Billingsley, and that the fund, the £1,500, was given from and after the death of Copel Billingsley. If nothing had been said of the interest, and the bequest had been with the language "from and after" his brother's death, then he thought the legacy would have been vested. But he said it was plain from the language used that the children took no interest in the £1,500 till after the death of the father, and that both as to vesting and payment it took place then. It was not to be paid until the children reached 21, if they survived their father. The words "from and after" the death of the annuitant were held here, as in *Wyllie's Case*, not necessarily to prevent vesting, but from their connection, what had preceded, to indicate the purpose of the testator that the legacy should not vest until after the death of Copel Billingsley, the annuitant. The words, "from and after the death of my said aunt," in Mr. Lorman's will, "from and after the death of any child, then I give the share to which such child was entitled to the child or children of such child," with great distinctness and force indicates that no vested estate in the legacy or bequest was intended, or intended to be given, until after the death of Anne Chancellor and child of Anne Chancellor. The testator gives \$600 a year to his cousin Anne Chancellor; the residue of the income of that half of the residue of his estate with which we are dealing was distributed among the children of Anne Chancellor. If one of those children died, the descendants of such child were to take the parent's share of these revenues. After the death of the aunt the testator directs the distribution of the whole income of the estate among her children "during their natural lives respectively." The children of Anne Chancellor, therefore, were to get no part of the *corpus* of the fund during their lives; the interest only was given to them. "From and after the death of any child of my aunt, then I give and bequeath the share to which such deceased child was entitled to the child or children of such deceased child, their heirs and assigns absolutely." No child of Mrs. Chancellor was to enjoy the fund, but the grandchildren only were to do that, if they survived their parents. The grandchildren are given that "absolutely," "to their heirs and assigns;" but if they did not survive their parents, or left no issue, the estate was to go over. No transmissible estate was before given. The language is,

"But if it should so happen that any one or all of my said cousins, the children of my said aunt, should die without issue or descendants of such issue, the direct," etc. Here was the contingency in which the "blind asylum" was to be his beneficiary. Evidently he was providing for his own blood kin, and wanted to keep his property in their hands; but, on failure of such blood kin, he wanted the blind asylum to have it. To make sure of this wish being realized, he fails to use any language which gives his first cousin or his second cousins any present interest in the *corpus* of the estate. He gives his second cousins, as he gives his first cousin, Anne Chancellor, only the income during life; and then when they die, if they leave descendants, such descendants are to take it; and if there are no such descendants, then another object of his bounty was to have the fund. The will should be construed so as to make its provisions effective if possible. We are all of opinion that the testator's meaning, as indicated by the language in which he has chosen to express himself, was as we have above stated it to be. Being so satisfied we cannot hold that the law favors the vesting of estates to the extent of defeating the testator's intention. *Travis v. Morrison*, 28 Ala. 498. The doctrine laid down and applied in *Taylor v. Mosher*, 29 Md. 444, does not so require. On the contrary, that case establishes that every will must be judged of by its own "language, terms, and phraseology." Our conclusion is that Mrs. Bailey was not entitled to a vested estate in remainder, under the will, but was only entitled to life estate; and that on her death Chancellor Bailey, her then only surviving child, took the whole share which she would represent. It follows that the decree of the circuit court from which appeal was taken must be reversed.

Inasmuch as this decision gives the appellant, Chancellor Bailey, the whole fund and estate involved in this controversy, the main question intended to be raised by the second appeal contained in this record becomes unimportant. The petition, the dismissal of which is complained of in this appeal, asked for a modification of the decree to the extent of excluding from its operation, so far as appellee, Love, was concerned, certain amounts forming part of the fund alleged to be the proceeds of real estate sold and reinvested, and which the petitioner claimed retained, under the provisions of the will, its distinctive character as real estate, and would not descend from Mrs. Love to her husband, even if she took a part of the estate. By the dismissal of that petition with costs, the appellant was injured, and the decree which we reverse was upheld. Under our view the appellant takes the whole estate, and the question presented by the petition is immaterial, and need not be considered. The order dismissing that petition will therefore simply be reversed, without further consideration of the question presented by it. Both decrees or decrees and orders from which appeal has been taken will be reversed, and the petition of the appellee for a distribution of the estate must be dismissed. The costs of these appeals will be paid from the fund.

Decrees reversed, and appellee's petition dismissed.

#### COLEMAN v. APPLGARTH and another.

(Court of Appeals of Maryland. October Term, 1887.)

CONTRACT—NUDUM PACTUM—PAROL AGREEMENT TO EXTEND OPTION.

In an action for specific performance of an option contract to purchase real estate the evidence showed that plaintiff paid defendant Applegarth five dollars for an option on a corner lot at \$645, at any time before November 1, 1886. Plaintiff claimed that subsequently Applegarth made a verbal extension of the time in a written option to December 1, 1886. On November 9th, Applegarth sold the lot to defendant Bradley. Between that date and December 1st, plaintiff tendered Applegarth \$645, and demanded a deed, which was refused. Held, that as there was no consideration for the extension of time, it was *nudum pactum*, and not enforceable.

Appeal from the circuit court of Baltimore city.

Richard Bernard, for appellant. Sebastian Brown and J. S. Soiecki, for appellees.

W. C. J. Coleman, the appellant, filed his bill against Applegarth and Bradley, the appellees, for a specific performance of what is alleged to be a contract made by Applegarth with Coleman for the sale of a lot of ground in the city of Baltimore. The contract upon which the application is made, and which is sought to be specifically enforced, reads thus: "For and in consideration of the sum of five dollars paid me, I do hereby give to Charles Coleman the option of purchasing my lot of ground, north-west corner, etc., assigned to me by Wright and McDermot by deed dated, etc., subject to the ground-rent therein mentioned, *at and for the sum of \$645 cash, at any time on or before the first day of November, 1886.*" It was dated the third of September, 1886, and signed by Applegarth alone.

The plaintiff, Coleman, did not exercise his option to purchase within the time specified in the contract, but he alleges in his bill that Applegarth, after making the contract of the third of September, 1886, and before the expiration of the time limited for the exercise of the option, verbally agreed with the plaintiff to extend the time for the exercise of such option to the first of December, 1886. It is further alleged that about the ninth of November, 1886, Applegarth gave notice to the plaintiff, Applegarth sold and assigned by deed the lot of ground to Bradley, for the consideration of \$700; and that subsequently, prior to the first of December, 1886, the plaintiff tendered to Applegarth the lawful money the sum of \$645, and demanded a deed of assignment of the lot of ground, but which was refused. It is also charged that Bradley had no right of the optional right of the plaintiff at the time of taking the deed of assignment from Applegarth, and that such deed was made in fraud of the rights of the plaintiff under the contract of September 3, 1886. The relief prayed is that the deed to Bradley may be declared void, and that Applegarth be decreed to convey the lot of ground to the plaintiff upon payment by him of the \$645, and for general relief.

The defendants, both Applegarth and Bradley, by their answers, deny that there was any binding contract or optional right existing in regard to the sale of the lot, as between Applegarth and the plaintiff, at the time of the sale and assignment of the lot to Bradley, and the latter denies all notice of the alleged assignment for the extension of the time for the exercise of the option by the plaintiff; and both defendants rely upon the statute of frauds as a defense to the relief prayed. The plaintiff was examined as a witness in his own behalf, and he also called and examined both of the defendants as witnesses in support of the allegation of his bill. But without special reference to the proof of the facts, the questions that are decisive of the case may be determined upon the facts as alleged by the bill alone in connection with the contract exhibited as a demurrer, such facts being considered in reference to the grounds of defense interposed by the defendants.

The contract set up is not one of sale and purchase, but simply for the option to purchase within a specified time, and for a given price. It was unilateral and binding upon one party only. There was no mutuality in it, and it was binding upon Applegarth only for the time stipulated for the exercise of the option. After the lapse of the time given, there was nothing to bind Applegarth to accept the price and convey the property; and the fact that this unilateral agreement was reduced to writing added nothing to give it force or operative effect beyond the time therein limited for the exercise of the option by the plaintiff. It is quite true, as contended by the plaintiff, that as a general proposition time is not deemed by courts of equity as being of the essence of contracts; and that in perfected contracts, ordinarily, the fact that the time for performance has passed will not be regarded as a reason for withholding specific execution. But while this is the general rule upon the subject, that

general rule has well-defined exceptions, which are as constantly recognized as the general rule itself. If the parties have, as in this case, expressly treated time as of the essence of the agreement, or if it necessarily follows from the nature and circumstances of the agreement that it should be so regarded, courts of equity will not lend their aid to enforce specifically the agreement, regardless of the limitation of time. 2 Story, Eq. Jur. § 776. Here, time was of the very essence of the agreement, the nominal consideration being paid to the owner for holding the property for the specified time, subject to the right of the plaintiff to exercise his option whether he would buy it or not. When the time limited expired, the contract was at an end, and the right of option gone, if that right has not been extended by some valid binding agreement that can be enforced. This would seem to be the plain dictate of reason, upon the terms and nature of the contract itself; and that is the plain result of the decision of this court made in respect to an optional contract to purchase in the case of *Maughlin v. Perry*, 35 Md. 352, 359, 360.

As must be observed, it is not alleged or pretended that the plaintiff attempted to exercise his option, and to complete a contract of purchase, within the time limited by the written agreement of the third of September, 1886. But it is alleged and shown that before the expiration of such time the defendant Applegarth verbally agreed or promised to extend the time for the exercise of the option by the plaintiff from the first of November to the first of December, 1886, and that it was within this latter or extended period, and after the property had been sold and conveyed to Bradley, that the plaintiff proffered himself ready to accept the property and pay the price therefor. It is quite clear, however, that such offer to accept the property came too late. There was no consideration for the verbal promise or agreement to extend the time, and such promise was a mere *nudum pactum* and therefore not enforceable, to say nothing of the statute of frauds, which has been invoked by the defendants. After the first of November, 1886, the verbal agreement of Applegarth operated simply as a mere continuing offer at the time previously fixed, and which offer only continued until it should be withdrawn or otherwise ended by some act of his; but he was entirely at liberty at any time before acceptance to withdraw the offer; and the subsequent sale and transfer of the property to Bradley had the effect at once of terminating the offer to the plaintiff. Pom. Spec. Perf. of Contr. §§ 60, 61.

The principles that govern in cases like the present are very fully and clearly stated by the English court of appeals in chancery in the case of *Dickinson v. Dodds*, 2 Ch. Div. 463. That case, in several of its features, is not unlike the present. There the owner of property signed a document which purported to be an agreement to sell it at a fixed price, but added a postscript, which he also signed, in these words: "This offer to be left over until Friday, 9 o'clock A. M.,"—two days from the date of the agreement. Upon application of the party who claimed to be vendee of the property for specific performance, it was held, upon full and careful consideration by the court of appeals, that the document amounted only to an offer, which might be withdrawn at any time before acceptance, and that a sale to a third person, which came to the knowledge of the person to whom the offer was made, was an effectual withdrawal of the offer. In the course of his judgment, after declaring the written document to be nothing more than an offer to sell at a fixed price, Lord Justice JAMES said: "There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o'clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he [Dodds] was bound by that promise, and could not in any way withdraw from it, or retract it, until 9 o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clearly settled law, on one of the closest principles of law, that this promise, being a mere

*nudum pactum*, was not binding, and that at any moment before a complete acceptance by Dickinson of the offer Dodds was as free as Dickinson himself. That being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, 'Now I withdraw my offer.' It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retraction. It must, to constitute a contract, appear that the two minds were as one, at the same moment of time; that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing." And Lord Justice MELBISH was quite as explicit in stating his judgment, in the course of which he said: "He was not in point of law bound to hold the offer over until 9 o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when on the next day he made an agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that that contract with Allan was not as good and binding a contract as ever was made. Assuming Allan to have known of it, [there is some dispute about it, and Allan does not admit that he knew of it, but I will assume that he did,] that Dodds had made the offer to Dickinson, and had given him till Friday morning at 9 o'clock to accept it, still in point of law that could not prevent Allan from making a more favorable offer than Dickinson, and entering at once into a binding agreement with Dodds." And further on he says: "If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere *nudum pactum*, how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that if a man who makes an offer dies, the offer cannot be accepted after he is dead; and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that just as when a man who has made an offer dies before it is accepted, it is impossible that it can then be accepted. So when once the person to whom the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer; and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson."

In this case, the plaintiff admits that at the time he proffered to Applegarth acceptance of the previous offer to sell at the price named, he was aware of the fact that the property had been sold to Bradley. It was therefore too late for him to attempt to accept the offer, and there was not, and could not be made, by such proffered acceptance, any binding contract of sale of the property. It follows that the decree of the court below dismissing the bill of the plaintiff must be affirmed.

#### CANTON and others v. MCGRAW.

(Court of Appeals of Maryland. November 18, 1887.)

##### 1. EQUITY—SUIT BY GRANTOR'S HEIRS TO SET ASIDE DEED—PROPER PARTIES.

Complainant, the son of a deceased grantor, brought a suit to set aside his deed for fraud; if the deed was set aside, he and his brothers and sisters would have interests in the real estate conveyed by the deed. *Held*, that his brothers and sisters, as well as the grantee in the deed and her husband, were proper parties to the suit.

##### 2. SAME—LACHES.

A bill to set aside a deed for fraud was filed within less than three years from the date of the deed, and 18 months after the death of the grantor. *Held*, that no laches could be imputed to complainant.

### 3. SAME—PLEADING—MULTIFARIOUSNESS.

Complainant, in a bill to set aside a deed for fraud, asked also that the grantee in the deed should account for the rents and profits of the property she had held under the deed, and also that she be removed from her trusteeship under the will of the grantor in the deed. The court in its decree dismissed the bill so far as it prayed for her removal from the trusteeship, for multifariousness. *Held*, that this action of the court was authorized under equity rule 33, and it was in the scope of equity jurisdiction to compel the fraudulent grantee to account for the rents and profits.

### 4. SAME—PRACTICE—HEARING FURTHER TESTIMONY.

In a suit to set aside a deed, the court, having decided to set it aside, gave the complainant leave to amend by making the executrix and trustee under the will of the grantor, his father, a party as such executrix, she being the grantee in the deed, and already a party in her own right. After the executrix was served, the court refused to hear further testimony, or delay the passage of the decree. *Held* that, as the grantee had taken much testimony in her own behalf, and needed none to sustain her title as executrix, if the deed was set aside, the order of the court was a proper one.

### 5. SAME—EXAMINER—RIGHT TO HAVE CLERK.

Code Md. art. 16, § 144, gives an examiner in equity the right to have a clerk write down the testimony. *Held*, that this provision of the Code is still in force, and has not been affected by any equity rule.

### 6. SAME—SUCCESSIVE EXAMINERS.

After a cause was at issue on motion of the complainant, leave was given to take testimony before any examiner of the court. The first examiner notified to take testimony being sick, complainant took testimony before a second, and finally before a third, examiner. The defendants were present and cross-examined the witnesses. The court, on motion of complainant, ordered the testimony as taken to stand, and that the third examiner should continue taking the testimony under the original order. *Held*, that the order of the court violated none of the equity rules, nor any of the general principles of equity.

### 7. EVIDENCE—LETTERS—ADMISSIONS OF PARTIES.

In a suit to set aside a deed for fraud in obtaining it, the court allowed letters to be introduced, written by parties to the suit, alleged to be the chief perpetrators of the fraud, but written after the deed was obtained. *Held* that, as the letters contained admissions of parties to the suit in regard to the fraudulent obtaining of the deed, those portions containing the admissions were admissible.

Appeal from the circuit court of Baltimore city.

*M. Bannon, Jos. J. Gallagher, and Frederick C. Cook, for appellants.*  
*James McCulgan and Thos. C. Ruddell, for appellee.*

MILLER, J. The principal question involved in this appeal is whether that part of the decree appealed from, which vacates and annuls the deed from James McGraw to his daughter Mrs. Canton, is correct. But before considering that question some preliminary matters must be disposed of.

1. We entertain no doubt whatever as to the right of the complainant to file a bill to vacate this deed. He is a son of James McGraw, the grantor, who died about a year after the deed was executed, leaving a will. If the deed is vacated, he will be entitled under that will to an interest in the property embraced in the deed. Nor have we any doubt but that he was right in making his brothers and sisters, as well as Mrs. Canton, the grantee, and her husband, parties defendant to the suit. These brothers and sisters will also all have an interest under their father's will in the property covered by the deed, if it is vacated, and the bill would in fact have been defective for want of proper parties if they had not been made parties to it.

2. We are equally clear in opinion that the averments in the original and supplemental bills are sufficient to let in all the direct legitimate proof by which this deed has been assailed. There is no rule of equity pleading which requires the pleader, in charging fraud, to set out the proof by which he expects to maintain the charge; and while the law requires the fraud to be proved by clear and satisfactory testimony, it allows a broad scope for the introduction of facts and circumstances bearing even remotely upon the question.

Mrs. Canton was executrix and trustee under the will of her father, as well as grantee in the deed, and the court below, after hearing the case on its merits, and having decided that the deed should be vacated, was of opinion the bill was defective, because she was not made a party in those capacities, as well as in her own right as grantee in the deed; the effect of setting aside the deed being to increase the property she would receive as executrix and trustee; and accordingly held the case over until the bill could be amended so as to make her a party in those capacities. The complainant then filed a petition reciting briefly the averments of the original and supplemental bills, and asking leave to amend the same by interlineation, so as to make Mrs. Canton a party in the capacities specified. Upon this the court passed an order granting the leave to amend as prayed, and directing a subpoena, returnable in 15 days, to issue to Mrs. Canton, and requiring her to answer the bills as executrix and trustee. After some difficulty and delay in the service of this summons, she appeared and answered the bills in these capacities. In this answer she reiterates and adopts the answers already filed by her husband and herself in their own right, and at the same time she objected to all the proof already taken, and claimed she was not bound thereby, because she was not originally made a party as executrix and trustee. She also specially excepted to the testimony of the complainant, upon the ground that he was an incompetent witness, inasmuch as she was now a party as executrix. The complainant then also excepted to the competency of the defendant's, upon the same ground. The court sustained the exceptions to the competency of the parties on both sides, under the evidence act, and excluded so much of their testimony as had been given on their own offer, but refused to delay the passage of the decree, or to allow further evidence to be taken in the case, and overruled her objection to the other testimony, as well as all other objections made, either by herself or the other defendants, to the immediate passage of the decree. Now as to these proceedings our opinion is—

1. That the court was right in refusing to allow further testimony to be taken, and also in overruling all other objections to immediate action upon the case as it then stood. Mrs. Canton had ample opportunity, of which she availed herself abundantly, to take testimony in support of her title as grantee in the deed, and she needed none to sustain that of executrix and trustee, if the deed was set aside. She was in fact thus brought in as a party, in order that the property covered by the deed about to be vacated might be devolved upon her as executrix and trustee under the will, and that her title to such property in these capacities might be formally adjudicated. As to the other defendants, their pecuniary interest was to have this property pass under the bill, and not to Mrs. Canton absolutely, and in her own right, under the deed. Such was unquestionably their legal interest, whatever may have been their feelings and sympathies in behalf of their sister. On their part, therefore, there could be no legal right or reason for delaying the passage of the decree.

2. Whether the court was right in requiring this amendment to be made, and whether, when made, the court was right in excluding by reason thereof the testimony of the parties under the evidence act, are questions about which we need express no decided opinion, and for this reason: if the evidence be excluded, the testimony in favor of the deed will be less strong, and that against it much stronger. It would therefore be for the advantage of the appellants, and especially of Mrs. Canton, that this testimony should be in the case, and we have so considered it in reaching our conclusion upon the main question as to the validity of the deed.

There is a large volume of testimony in the record. The order directing it to be taken was issued in October, 1884, and it was not returned until May, 1886. The witnesses are numerous, and have been examined at great length; to one of them no less than 482 cross-interrogatories were put, and to another 308. A great deal of hearsay and irrelevant matter was introduced, to which

we have paid no attention in making up our judgment, and it is need therefore to consider in detail the many exceptions to portions of the testimony on this ground. Of the other exceptions to the admissibility of evidence only one is of sufficient importance to require notice. A number of letters which passed between John B. McGraw and Michael Canton (some of which were written by the former to Mrs. Canton) were obtained and offered in evidence by the complainant. The mode in which they were obtained cannot be too strongly condemned, but it does not render them inadmissible as evidence. They were written some time after the date of the deed, but the writers of them were parties to the suit, and were the two to whom, with Michael Canton, the testimony on the part of the complainant pointed as the chief perpetrators of the alleged fraud in regard to the deed. The objection to them chiefly relied on, is that, if offered as declarations of co-conspirators binding Mrs. Canton, they are inadmissible because the conspiracy, if there was one, in fact, ended in the procurement of the deed, and they are therefore mere declarations as to past events. The court below sustained this objection, and held the letters inadmissible for that purpose, but considered them pertinent and admissible for the purpose of showing the relations between the alleged conspirators, and the manner in which they lived together after the transaction was completed. But according to our reading of these letters some of them contain important admissions in regard to the fraudulent obtaining of this deed; and, being admissions of parties to the suit, those portions of them which contain such admissions are for that reason admissible; and it is these admissions alone that we have considered.

Objections have also been made to the testimony, or some parts of it, upon the ground that it was irregularly and unlawfully taken. As to these objections all that need be said is:

1. That there is nothing in the equity rules adopted by this court to prevent the examiner before whom the testimony is taken from having a clerk to write it down. No provision on this subject is made by these rules, and rule 1 expressly provides that "all procedure not provided for by the foregoing rules shall remain to be regulated and governed by existing statutes, and by general rules and principles of equity pleading and practice as heretofore existing." By the Code, art. 16, § 144, the right to have a clerk to write down testimony in equity cases is recognized, and his *per diem* fixed. That statute is still in force. Of course the examiner must be present when the testimony is taken, but we find no evidence in this record that any testimony that was received and considered by the court below was taken by a clerk alone, without the presence of an examiner.

2. We find no error in the court's order of January, 1885. The first order was passed upon the application of the complainant in October, 1884, after which cause was at issue upon the amended and supplemental bill and answer thereto, granted leave to the parties, in the usual form, to take testimony before any one of the standing examiners. The complainant then took some testimony before Examiner Wright, who acted for a short time in place of Examiner Tidy, who was originally notified to take the testimony, but who was too sick to act. Mr. Tidy still continuing indisposed, the complainant made arrangements for continuing the taking of testimony before Examiner Stockbridge, and proceeded to take testimony before him. In December, 1884, the authority of Mr. Stockbridge to act was denied by a witness against whom he had issued an attachment to compel her appearance to testify. The complainant thereupon filed his petition, stating what had been done, and asking of the court authority to continue the taking of testimony before Mr. Stockbridge, and that the testimony heretofore taken might stand as if taken under the original order of October, 1884. Upon this petition the court passed the order in question, on the ninth of January, 1885, ordering the testimony heretofore taken to stand as taken regularly before one of the examiners, and

authorizing and directing Mr. Stockbridge to continue taking the testimony under the original order of October, 1884. In passing this order the court, in our opinion, violated no provision of the equity rules, nor any general rule or principle of equity practice; moreover, at the taking of all the testimony prior to the passage of this order, the solicitors of the appellants were present, and cross-examined the witnesses.

It is further contended that the bills should be dismissed, upon the grounds of multifariousness and laches.

1. The amended and supplemental bill is said to be multifarious because it prays, not only that the deed be vacated, but that Mrs. Canton may be removed from her trusteeship under the will, and may be also required to account for the rents and profits of the property she has held under the deed. But the decree appealed from dismisses the bill, so far as it prays for her removal from the trust. This action of the court is expressly authorized by equity rule 33, which was adopted for the very purpose of relieving a bill from the objection of being multifarious, and to save it from being dismissed *in toto* on that ground. As to the prayer for an account, we are clearly of opinion it does not make the bill multifarious. A court of equity has undoubted jurisdiction to vacate a deed for fraud, and when a bill is filed for that purpose, the court will, if it is vacated, proceed to do full and complete justice to all parties interested in the property. It will sell the property, if necessary, and distribute the proceeds, and will always see to it that it goes to the parties entitled to it. To require an account from the fraudulent grantee, of the rents and profits during the time he has held the property under the fraudulent deed, is clearly within the scope of the power and jurisdiction of the court in such cases.

2. The defense of laches always depends upon the circumstances of each case. Here the bill was filed within less than three years after the date of the deed, and only about 16 months after the death of the grantor. Under all the circumstances of the case disclosed by the record, we do not think laches can be imputed to the complainant in the assertion of his right.

Having thus disposed of all the preliminary matters we deem of sufficient importance to notice, we come to the main question in the case: Has the complainant made good his charges against the validity of this deed? We have carefully read and considered the proof on this subject, relying upon none that is open to any valid objection, and rigidly excluding from our minds all extraneous and irrelevant matters found in the record. The testimony of the chief witnesses on either side is in hopeless and irreconcilable conflict on most important and material points, so that one or the other must be discredited. Upon this main question the learned judge of the circuit court (Judge FISHER) has prepared an able and elaborate opinion. In that opinion he says: "Fully appreciating the gravity of the litigation to the parties, and plainly sensible of the responsibilities resting upon myself, I have given to the case more time and more careful consideration than to any other argued before me." He reached the conclusion that the deed is invalid, and should be vacated. After a like careful examination of the case we have reached the same conclusion, and are content to rest our affirmance of his decree on this point upon his opinion.

Decree affirmed and cause remanded.

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#### BLAKESLEE v. TYLER.

(*Supreme Court of Errors of Connecticut. June Term, 1887.*)

1. HIGHWAYS—ESTABLISHMENT—DESCRIPTION OF PLACE OF BEGINNING—ACTION FOR OBSTRUCTING.

Gen. St. Conn. p. 253, § 1, provides that if any person place anything on a highway by which the passage of travelers shall be obstructed, or the highway incum-

bered, it shall be deemed a common nuisance. By the survey of the lay-out of road the eastern point was fixed near E.'s house, thence to run by courses 24 rods to a heap of stones. *Held*, in a *qui tam* action for obstructing the highway, that the place of beginning was accurately fixed.

2. **SAME—ESTABLISHMENT—PAYMENT OF DAMAGES—PRESUMPTION FROM USE.**

A town in 1819 voted in favor of establishing a highway, providing one E. should pay half the expense. The town records showed that it had paid one-half. The road had been maintained at the expense of the town for 70 years. *Held* that, under these circumstances, it will be presumed the owners of the land taken for the road have been paid their damages.

3. **SAME—GATES UPON HIGHWAY—OBSTRUCTION.**

In 1819 a highway was laid out with a gate at each end, and one intermediate. It was described in the lay-out as "a pent highway." *Held*, that the character of the road as a highway was not qualified by the authorization of gates upon it, and those using it were entitled to the protection of the statute against unauthorized obstructions on it.

4. **SAME—PRESUMPTION OF RIGHT TO OBSTRUCT.**

In a *qui tam* action for obstructing a highway by placing bars across it, it was found that defendant and his ancestors owning the land adjoining the highway had maintained bars during the summer, and sometimes in the winter, at the place in question, from 1818 to 1879, by common consent. In 1874 defendant applied to the selectmen for permission to keep the bars there, which was refused. *Held*, that there was no presumption that defendant had acquired from the public the right to obstruct this highway.

*T. E. Doolittle*, for appellant. *W. B. Stoddard* and *L. C. Loomis*, for appellee.

**BEARDSLEY, J** This is a *qui tam* action, brought upon the statute against nuisances. The statute is as follows: "If any person shall place, or suffer to remain, anything in a highway, or dig up the ground therein, by which the passage of travelers shall be obstructed or endangered, or the highway incumbered, the same shall be deemed a common nuisance," etc. Gen. St. p. 253, § 1.

It was admitted that the defendant obstructed the way in question, by placing bars across it, but the parties were at issue upon the question whether such way was a highway within the meaning of the statute quoted. The plaintiff claimed that it was laid out as such in the year 1819, and offered in evidence a petition by Calvin Eaton and others, to the selectmen of the town of Branford, for a highway from the Northford road, etc., dated the twentieth of September, 1817, and a survey and lay-out by the selectmen of a way between the points named in the petition, to be incumbered by three gates, one at each end, and one intermediate, and described in the lay-out as a pent road, and again as a pent highway. It is stated in the lay-out that "said pent highway" is laid out at the joint expense of Calvin Eaton and the town of Branford, and appended to the lay-out is a certificate by Calvin Eaton of his acceptance of the location and conditions of the above described "pent highway." The plaintiff also offered in evidence a vote of the town of Branford, passed April, 1819, approving this "pent highway, provided that Calvin Eaton pays one-half the expense of it," and the following extract from the town records: "1818, 1819. Expense of pent road, Northford. \* \* \* damages and expense, laying out, \$33.74." It is found that the road so laid out is the one in question.

The defendant objected to the lay-out, claiming it was void for uncertainty respecting the eastern terminus of the road. By the survey the eastern initial point is fixed near Peter Elwell's house, and thence the road is to run, by given courses, 24 rods to a heap of stones. It is apparent that by running the line back on the given courses, from the heap of stones, the place of beginning could be accurately fixed.

The defendant claims that it does not appear that the selectmen found the road to be of common convenience and necessity. Such a finding in terms

necessary, as it is involved in the action by the selectmen in laying it out. *Unsend v. Hoyle*, 20 Conn. 7.

The defendant also claims that it does not appear that damages have been paid to the owners of land taken. The court has failed to make any specific finding on the question, but it appears that Eaton agreed to pay one-half the damages, which he has presumably done, in view of the fact that the road has been maintained by the town, and used for nearly 70 years, and the extract from the records is evidence that the town has paid the other half. If there is no evidence on the subject, such payment should be conclusively presumed after such a lapse of time. The court finds, as already suggested, that, since the establishment of said pent road in 1819, the same has been free to persons desiring to use it, but has been mostly used for farm purposes, and for the carting of wood and charcoal, and occasionally by other persons, and that it has been maintained by the town, and repaired as a public highway" from the time when it was laid out and established.

Upon these facts the defendant claims that the road was not a highway within the meaning of the statute referred to, by reason of the gates upon it erected and maintained by authority of the town. Pent roads, or pent highways, are not provided for by the statutes of this state. Provision is made for two kinds of ways only—highways and private ways; one for public, and the other for private use. The defendant suggests that this way is a private one, but there is nothing in its lay-out or history to characterize it as such. The selectmen are now empowered to authorize the erection of gates or bars across private ways. Gen. St. p. 234, § 19. But the statute giving them this power was first passed in 1822, some years after the road was laid out. It is clear that the selectmen attempted to lay out this road as a highway, and if they failed to do so, it is because of the provision for gates upon it. Irrespectively of such lay-out, the use which has been made of the road by the public for nearly 70 years, and the action of the town regarding it, would afford sufficient evidence that it is a highway, unless they are controlled by the fact of the gates. It is apparent that the gates were authorized merely to save the expense of fences next to the road, upon the idea that in view of the kind and amount of travel likely to pass over it, they would not be a serious impediment to it. If they were so in fact, a question might arise whether the selectmen, acting as they do in behalf of the state in the laying out and maintenance of highways, would have power to authorize them. But assuming that in the present case they had such power, the character of the road as a highway was not qualified by the authorization of gates upon it, and those using it were entitled to the protection of the statute against unauthorized obstructions upon it. Ang. Highw. p. 19, § 24; *Whittingham v. Bowen*, 22 Conn. 317, in which case, the question being whether a pent road authorized by the statutes of Vermont was a highway, Judge REDFIELD says: "Those highways which are permitted to be pent are as much public highways as any others, free to all persons who may have occasion to pass along them." The defendant claims that he has acquired by prescription the right to maintain the bars complained of across the highway. The finding is conclusive against him on this point. It is found that he and his ancestors, from whom he has derived title to his land adjoining the highway, have maintained bars at the place in question, during the summer, and sometimes in winter, from 1818 or 1819 down to 1879, but that the bars were so kept there by common consent, and without any claim of right so to do, and that in 1874 the defendant applied to the selectmen for permission to keep the bars there, which was not given. Under such circumstances, if the injury had been to individual property, no presumption of a grant of the right to maintain the bars would arise; certainly it cannot be presumed that he has acquired from the public the right to obstruct this highway. 2 Greenl. Ev. § 539.

## BRIGHAM v. ROSS.

*(Supreme Court of Errors of Connecticut. January Term, 1857.)*

## DEED—CONSTRUCTION—CONVEYANCE OF WATER-POWER.

A deed to plaintiff's grantors gave them the right to construct a ditch, across the lands of grantee to their own, for the purpose of carrying the water from a river to run mills and water-works, and also the privilege of constructing another ditch to carry the water back again. From the upper to the lower ditch there was a fall of 14 feet 4 inches in the river. Mills were erected, and all the fall in the river had been used from the time of the deed in 1807 to the present time. *Held* that, as there was no limitation or reservation of the right conveyed, it must have been the intention of the parties to convey the entire fall from the upper to the lower end of the tract.

*J. L. Hunter*, for appellant. *John M. Hall*, for appellee.

PARK, C. J. This case depends upon the construction to be given to the deed to the plaintiff's grantors of June 1, 1807. That deed conveyed a tract of land by particular description to the grantees, their heirs and assigns, and then proceeded as follows: "And also the right, privilege, and benefit of opening a ditch on our land, in the most convenient place, twelve feet wide, with proper and convenient room to throw the earth, to convey the water from the Willimantic river to the aforesaid premises, for the purpose of carrying a grist-mill, saw-mill, and any other water-works that may be erected on the premises; and also the like liberty is hereby given to said grantees to open a sufficient and proper ditch to drain the water from the above premises to the said river; said ditch to be made in the most convenient place, doing the least damage."

The case finds that the plaintiff is the owner of all the rights conveyed by the deed; that when the deed was given the grantors owned a tract of land bounded westerly, for about three-fourths of a mile, on Willimantic river; that from the upper to the lower line of this tract there was a fall of about 14 feet and 4 inches in the river; that the grantees went into possession of the premises conveyed by the deed, built a mill upon them, and used all the fall of the river in the running of the mill, drawing the water from it at the upper end of the tract, and returning it at the lower end; and that, from the time the deed was given to the present time, all the fall has been so used by the original grantees and those holding under them.

We think the construction which the parties themselves have put upon the deed for this long period, under which the plaintiff and his grantors have claimed and used the entire fall from the upper to the lower end of the tract, is the proper one. The deed contains no reservation of the fall,—no limitation of the right conveyed; but, on the contrary, uses language adapted to a conveyance of the entire fall on the grantors' land. The grantees had the right to take the water of the river to their mill from the upper line of the grantors' land, as they did, and return it to the river at the lower extremity of their land, for by the terms of the deed they were required to consult only their own convenience in the matter. Besides this, the entire fall of the river on the grantors' land was only 14 feet and some inches, scarcely enough for one mill privilege. Obviously, if only a part of the fall was conveyed, there would be almost a certainty of loss. There would have been, therefore, no motive on the part of the grantees to purchase anything less than the entire fall, but a strong motive to the contrary. That such must have been their intention is therefore not only probable, but the practical construction of the deed given to it at the time shows that both parties so then understood it.

There is no error in the judgment appealed from.

(In this opinion the other judges concurred.)

DENNENY v. WEBSTER, Clerk, etc.

(*Supreme Court of Rhode Island.* October 22, 1887.)

**INTOXICATING LIQUORS — CONVICTION FOR ILLEGAL SALE — APPEAL — TIME OF FILING REASONS.**

Petitioner was sentenced for keeping intoxicating liquors for sale in violation of Pub. Laws R. I. c. 596, as amended by chapter 634, and brought in reasons of appeal on the second day of the term of the court to which he appealed. The clerk refused to file and docket the reasons of appeal, and the petitioner asked a *mandamus* to compel the clerk to do so. *Held* that, under section 32 of chapter 596, amended by section 3 of chapter 634, providing that reasons for appeal from sentence for any offense under those chapters shall be filed at least five days before the sitting of the court appealed to, it was too late to file such reasons on the second day of the term, even though Pub. St. R. I. c. 219, containing the general provisions in regard to criminal appeals, allows the appellant to file his reasons on such second day.

Petition for a writ of *mandamus* to clerk of court of common pleas, Providence county.

*Hugh J. Carroll* and *Thomas F. McParlin*, for relator. *Ziba O. Slocum*, Atty. Gen., for respondent.

DURFEE, C. J. This is a petition for a writ of *mandamus* to issue to the respondent, as clerk of the court of common pleas, commanding him to receive, file, and docket certain reasons of appeal. The appeal was taken to the court of common pleas at the term now holding, from a sentence of the district court of the Tenth judicial district, as on complaint against the present petitioner for keeping intoxicating liquors for sale in violation of Pub. Laws R. I. c. 596, of May 27, 1886, as amended by chapter 634 of May 4, 1887. The reasons of appeal were brought in on the second day of the term, and were refused on the ground that they should have been filed at least five days before the sitting of the court. The question is, were they rightly refused? The answer to the question depends upon the construction to be given to certain provisions of the Public Statutes and the Public Laws.

There is no statute which expressly fixes the last day for filing reasons of appeal in criminal cases. The general provisions in regard to criminal appeals are contained in Pub. St. R. I. c. 219. The second section of the chapter provides that, when an appeal is taken, the appellant shall be required to give recognizance, with condition that he will file his reasons of appeal in the court appealed to on or before the second day of the term. This seems to fix by implication such second day as the last day for filing the reasons. Since the enactment of the Public Statutes, chapter 596 of the Public Laws, entitled "An act for the suppression of intemperance," and chapter 634 in amendment of, and in addition to, chapter 596 have been passed. Section 32 of chapter 596, as amended by section 3 of chapter 634, provides that, on appeal from sentence for any offense under said chapters, "the appellant shall be required to give recognizance, \* \* \* with condition that he will file his reasons of appeal, in the court appealed to, at least five days before the sitting of said court." This provision evidently supersedes the provision of section 2 of chapter 219 for appeals from sentences for offenses under chapters 596 and 634, and it seems to fix the fifth day before the sitting of the court appealed to as the last day for filing reasons of appeal in such appeals, instead of the second day of the term. As we have seen, the appeal taken by the relator was an appeal from sentence under chapters 596 and 634. He has evidently committed a breach of his recognizance by not filing his reasons at least five days before the sitting of the court. How, then, has he the right to have his reasons brought in on the second day of the term, filed, and docketed? He claims the right by section 4 of chapter 219, which has not been superseded by any corresponding provision of chapters 596 and 634. Section 4 provides

that if an appellant, having given recognizance, shall neglect to file his reasons, in the court appealed to, on or before the second day of the term, he shall be defaulted on the recognizance, and the attorney general shall file the paper in the case, and proceed in the same manner as if the reasons had been filed on or before the second day. It is contended that this provision recognizes the right of an appellant to file his reasons on the second day of the term, and that it is therefore the duty of the clerk to receive them. Section 4 was framed with reference to section 2 of the same chapter, and naturally adopts the language prescribed for the recognizance required by section 2; but evidently the purpose of section 4, in the provision referred to, is not to give the appellant until the second day of the term to file his reasons, but to prescribe what shall be done in case he *neglects* to file his reasons on or before the second day of the term in accordance with his recognizance; and therefore the section, if applied to appeals under chapters 596 and 634, cannot be held to give the appellant until such second day to file his reasons, but must be construed according to its purpose, as prescribing that the appellant shall be defaulted if he neglects to file his reasons at least five days before the sitting of the court, in accordance with his recognizance, and that thereupon the attorney general shall proceed as stated. Is section 4 capable of being so construed and applied? Doubtless the language of the section is not such as would have been chosen if the section had been originally designed to be so applied; but we cannot suppose that the general assembly intended to relieve defaulting appellants, under chapters 596 and 634, from the consequences attending defaults in the case of other appellants, and therefore the section should, if it can reasonably, be construed as applicable. The language is, "if the appellant *neglects* to file his reasons on or before the second day." Applying the language to the case of an appellant who is bound by his recognizance to file his reasons at least five days before court, does not such appellant *neglect* to file his reasons on or before the second day, when he neglects to file them at least five days before the court as his recognizance requires, instead of waiting until the second day of the term, when he has no right to file them? We incline to think so. Indeed we think such must be the conclusion, unless the provision of section 4 is questioned be rejected as inapplicable; and if the provision is rejected, then there can be no question but that the reasons were rightly refused, because in that case there is plainly nothing but section 32 of chapter 596, as amended by chapter 634, to determine the time for filing, and that section fixes the time as at least five days before court. The relator has clearly committed a breach of his recognizance, and is liable to default therefor under Pub. St. R. I. 248, § 24, whether liable under chapter 219, § 4, or not.

The petition must be denied and dismissed.

#### COGGESHALL v. GROVES and others.

(*Supreme Court of Rhode Island. November 5, 1887.*)

#### INTOXICATING LIQUORS—PROHIBITORY AMENDMENT—PRIOR LICENSE—ACTION ON BOND.

The amendment to the Rhode Island constitution, prohibiting the sale of intoxicating liquors to be used as a beverage, did not take away the right to recover for the breach of the condition of a bond given pursuant to the requirements of the license law in force before and upon the adoption of said amendment.

STINESS, J. This suit is brought upon a bond which was given pursuant to the provisions of Pub. St. c. 87, upon an application for a license to sell intoxicating liquor. Under the statute, the license could not issue until the bond was given, with condition not to violate any of the provisions of the law. The license was granted for the year from July, 1882, to July, 1883, and the breach of the condition is alleged, and has been found by the jury, to have been in August, 1882. May 15, 1886, an amendment to the constitution of the state went into effect, prohibiting the sale of intoxicating liquors to be

used as a beverage. On the first of July following, this action was commenced, and after a verdict for the plaintiff the defendant moved in arrest of judgment, upon the ground that the amendment to the constitution repealed, unconditionally, the license law then in force, and such repeal took away the right to recover upon the bond which was given pursuant to its requirements. They claim that the purpose of the bond was to create a penalty for a violation of the act, additional to other penalties therein prescribed, and the penalties were wiped out together by the amendment to the constitution.

The amendment undoubtedly repealed any provision of law which was inconsistent with it, for such a law thereupon became unconstitutional. The amendment, however, relates only to the sale of liquor. It does not directly annul any right of action, or right to prosecute an action. But the defendants argue that it does this indirectly, because chapter 87 constituted a license system, of which the provision relating to bonds was a part, and that the chapter and system, in every part, became unconstitutional, and therefore repealed, upon the adoption of the amendment. We do not need to decide, in this case, whether this is so or not, for, assuming that the chapter was thus repealed, as claimed by the defendants, we still think the present action can be maintained.

It is beyond question that when a statute is repealed, without a saving clause, all authority to proceed solely under that statute is gone, for it is no longer in existence. Hence if one has been convicted under it, he cannot be sentenced or subjected to a penalty for the violation of the act; and if an action, dependent upon the act, has been commenced, it cannot be further prosecuted; for, when the statute is taken away, all proceedings which depend upon it must fall. So, too, if a right of action is given by statute, it is also taken away with the statute, and cannot be carried to judgment. This result necessarily follows from the dependence of the proceedings upon the statute.

The case of *Dillon v. Linder*, 86 Wis. 344, is an illustration of this rule. A suit was brought to recover damages, under what is known as the civil damage section of a liquor law. The repeal of the law took away the right of action. As the right to recover no longer existed, there could be no judgment, just as in a criminal case there could have been no sentence. The case of *Rood v. Railway Co.*, 43 Wis. 146, is to the same effect. But when the cause of action is one that may subsist and be prosecuted independently of a statute, the repeal neither takes away the right of action nor the right to proceed. The rule, in both cases, is clearly stated in *Graham v. Railway Co.*, 53 Wis. 473, 484, 10 N. W. Rep. 609: "Those rights of action which are expressly given by the statute, and do not exist outside of the statute, are necessarily destroyed by its repeal; but rights of property or causes of action which accrue to a party, and which indirectly depend upon the statute, are not necessarily destroyed by its repeal." Accordingly, where a statute made it unlawful to charge a greater sum for transporting freight than that prescribed in the act, and an action had been brought to recover back an excess that had been paid under protest, it was held that the subsequent repeal of the statute did not take away the plaintiff's right to recover, because he had the right under a common-law action, and the only necessary reference to the statute was to ascertain what was unlawful at the time. In *Butler v. Palmer*, 1 Hill, 324, a right to redeem under a mortgage, given by statute, was held to fall with the repeal of the statute, but Judge COWEN, in the opinion, recognized a distinction between inchoate rights arising under a statute which is destroyed, and rights which may stand independently of the statute. *Grey v. Trade Co.*, 55 Ala. 387, was an action to recover damages which resulted to the plaintiff from the failure of the defendant to conform to the requirements of an act of congress, which was subsequently repealed. The court decided that the suit could be maintained upon the ground that it was not a penal action, nor a suit in the nature of a penal action, under the statute, but a suit

which stood upon a common-law right of recovery. See, also, *Conley v. Palmer*, 2 N. Y. 182; *Palmer v. Conly*, 4 Denio, 374.

The doctrine of these cases seems to be decisive of this case. This is a suit upon a bond. The cause of action does not depend upon the statute, although it grew out of it. The suit is maintainable as a common-law suit. Jurisdiction of the form or cause of action was not given by the statute. It is not a suit for a penalty imposed by the statute. The bond was rather a security to the municipal corporation, about to grant a license, that the licensee would not be an offender against the law. The only necessary reference to the statute is to ascertain whether the obligation still subsists by reason of a breach of its condition, which happens to involve the question whether the statute was violated. If the principal violated the law, and thus broke the condition, the bond thereby became due. It was recoverable in an action of debt, which was not taken away by a repeal of the statute, and which can now be prosecuted. The amendment directed the general assembly to provide by law for carrying it into effect. At the May session, 1886, a law was passed repealing chapter 87, but saving all penalties and forfeitures which had accrued under it. Upon the view which we have taken of the case, it is not necessary to pass upon this phase of the right to maintain the action.

The motion in arrest of judgment must be denied.

#### BARRON v. ARNOLD.

(*Supreme Court of Rhode Island. November 17, 1887.*)

##### 1. ATTACHMENT—WHAT SUBJECT TO—INTOXICATING LIQUOR.

The sale of liquor in Rhode Island, by any person, except a registered pharmacist or his assistant, without a license, being unlawful, such goods cannot be attached.

##### 2. INTOXICATING LIQUORS—SEIZURE UNDER ATTACHMENT—ACTION TO RECOVER.

Pub. St. R. I. c. 87, § 65, provides "no action of any kind shall be had or maintained in any court of this state for the possession or the value of any liquors held, purchased, or sold, contrary to the provisions of this chapter." *Held*, that this section applies only to actions where a party seeks to recover the possession or value of liquors, which by some act of his own, or by some act or contract to which he was a party, are held, or have been disposed of, in violation of law, and does not prevent the owner of such liquors from recovering them when seized under attachment.

##### 3. SAME—SALOON RUN IN NAME OF AGENT—ESTOPPEL.

Plaintiff owned a saloon and the liquors therein. The saloon was run under a license granted to his agent, who represented himself to be the proprietor. The liquors were attached as the property of the agent. *Held*, that plaintiff could maintain an action of replevin for his property, and was not estopped by allowing the agent to hold himself out as the proprietor.

STINESS, J. The statement of facts shows that the plaintiff owned certain liquors kept by him for sale in a saloon, under a license granted to his agent, Brown. The defendant attached the liquors, on a suit against Brown, as his property, and the plaintiff then replevied them, in this suit. The defendant pleads property in Brown, and avows his taking under the attachment. At the time of the attachment, no one, other than a registered pharmacist or his assistant, could sell liquor without a license. Under a similar law, it has been held in Massachusetts and Maine that such property is not attachable. It cannot be sold without a violation of the law. The attachment, therefore, cannot be perfected by sale under execution. If it cannot be sold and its proceeds applied to the execution by the officer, the reasonable conclusion is that it cannot be attached, for all that could be done with it, on attachment without sale, would be to hold it indefinitely. *Ingalls v. Baker*, 13 Allen, 449; *Nichols v. Valentine*, 36 Me. 322. See *contra*, *Howe v. Stewart*, 40 Vt. 145.

The defendant contends that Pub. St. c. 87, § 65, prevents the plaintiff from maintaining his action, because, having no license, he was keeping the

liquor for sale illegally. The section is: "No action of any kind shall be had or maintained in any court of this state, for the possession or the value of any liquors held, purchased, or sold, contrary to the provisions of this chapter." As this provision is in derogation of ordinary rights in regard to property, it should be strictly construed. It does not strip liquor of its character as property, and prohibit actions for the possession or value of all liquors, but it relates solely to actions for liquors held, etc., contrary to law. What then is the force of the word "held" as applicable to this case? We think the section must have been intended to apply to that class of actions where a plaintiff seeks to recover the possession or value of liquors, which, by some act of his own, or by some act or contract to which he is a party, are held, or have been disposed of, in violation of law. The section cannot mean an illegal holding by the defendant alone, for if liquors were in a defendant's possession legitimately, without any violation, or connivance at violation, of law, on the part of the plaintiff, clearly the defendant's unlawful act should not deprive a plaintiff of his remedy; for this would enable a defendant to take advantage of his own wrong. But if a plaintiff had sold or delivered liquors to a defendant to be sold without license, so that both, to some extent, were parties to the violation of the law, then under this section the plaintiff could not maintain his action for the possession or value of the liquors so held by the defendant. The provision is based upon the principle that the law will not aid a party in enforcing an illegal transaction. To apply the principle, however, the transaction which is the subject of the suit must be illegal, or one entered into for illegal purposes.

The case before us calls for no enforcement of an unlawful transaction, as between the plaintiff and defendant. Admitting that the plaintiff was keeping this liquor for sale without a license, as under the agreed facts undoubtedly he was, the question is whether his property, so held, can be taken to pay another man's debt; whether the legislature intended, in such a case, to lay open his property as free booty to any one who might seize it. We do not think the provision was intended to go to this extent. In *Howe v. Stewart*, *supra*, the plaintiff had sold liquor to one Kirk, to be disposed of by him contrary to law, and it was attached as Kirk's property. The plaintiffs replevied, claiming they had stopped the goods *in transitu*. Upon agreed facts, the court decided that the property had become Kirk's by arrival at its destination, and that it could be attached. This was enough to dispose of the case; but the court added that the section prohibiting actions for liquors unlawfully held denied the plaintiff any right of action, even if the goods were *in transitu*. This, however, is not inconsistent with the view we have taken of the section, for the plaintiffs were seeking to enforce a right under a contract, the purpose of which was known to be in contravention of law. In Iowa the question came exactly as in this case, under a similar statute. A majority of the court held that the plaintiff could maintain his action. The scope of the section is fully and very vigorously considered in both opinions in the case, but we think the conclusion of the majority of the court is the sounder. *Monty v. Arneson*, 25 Iowa, 383.

The defendant further claims that the plaintiff is estopped from asserting his title, because he allowed Brown to hold himself out as the proprietor of the saloon. There is no estoppel in this case. The defendant attached Brown's interest in the property, and it is admitted that he had none. If the creditor of Brown were a party to the suit, the fact that his debt was contracted before Brown went into the saloon would be enough to dispose of the question of his estoppel. Exceptions overruled.

## TOWNSEND'S APPEAL.

(Supreme Court of Pennsylvania. October Term, 1887.)

## ABATEMENT—BY DEATH—SUBSTITUTION OF ADMINISTRATOR—HOW BROUGHT IN.

The record shows that this suit was brought by plaintiff against defendant Hill and Townsend, his surety on a promissory note. Townsend died after the suit was brought, and before trial, and his administrators were erroneously substituted as co-defendants, as they claim, without their knowledge or consent, and without notice. The record failed to show at all how they were brought in. *Held*, that the record was fatally defective.

*Certiorari* to common pleas, Armstrong county.

This suit was brought by Simon Truby against John W. Hill and John H. Townsend, his surety on a note signed by them, dated August 11, 1883, payable April, 1884, for \$125. Townsend died after suit was brought, and his administrators were substituted.

*M. F. Leason* and *David Barclay*, for defendants, appellants. *Joseph Bufington* and *John F. Whitworth*, for appellees.

GREEN, J. The record shows a substitution of administrators, but it does not show that it was done at their instance, or by their authority, or by any one acting for them. They claim that it was done without their knowledge or consent, and without any notice to them; and that, in consequence thereof, they were ignorant of the trial, and the cause was tried, and verdict rendered against them, in their absence. Of course this is contrary to the plainest legal principles, and the error must be corrected. Where the record does not show that the substitution was done at the instance of the administrators or their counsel, it should show that they were brought on the record by some sort of notice or process. A *scire facias*, or a rule to show cause in the proper proof of service, would be suitable, and are the usual methods employed. In the present case, the record does not inform us how the representatives of the deceased party were brought in, nor that they were brought in at all, and in that respect it is fatally defective, and cannot sustain the verdict and judgment.

Judgment reversed as to Townsend's administrators, and order of substitution stricken off.

## BECK v. KITTANNING WATER CO.

(Supreme Court of Pennsylvania. October Term, 1887.)

## 1. CONTRACT—CONSTRUCTION—SUPPLY OF WATER.

Plaintiff had a contract with a water company to be supplied with water for use about his brewery. The brewery was destroyed by fire, owing, as plaintiff claimed, to deficiency of water. *Held*, that the plaintiff had no contract with defendant for a supply of water for the extinguishment of fires. Defendant owed him no duty in this respect, and on the basis of such contract he had no cause of action.

## 2. SAME—PRIVITY—REMOTE INTEREST.

Defendant was under contract to supply a town with water for the extinguishment of fires. Plaintiff's brewery in the town was destroyed by fire, owing to deficiency of water. *Held*, that plaintiff's interest in the contract was too remote to raise such privity therein as would enable him to maintain a suit against defendant.

Error to common pleas, Armstrong county.

The plaintiff carried on the business of brewing beer in the borough of Kittanning. His brewery and stock were destroyed by fire. The defendant is a corporation, chartered by special act of assembly, and authorized to supply the borough of Kittanning and its residents with water. Plaintiff had a hydrant supplied by defendant with water for the use of plaintiff about his brewery. When the fire was first discovered, plaintiff attached hose to the hydrant, and attempted to throw water through the hose on the fire, but no water came. Under a contract between the borough and defendant, the lat-

ter had erected fire plugs, and had covenanted to supply these plugs with water. For these plugs the borough paid defendant. The money for this was realized from the taxation of the borough inhabitants. Plaintiff claimed that at the time of the fire there was not an ordinary supply of water at the plugs near the brewery; that, if that supply had been there, the brewery and its contents could have been saved. Upon these grounds the plaintiff claimed that the defendant was liable to him. The defendant's counsel moved a compulsory nonsuit, and the court, H. J. CUMMIN, P. J., delivered the following opinion and judgment: "After a very full and able discussion by counsel of the question involved in this motion, I arrive at the following conclusions: The evidence does not show any unlawful or wrongful act done by the defendant, nor any neglect committed by the defendant, which occasioned the injury to the plaintiff complained of. The evidence disclosed no duty due from the defendant to the plaintiff the omission to perform which would sustain an action on the case. For these reasons, and those assigned in the motion, the motion for a compulsory nonsuit is allowed, and judgment of compulsory nonsuit is now entered. To which ruling of the court plaintiff's counsel take an exception, and at their request bill sealed."

Counsel for plaintiff moved the court *in banc* to take off the judgment of compulsory nonsuit. The motion was refused, and plaintiff brings error.

*J. R. Henderson, H. N. Snyder, and W. S. Pier, for plaintiff. McCain & Leason, for defendants.*

**PER CURIAM.** The plaintiff in this case had no contract with the defendant for a supply of water for the extinguishment of fires, hence it owed him no duty in this respect, and on the basis of such contract he had, of course, no cause of action. As to the contract with the borough, with that he had nothing to do. That was a matter between the municipality and the water company, and his interest in it is too remote to raise such a privity therein as would enable him to maintain this suit. The judgment of the court below is affirmed.

#### BROWNBACK and others v. OZIAS.

(*Supreme Court of Pennsylvania. October 3, 1887.*)

#### MORTGAGE—NOTICE—RECORDING ACTS—ORPHANS' COURT SALES.

A mortgage was executed in 1829, and assigned to A. in 1855, who failed to record his assignment until 1883. In 1866 the mortgagor died, and his administrator, by authority of the orphans' court, sold the mortgaged premises for payment of debts. The administrator's deed to the purchaser, B., recited that the conveyance was subject to the payment of a certain mortgage of \$1,000 unto A. The account of said administrators was duly confirmed. In it credit was claimed for the amount of the mortgage as a debt paid. It appeared in reality that, by an arrangement with B., the sum was not paid, but was deducted from the purchase money. B. paid interest thereon to A., and in 1873 conveyed the premises to C. by a deed containing a like reservation. C. also paid interest to A., but in 1874 conveyed the premises to D. by deed which contained no reservation, and took a mortgage for part of the purchase money. C. continued to pay interest to A. until 1881, and then ceased to do so. Meantime E., who was assignee of the purchase-money mortgage by D. to C., issued a *sci. fa.* thereon, and in 1878 bought in the property at sheriff's sale. In a *sci. fa.* by A. against the original mortgagor, and E. as terre-tenant, held, that E. had a right to assume that A.'s mortgage was discharged by the orphans' court sale, and that, there being no evidence of express notice to him of the contrary, he was in the position of a *bona fide* purchaser for value without notice, and as such entitled to judgment in his favor; that the recitals in the deeds to and from C. were not sufficient to charge E. with notice of the fact that the mortgage had been kept alive, and that they constituted at best but an equitable lien on the land, which was discharged by the sheriff's sale to E.

Error to common pleas, Montgomery county.

*Scire facias, sur mortgage*, by Mira M. Brownback and Lewis C. Brownback, administrators of the estate of George Grubb, or Krupp, deceased, against John Walters, with notice to George Ozias, terre-tenant.

John Walters, in the year 1829, was the owner of certain real estate in the township of Marlborough, upon which he borrowed the sum of \$1,000 of one John Welker, and secured the sum on said real estate, by a mortgage and bond dated April 1, 1829, for said \$1,000, payable the first day of April then next, said mortgage being duly recorded. On the ninth day of April, A. D. 1855, this mortgage was assigned to one George Grubb, (or Krupp, in German,) which assignment was not recorded until April 10, 1883. The interest was paid by the said John Walters to said Welker and Grubb yearly, up to the time of Walters' death, who died intestate about the year 1865. Catharine Walters and Charles Walters, his son, became administrators, and they, under an order of the orphans' court of Montgomery county, dated August 23, 1865, exposed the said mortgaged premises to public sale, but, failing to get a satisfactory price, subsequently sold the same at private sale to Jacob Q. Hartzel, but returned the same as sold at public sale, for the sum of \$3,383.53, which included the mortgage debt of \$1,000, and which it was agreed by the seller, purchaser, and mortgagee should not be paid, but be and remain a charge on said real estate sold and conveyed May 25, 1866, to said Jacob Q. Hartzel for the sum of \$2,383.53, subject to said \$1,000 mortgage. Jacob Q. Hartzel never paid the principal of said mortgage, but paid the interest thereon yearly to said George Grubb, of Chester county, so long as Grubb lived, as he had agreed to do. On the twenty-ninth of October, 1873, said Hartzel conveyed the real estate bound by this \$1,000 mortgage to one Israel Wood, and by the deed made expressly "subject, nevertheless, to the payment of a certain mortgage of \$1,000 unto George Grubb, of the county of Chester, and all interest accruing due thereon from the first day of April ultimo." Grubb died in the fall of 1874. Wood paid the interest due on the same to him while he lived, and afterwards to his administrators until and including 1880. Wood having neglected to pay the interest in 1881, the administrators made inquiry, and found Wood had sold it September 24, 1874, to Edward Mitchell, and took from him, in part payment of the purchase money, a mortgage for \$3,250. This mortgage was assigned to James W. Sunderland, who in turn assigned it to George W. Ozias, the terre-tenant defendant in this suit.

The property, with these mortgage liens of \$1,000 and \$3,250 upon it, was afterwards sold at sheriff's sale upon a judgment obtained on the subsequent mortgage of \$3,250 to said George W. Ozias. The sale took place August 23, 1878, as before stated. The administrators of Grubb knew nothing of these proceedings until 1881, when they attempted to collect that year's interest of Wood.

The court charged that the defendant terre-tenant, Ozias, was a *bona fide* purchaser for value without notice, and that the verdict must be for the defendant. Verdict and judgment accordingly. Plaintiffs thereupon took this writ.

*G. R. Fox, Franklin March, and H. M. Brownback*, for plaintiffs in error.

A person has constructive notice of the contents of any instrument under which he claims, or to which he is referred by such instrument. *Trefts v. King*, 18 Pa. St. 159; *Butcher v. Yocum*, 61 Pa. St. 170; *Biddle v. Moore*, 3 Pa. St. 161; *White v. Foster*, 102 Mass. 375; *George v. Kent*, 7 Allen, 16; *Dexter's Appeal*, 81 Pa. St. 403; *Parke v Chadwick*, 8 Watts & S. 96; *Sergeant v. Ingersoll*, 7 Pa. St. 340; *Jermon v. Lyon*, 81 Pa. St. 107. Constructive notice is evidence of notice. Whatever is sufficient to put a party upon inquiry is, in equity, held to be good notice to bind him. *Speer v. Evans*, 47 Pa. St. 141; *Billington v. Welsh*, 5 Bin. 134; *Bank's Appeal*, 36 Pa. St. 458; *Mellon's Appeal*, 96 Pa. St. 477; *Epley v. Witherow*, 7 Watts,

163; *Lodge v. Simonton*, 2 Pen. & W. 439; *Mulliken v. Graham*, 72 Pa. St. 490; *Angier v. Schieffelin*, Id. 109; *Bancroft v. Consen*, 13 Allen, 50; *Knouff v. Thompson*, 16 Pa. St. 364; *Bellas v. Lloyd*, 2 Watts, 401; *Ogden v. Porterfield*, 84 Pa. St. 191; *Maul v. Rider*, 59 Pa. St. 167; *Hottenstein v. Lerch*, 104 Pa. St. 454; *Parke v. Neeley*, 90 Pa. St. 59; *Hood v. Fahnstock*, 1 Pa. St. 470; *Barnes v. McClinton*, 3 Pen. & W. 67; *Brown v. Henry*, 15 Wkly. Notes Cas. 385.

*Samuel Morey, Jr.*, and *Charles Hunsicker*, for defendant in error.

There was nothing of which Ozias was bound to take notice. *Stewartson v. Watts*, 8 Watts, 392; *Dexter's Appeal*, 81 Pa. St. 403; *Pierce v. Garden*, 83 Pa. St. 211; *Hiester v. Green*, 48 Pa. St. 96; *Heist v. Baker*, 49 Pa. St. 9.

GREEN, J. It is not at all questioned that the orphans' court sale divested the lien of the mortgage in suit. The whole record of that proceeding was in confirmation of that result. When the administrators of John Walton, the mortgagor, filed their account in March, 1867, they claimed and were allowed credit for the payment of the mortgage. When Hartzel conveyed to Wood, it was subject "to the payment of a certain mortgage of one thousand dollars unto George Grubb, of the county of Chester." In point of fact, there never was a mortgage which corresponded with that description, and hence any amount of inquiry would never have developed the existence of such a mortgage.

But it is argued that George Grubb's interest in the original mortgage to Jacob Welker might have been discovered if Ozias had made inquiry of Hartzel, Wood, and Mitchell. Possibly this might be so, but George Grubb's interest in a mortgage made to some other person is not the fact mentioned in the charge contained in the deed from Hartzel to Wood, and hence Ozias was not bound to inquire for it, any more than he would have been bound to inquire for any other fact extrinsic to the record known to his predecessors in the title, and affecting his interest. That which appeared in the language of the charge contained in the deed from Hartzel to Wood would bind a purchaser, of course; but why should he be bound by matter which did not appear there? At the best, this sort of notice is but constructive notice, and it is quite enough to hold a purchaser bound by that which does appear upon the record, without subjecting him to responsibility by construction for that which does not appear there.

The mortgage which is now claimed against the defendant is the original Walters mortgage; but of that instrument there is no kind of description, not even an allusion to it, contained in the deed from Hartzel to Wood. Why should a subsequent purchaser inquire for that mortgage, when there was nothing in the deed which in any manner indicated its existence? When the defendant examined the record he found that the Walters mortgage was discharged by the orphans' court sale, and paid, as indicated by the administrator's account of John Walters' estate. He therefore could not suppose that the description in the Hartzel deed of a mortgage payable to George Grubb could refer to it, and hence he was under no legal duty to inquire whether that description was intended to refer to that mortgage. If he was under no legal duty to make such an inquiry, he is not chargeable with constructive notice for breach of such a duty. Grubb did not see fit to record his assignment of the Walters mortgage, and he thereby prevented innocent subsequent purchasers from acquiring a knowledge of his interest in that mortgage, by the method which the law recognizes as proper constructive notice. It was his own dereliction, and, if loss to him is occasioned by it, that loss must rest with him, rather than with an innocent purchaser, who, in consequence of that very dereliction, was prevented from acquiring a knowledge of Grubb's interest which would have enabled him to protect himself.

Between Grubb and Ozias, so far as this question is concerned, there is no equality of innocence. Grubb knew that he held an assignment of the Walters mortgage, and that he had not recorded it. He knew, also, that the mortgage was discharged by the orphans' court sale, and that its lien was only preserved, if at all, by a private agreement between Hartzel and Walters' administrators. He is presumed to know that, while Hartzel would be bound by that agreement, it would not be binding upon a subsequent purchaser without notice. If he wished to preserve the lien of the mortgage debt against all persons, he should either have taken a new mortgage in his own name, or, at the very least, placed his assignment from Welker on record, so that there would have at least been a duty of inquiry resting upon a purchaser. It is quite probable he was not a party to the insertion of the change in the deed from Hartzel to Wood. If he was, his dereliction would be increased by the incorrectness of the description. If he was not, he can claim no benefit from it other than that which necessarily and technically belongs to it. Tried by that standard, the charge in the deed is in no sense notice of a mortgage from Walters to Welker made in 1829, and that particular mortgage is the only cause of action set up against the defendant, Ozias.

It is almost needless to add that the charge in the deed itself is not available to the plaintiff as a lien, since it would constitute at the best but an equitable lien, which was discharged by the sheriff's sale at which the defendant purchased the land. *Pierce v. Gardner*, 83 Pa. St. 211. Judgment affirmed.

#### FIRST NAT. BANK OF TAMAQUA v. SHOEMAKER.

(Supreme Court of Pennsylvania. October 3, 1887.)

##### 1. BANKS AND BANKING—CHECKS—ACTION BY PAYEE AGAINST BANK.

A holder of a bank check has no right of action on the check against the bank, although there are funds of the drawer in the hands of the bank sufficient to pay the check, unless the bank has accepted the check in the hands of the holder.<sup>1</sup>

##### 2. SAME—SUBSTITUTION OF DRAWER AS PLAINTIFF.

Where a check is drawn by A. to the order of B., A. has no right of action upon the same; his remedy against the bank is an action for damages for dishonoring his check, or he can bring *assumpsit* for the amount of his deposit; his rights of action being different, therefore, from that of B., it is error in an action by B. against the bank, where there has been no acceptance by the latter, to allow an amendment substituting A. as the legal plaintiff, particularly when A.'s rights are subject to the bar of the statute of limitations.

Error to court of common pleas, Schuylkill county.

Case by Daniel Shepp and J. B. Harsh, trading as Daniel Shepp & Co., against the First National Bank of Tamaqua, to receive the amount of a check on said bank, given by John A. Shoemaker to plaintiffs.

On the trial before BECHTEL, J., the following facts appeared:

On August 26, 1874, John A. Shoemaker, being then indebted to plaintiffs, gave them his check on defendant, for \$899.31, in payment of his indebtedness; on the same day, Daniel Shepp presented this check, properly indorsed, to the bank for payment, which was refused; the check was then duly protested for non-payment, and on August 24, 1874, this suit was brought.

On November 24, 1885, the case was called for trial, and the plaintiffs proved the indebtedness of Shoemaker to the plaintiffs; the check of John A.

<sup>1</sup>No suit in equity can be maintained upon the mere possession and production of a check by the payee. In order to work an assignment in equity, some equitable circumstance must exist, as the insolvency of the drawer, or the fact that notice has been given to the bank of the drawing of the check. *Schuler v. Bank*, 27 Fed. Rep. 424. In *Illinois* it is held that a check drawn by a depositor upon his banker operates as an assignment of the sum named in the check, and the payee can recover such sum from the bank. *Bank v. Indiana Banking Co.*, 2 N. E. Rep. 401.

Shoemaker given to said Shepp & Co. on the twenty-sixth of August, 1874; the presentation of the check at the bank, and demand for its payment, and the refusal of the bank to pay the check; the fact that including the proceeds of a note of the Tamaqua Rolling-Mill Company, discounted on the eighteenth of August, 1874, there was sufficient to pay the said check, and \$76.58 in addition.

It appeared that on June 23, 1874, the bank had discounted for Shoemaker another note of the Rolling-Mill Company, for \$462.61, which fell due on August 26, 1874, and was protested for non-payment; that the company failed on the same day; and, also, that Shoemaker had, earlier in the day of August 26, 1874, presented to the bank a check; and that the same had been refused payment, because the bank applied the proceeds of the note discounted on August 18th, to the payment of the note maturing August 26, 1874.

Plaintiffs then offered in evidence the check in suit, with the certificate of protest: Objected to. Objection overruled. Evidence admitted. Exception. (First assignment of error.)

Plaintiffs then moved to amend the record by adding the name of John A. Shoemaker to the use of D. Shepp & Co., as party plaintiffs, to which defendant's counsel objected, but the court allowed the amendment. Exception. (Second assignment of error.)

The president of the bank testified that when the note of August 18th was presented for discount, it was deferred to the committee on discounts, who agreed to discount it provided that its proceeds should go to the note due August 26th; and that Shoemaker agreed to this.

Verdict for plaintiffs \$671.61, and judgment thereon, whereupon defendant took this writ.

*Guy B. Farquhar*, for plaintiff in error.

A check or draft, without more, is neither a legal nor equitable assignment or appropriation of a corresponding amount of the drawer's funds in the hands of the drawee, but gives the payee no right of action against the drawee, nor any valid claim to the fund of the drawer in his hands. *Bank's Appeal*, 10 Wkly. Notes Cas. 42.

The assignor must, by some insignificant act, express his intention that the assignee shall have the debt or right in question, and second, the assignment must be of the whole debt. *Palmer v. Merrill*, 6 Cush. 282; *Byles, Bills*, \*17. It was error to add a new party to the record, who had new rights, and whose cause of action was barred by the statute of limitations.

*S. H. Kaercher* and *H. B. Graeff*, for defendants in error.

In *Bank's Appeal*, cited by plaintiff in error, the check was not presented for payment until after a general assignment by the drawer for the benefit of creditors had been made, and the rights of other parties had intervened. If the bank, in violation of its duty, disallows a check, the holder may be injured quite as much as the drawer, and the bank ought to be answerable to each party injured by breach of the contract. *Saylor v. Bushong*, 12 Wkly. Notes Cas. 81; *Laber v. Steppacher*, 103 Pa. St. 81; *Stedman v. Carstairs*, 97 Pa. St. 237; *Bank v. Leyrand*, 103 Pa. St. 314; *Morse, Banks*, 35; *Bank v. Henninger*, 105 Pa. St. 496. Amendments, where no change is wrought in the cause of action, are a matter of right, and the court is bound to allow the same. *Cochran v. Arnold*, 58 Pa. St. 399; *Kaylor v. Shaffner*, 24 Pa. St. 489; *Richter v. Cummings*, 60 Pa. St. 441; *Patton v. Railway Co.*, 96 Pa. St. 171; *Knapp v. Hartung*, 73 Pa. St. 291.

GREEN, J. It has been repeatedly held that the holder of a bank check has no right of action on the check against the bank. Although there may be funds of the drawer sufficient to pay the check, in the hands of the bank at

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the time of presentment, and no other appropriation of them made, yet the bank may refuse payment without subjecting itself to a suit by the holder. *Saylor v. Bushong*, 12 Wkly. Notes Cas. 81; *Bank v. McMichael*, 106 Pa. St. 460; *Bank v. Millard*, 10 Wall. 152. In *Bank's Appeal*, 10 Wkly. Notes Cas. 41, we said that an ordinary bank check "is neither a legal nor an equitable assignment or appropriation of a corresponding amount of the drawer's funds in the hands of the drawee. It gives the payee no right of action against the drawee, nor any valid claim to the funds of the drawee in his hands." Of course, if the bank has accepted the check in the hands of the holder, it then becomes liable to pay, and must respond in an action by the holder.

In the present case there was no acceptance of Shoemaker's check in favor of Shepp & Co., nor any acts done indicating an intention to accept it. On the contrary, payment was refused as soon as it was presented. The action was brought by Shepp & Co., in their own name only, in August, 1874. On the trial, in November, 1885, the court permitted an amendment of the record by adding "John A. Shoemaker, to the use of D. Shepp & Co.," and a recovery was then had, upon the theory that the cause of action was the same, and it was simply adding the name of the legal plaintiff. But it is very clear that the cause of action is not the same in any point of view; and that John A. Shoemaker could not be the legal plaintiff in an action upon the check in suit. It is a check drawn by Shoemaker payable to the order of Shepp & Co., and hence the whole right of action upon it was vested in Shepp & Co., when accepted by the bank. Shoemaker could under no circumstances bring an action upon the check as an obligation payable to himself. He could sue the bank to recover damages for dishonoring his check, or he could bring an action of *assumpsit* to recover the amount of his deposit, as for money had and received, but in no event could he maintain any action upon the check itself. In 2 Pars. Bills & N. 61, it is thus said: "One of the many reasons why the holder of a check upon the refusal of the bank to pay it, having sufficient funds of the drawer therefor, cannot maintain an action against the bank is the existence of such a right of action on the part of the drawer, who may sue the bank in tort for the wrong done, or in *assumpsit*, for the breach of the implied contract to honor promptly the customer's checks. In such action nominal damages may be recovered, though no actual damage be shown." The writer further states that the jury may give the plaintiff in such an action such reasonable damages as he may have sustained from the dishonor. It follows that adding Shoemaker's name as legal plaintiff conferred no additional right of action upon Shepp & Co. in relation to the check in suit. As to Shoemaker's right of action to recover damages for the dishonor of his check, or specifically to recover his deposit, it was of course entirely different from any right of action possessed by Shepp & Co., either on the check or for any other cause; and hence the amendment could not properly be allowed. Either of Shoemaker's rights of action was subject to the bar of the statute of limitations several years before the amendment was allowed, and therefore it was error to permit the amendment against the present defendant, who would thereby be deprived of the privilege of pleading the statute.

An amendment to a declaration will not be allowed if a new cause of action is thereby introduced, especially where the new cause is so old as to have been barred by the statute of limitations. *Wright v. Hart's Adm'r*, 44 Pa. St. 454. See, also, *Smith v. Smith*, 45 Pa. St. 404, and *Tyrrill v. Lamb*, 96 Pa. St. 464. The assignments of error are all sustained.

Judgment reversed.

## TAYLOR'S APPEAL.

(Supreme Court of Pennsylvania. October 3, 1887.)

## CONSTRUCTION OF TRUST DEEDS—ADVANCEMENTS BY TRUSTEE.

One in embarrassed circumstances conveyed real estate to a trustee, in trust to pay debts, and to apply the income to the support and maintenance of the grantor and his wife, and, in case the income should prove insufficient to supply the wants and necessities of the said grantor and his wife, giving him power to sell or mortgage the same for that purpose; and upon further trust, after the grantor's death, to convey the premises, excepting his widow's dower, to his heirs. The trustee accepted the trust, and mortgaged the premises for as large a loan as he could obtain, which he employed to pay the grantor's debts. The income proved entirely sufficient to support the grantor and his family, whereupon the trustee leased to him a store, and afterwards a farm, belonging to the trustee, at a fair rental. The grantor occupied the store, and afterwards lived on the farm, with his family. The trustee advanced to the grantor a small sum to buy farm implements, and also, from time to time, advanced him divers other sums, for which the grantor gave his receipts. It did not appear what use was made of all said advancements, but it was evidence that part was used to stock the store, and part to purchase an interest in a vessel which proved a loss. After the grantor's death intestate, the trustee continued to act for several years without objection from the widow and children, paying the net income for the support of herself and her family. He then filed an account claiming credit for the rent of the store and farm, and for all his advances of money, with interest; also for all payments made after the grantor's death. Held, that, under the terms of the trust deed, the trustee was entitled to credit for the rents of the store and farm, the sum expended for farm implements, and the income paid for by him after the grantor's death, but that he was not entitled to credit for the sums made by him used to stock the store, and purchase the interest in the vessel, for any others, the appropriation of which by the grantor did not appear by competent evidence.

## WIDOW'S DOWER—COMPETENCY—TRUSTEE.

A trustee is not a competent witness as to matters between himself and a deceased testator, *vis que trust*, but is a competent witness as to matters between himself and living parties, *vis que trust*.

Appeal of Caleb N. Taylor from a decree of the common pleas No. 1, Philadelphia county.

Filed in equity by Louisa M. Joyce and others, widow and children of Anthony K. Joyce, against Caleb N. Taylor, to compel a conveyance by defendant of the title of certain real estate, and an account of his collection of the same. An answer was filed, with an account annexed, showing a balance due to defendant. D. Webster Dougherty, Esq., was appointed referee, and upon the filing of his report the case was referred to William E. Wistar, Esq., as master, before whom the facts appeared to be as fol-

low: That Anthony K. Joyce and Louisa M. his wife, by an indenture dated April 11, 1849, and duly recorded, granted and conveyed certain real estate situate on Market and Minor streets, in the city of Philadelphia, together with all other real and personal estate and property, to Caleb N. Taylor, in and to whom they should pay their debts, and then to receive and take the income and apply the same to the maintenance and support of the said Anthony K. Joyce and Louisa M., his wife, during all the time of their natural lives; and in case the income should prove insufficient to supply the wants and necessities of the said Anthony K. Joyce and Louisa M., his wife, to sell or mortgage, as occasion may arise, a portion or all of the said real estate for that purpose. And upon the further trust, from and immediately after the decease of the said Anthony K. Joyce, that the said Caleb N. Taylor shall and will convey and transfer all the said trust-estate and effects (the widow's dower excepted) remaining in his hands to such person or persons as the said Anthony K. Joyce by his last will limit and appoint, and, in default of any such limitation or appointment, to such persons as under the intestate laws of this common-

wealth may be his heirs and legal representatives. That, at the time of execution of the foregoing deed, Anthony K. Joyce, who was then a twenty-three years old, was in very moderate circumstances, and constantly importuned by parties to whom he was largely indebted.

"The trust, when the defendant Caleb N. Taylor accepted the management and for many years afterwards, yielded an income of hardly \$600 per annum and at no time did it amount to more than \$1,000, until about a year previous to Joyce's death, at which time the remainder in a store on Market street was brought into possession, and it then reached the sum of nearly \$4,000. That the entire estate consisted of two stores on Minor street, and a remainder in the store on Market street; the income from which was entirely inadequate to support and maintain the settlor and his family. That, in consequence of his increasing wants and absolute necessities, Joyce procured from the defendant Taylor, during 1854 and succeeding years, considerable sums in excess of his actual income, which he used first in business as a coal merchant in Bristol, and, when that proved unremunerative, in stocking and carrying on a business of one hundred and forty acres in Bucks county, Pennsylvania. That the means of these enterprises he added sufficiently to his resources to enable him to support and rear his family, which consisted at the time of his death of a wife and eight children. That when he was in business at Bristol, he occupied a store belonging to the defendant, for which the latter charged him his account the annual rent of \$250; and that the farm which he afterwards occupied and lived on also belonged to the defendant, for which he charged the rent of \$800 per annum. That the rent charged for the store and farm was not only moderate and reasonable, but, if anything, less than its value.

"That during the time Joyce occupied the farm it was improved to a great extent by draining and manuring. Some alterations and repairs were made to the buildings; a two-story stone kitchen being substituted in place of a one-story that previously existed, and the out-buildings being repaired. It was understood between Joyce and the defendant that, if the former should sell the farm for more than its original cost, he should have the excess. Several attempts were made by Joyce to sell, but they proved unsuccessful, and the farm still belongs to the defendant. That the advances and charges in excess of income amounted at the death of Anthony K. Joyce to upwards of \$12,000, exclusive of interest.

"That Anthony K. Joyce died intestate, in March, 1868, leaving a wife, Louisa M. Joyce, and eight children, one of whom, Mary L. Joyce, is now married with Henry G. Booz, and died in 1881, having devised her estate to him. All of the above persons are parties to the present bill. That after the death of Joyce the defendant continued in possession of the trust-estate, with the acquiescence of the widow and children, collected the rents, and paid over the same with some advances to her and several of the children, until the latter part of 1877, when he ceased to act, at the widow's request.

"That the trustee kept no regular set of books, and the items of cash received were vouched before the examiner by the production of receipted bills, and the payments to Joyce, by his receipts and his notes to the defendant, and the latter's check to the order of Joyce. No account was filed during the life-time of Joyce, nor at his death; but statements and vouchers were furnished to him from time to time, which he acquiesced in and approved. The *cestuis que trust* never asked nor demanded an account until May, 1881, when an account was presented to the complainants with which they were dissatisfied, and the present bill was then filed. That the trust was faithfully and judiciously administered, and the estate managed with care and prudence. The advances were made in good faith in the exercise of a sound discretion, and resulted, not only in benefit to the tenant for life, but also to the present complainants."

The answer denies the equity of the bill, and avers that there is a large sum due the defendant for disbursements in excess of the income, which are a lien or charge upon the estate, and which the defendant is entitled to have paid before surrendering the legal title.

It was to the admission of the defendant as a witness, and to the charges made for the rent of the store and farm, as well as to all payments in excess of the income, that the complainants objected before the master. They contended that these payments and charges were not available against the parties in remainder under the powers in the deed; that the trustee was limited in his payments to the life-tenant to the actual income, and that many of the payments being only evidenced by checks to the order of Joyce, and by notes of the latter paid by checks, were inadmissible as claims upon the estate. It was also alleged that there was an understanding between Joyce and the defendant that the former was to occupy the store and farm free of rent, and afterwards sell them, and receive all that they realized above the original cost; and, finally, that the payments made to the widow were after the termination of the trust, and therefore invalid as against the children. There were, besides, specific objections as to certain items in the account.

The questions raised were—*First*. Was the defendant competent as a witness? *Second*. Were the payments in excess of income authorized by the deed, and is the trustee entitled to reimbursement out of the estate? *Third*. Was the rent of the store and farm a proper charge, and entitled to payment? *Fourth*. Is the trustee entitled to credit for the payments made to the widow since the death of Joyce? *Fifth*. Is the account, as it stands, correct? As to the first question the master was of opinion that it was unnecessary to pass upon it, as all material matters were, he thought, satisfactorily proven by evidence other than that of defendant. Upon all the other questions he ruled in favor of defendant, and reported a decree accordingly, fixing the balance due him, and directing a conveyance by him of the premises, upon payment to him by complainants of said balance. Exceptions filed by complainants were sustained by the court, who were of opinion that none of defendant's items of credit, except for actual disbursements of income received, were proper. A decree was entered accordingly, directing a conveyance of the premises by defendant, as prayed for in the bill. Defendant thereupon took this appeal.

*H. La Barre Jayne, Arthur Biddle, and George W. Biddle, for appellant.*

The trustee was a competent witness. *Pattison v. Armstrong*, 74 Pa. St. 476; *Hostetter v. Schalk*, 85 Pa. St. 220; *Doddington v. Hudson*, 1 Bing. 257; *Nowell v. Davies*, 5 Barn. & Adol. 368; *Paull v. Brown*, 6 Esp. 34; *Davies v. Davies*, Moody & M. 345; *Schnable v. Koehler*, 28 Pa. St. 181; *Musser v. Gardner*, 66 Pa. St. 243. This deed being inoperative as to creditors, any creditors could have forced the trustee to pay any debt that Joyce might contract. *Mackason's Appeal*, 42 Pa. St. 330; *Ashhurst's Appeal*, 77 Pa. St. 464. The advances were made on the faith of the deed. *Straubridge's Appeal*, 5 Whart. 568; *Dilworth's Lessee v. Sinderling*, 1 Bin. 488; *Dawes v. Howard*, 4 Mass. 97; *Reck's Appeal*, 78 Pa. St. 432; *Oil Refining Co. v. Bush*, 38 Pa. St. 335; *Spackman's Appeal*, 16 Wkly. Notes Cas. 79. The advances were made for necessities. *Peters v. Fleming*, 6 Mees. & W. 41; *Rundel v. Keeler*, 7 Watts, 237.

*John G. Johnson, for appellees.*

The trustee was incompetent as to matters occurring in Joyce's life-time. *Karns v. Tanner*, 66 Pa. St. 297; *Gardner v. McLallen*, 79 Pa. St. 398; *Ewing v. Ewing*, 96 Pa. St. 381; *Hunt's Appeal*, 100 Pa. St. 590; *Murray v. Railroad Co.*, 103 Pa. St. 37; *Fross' Appeal*, 105 Pa. St. 258; *Foster v. Coll-*

ner, 107 Pa. St. 305; *Henry v. Com.*, Id. 861. The moneys were not advanced by the trustee upon the faith of the deed. *Raybold v. Raybold*, 20 Pa. St. 308; *Bacon's Appeal*, 57 Pa. St. 504.

GREEN, J. We are quite clear that the defendant was an incompetent witness as to any matters between himself and A. K. Joyce during his life, but entirely competent as to any matters between the complainants and himself after Joyce's death.

On the construction of the deed of trust, we are unable to agree with the learned court below in all respects. The claims of the defendant for rent of the store and farm, it seems to us, are within the provisions of the trust. The requirements both for shelter and occupation are embraced within the meaning of either of the words "wants" or "necessities," and the express terms of the trust enjoined upon the trustee the positive duty of supplying "the wants and necessities" of Joyce and his wife "during all the term of their natural lives." That duty demanded the expenditure, not only of the rents, issues, and profits of the real estate, but also the appropriation of the real estate itself, if necessary. It is true, a sale or mortgage of the real estate were the methods indicated in the deed of trust for getting at its available product, and the power to mortgage was duly exercised by the trustee within the very letter of the trust, and up to the full mortgage value of the property. Of course, the trustee might have sold the real estate, and thus have left the trust barren of a subject, and avoided the present litigation. But it would have involved the sacrifice of the trust property, and would have wrought distress to the principal *cestui que trust*, and much loss to the present complainants. The trustee adopted a more kindly, and, as the result proved, a wiser, course, and one which has proved far more advantageous to these plaintiffs. He paid the debts of Joyce, made advances of money to him, started him in the store business, and, when that proved a failure, placed him on one of his own farms, where he lived a number of years, supporting his large family out of the farm products to a considerable extent.

In his account the trustee claims credit for rent of the store at the rate of \$250 per annum, and \$800 for the farm. These amounts the master found to be reasonable charges, and an examination of the testimony of quite a number of witnesses other than the defendant fully sustains his finding. The master allowed these claims, but the court disallowed them, for the reason, substantially, that they were not founded upon a literal execution of the powers conferred by the deed of trust. In other words, they simply represented an indebtedness due upon contracts made with the *cestui que trust* subsequently to the making of the deed, and for all such indebtedness as that the deed expressly provided there should be no liability of the trust-estate. There is much force in this view of the subject, and we are of opinion that it must be applied to some of the items for which credit is claimed. But we do not agree that it must necessarily be enforced as to the claims for rents, or, rather, for the price of the occupancy of the real estate in possession of which the *cestui que trust* was placed by the trustee. If the trustee had leased these premises from strangers, and had paid the rents, it could not have been denied that the payments were for necessities. Of course, Joyce and his family must have suitable shelter, and of such a character as to enable him to prosecute some kind of calling.

It is perfectly manifest that the income of the Minor-street property, which was but \$600 for several years, and out of which had to be paid interest on a \$5,500 mortgage, and taxes and repairs, was not, and could not be, sufficient for the maintenance of Joyce and his family. The remainder in the Market-street property did not fall in until April, 1867,—nearly 18 years after the deed of trust was made. The rent of the Minor-street store was but \$600 per year until 1855, and then only rose to \$750 until 1861, and it was neces-

sarily inadequate, after fixed charges were defrayed, for the support of Joyce and his family.

What, then, was the duty of the trustee under his quite broad powers? He might have sold the real estate, and had a mere trifle left after payment of the mortgage, or he might have used the rents to support the family, and neglect to pay interest and taxes, and thus brought on the forced sale of the property under the mortgage; but he did not do this. He paid the interest and taxes and other expenses, and, indeed, went beyond those limits, and made advances, and took promissory notes from Joyce, part of which proved a loss. The notes representing indebtedness from Joyce to Taylor are produced, and credit is claimed for them in the account, but, as they are not supported by evidence showing that they were given for any indebtedness which it was within the power of Joyce to create so as to make it a charge upon the trust-estate, they must be rejected. So far we agree with the learned court below.

As to the claims for rent, viewing them as claims for necessities which were furnished by the trustee, we do not perceive the necessity of a technical execution of a mortgage upon the trust-estate in order to sustain them or preserve them. The trustee could not give a mortgage to himself, and it was not necessary to do so, as he held the legal title to the trust-estate, and that was a sufficient pledge to him, in his position, for all legitimate advances within the terms of the trust. The plea of the statute of limitations is not applicable, for the same reason.

The question is, on what terms must the trustee now transfer the legal title? and equity will not compel him to convey it except upon reimbursement for such of his claims as are legitimately within the powers conferred upon him by the deed. We see no objection to the allowance of the claim for overpayments made to the widow after Joyce's death. It cannot be doubted that he continued to act as trustee for a number of years after the death of Joyce, by the express consent of the widow and children, and the deed in terms required that the trust should continue during the lives of both Joyce and his wife. There is nothing in the evidence to call in question the perfect good faith of the trustee in continuing in the trust after Joyce's death. His receipts during several years, while he so continued to act, were very considerable, and are not fairly to be questioned as to their character. They appear to be within the trust, and are really not challenged in their details. It is true that the trustee was derelict in not filing his accounts, and especially in not having a settlement with the widow and children after Joyce's death; but they also were derelict in not calling him to account. Instead of doing this, they clearly assented to his continuance in the trust, and have had the benefit, not only of his services as trustee, but of the large advance in the value of the trust-estate which was preserved to them by his method of administering the trust. As he will lose a considerable portion of his claim in consequence of his delay in the settlement, he is the severest sufferer from that cause.

Without elaborating more fully upon the details of the controversy, we think it sufficient to say that the account as adjusted by the master should be corrected by striking out the credits for the two checks for \$1,500 and \$300, dated third and twenty-first March, 1854, paid to Joyce to start him in a store, and certain notes, a list of which appears in the printed argument for appellees at page 6, together with all sums of interest charged on all of said items, and confirming the report as to the remainder of the account as found by the master.

Decree reversed, and record remitted, with directions to correct the account in accordance with the foregoing opinion; the costs of this appeal to be paid by the appellees.

## WOODS' APPEAL.

*(Supreme Court of Pennsylvania. October 3, 1887.)*

## WILL—LEGACY CHARGED ON LAND—LIEN OF, DISCHARGED BY SHERIFF'S SALE—MERGER.

A. owned real estate bequeathed him in 1855 by his father, subject to the payment to his sister of a legacy of \$400. He never paid the legacy or any interest. The will of his sister, who died in 1882, devised and bequeathed to him for life all her property, including this legacy, with remainder to his children. The legacy with accrued interest then amounted to \$901.60. The real estate was sold by the sheriff in 1886, on an execution against A., realizing a sum insufficient to pay the liens upon it. *Held*, that the sale discharged the lien of the legacy; that the legal effect of the sale was to pay the legacy, with the accrued interest; that, under his sister's will, A. had a life interest only in both the principal and accrued interest of the legacy, and that this life interest did not merge in his estate in the land, and did not pass to the sheriff's vendee at the sale.

Appeal of D. W. Woods from the decree of the common pleas, Mifflin county, distributing the proceeds of the sheriff's sale of the real estate of William R. Graham.

The auditor, James S. Rakerd, Esq., found the facts to be as follows:

John Graham died August 13, 1885, leaving a will devising to his son, William R. Graham, a tract of land in Granville township, Mifflin county, Pennsylvania, charged with the payment of a legacy to a sister of the devisee, Mrs. Mary Jane Foster, of \$400, of which \$200 was to be paid five years after the death of testator, and \$200 six years after his death. Mrs. Foster died January, 1882, and William R. Graham testified before the auditor that he had never paid her any part of the legacy. The auditor found that no interest had been paid on this legacy, which amounted at her death to \$901.60. Mrs. Foster left a will, providing, *inter alia*, as follows: "First. I hereby give, devise, and bequeath to my brother, Robert R. Graham, of said county, all property I may have at the time of my decease, whether real, personal, or mixed, and all goods, chattels, rights, credits, choses in action, legacies, or other moneys or properties then belonging or coming to me, to be used and enjoyed by him during the term of his natural life, and at his death to descend to and become absolutely the property of his children, share and share alike; said Graham to have no other or greater interest in said property above stated than the right to use and enjoy the same during his natural life."

On August 21, 1886, the above tract was sold at sheriff's sale as the property of William R. Graham. It was then subject to liens in the following order: (1) The legacy aforesaid; (2) a judgment in favor of S. S. Woods, executor, amounting to \$379.28; (3) a mortgage in favor of C. K. Davis, assigned to D. W. Woods, amounting to \$1,362.01. At the time of the sale, the attorney for William R. Graham gave notice that the tract was being sold subject to the legacy. The sheriff paid no attention to the notice, but sold the tract without making any announcement as to its being sold subject to a lien. It was purchased by D. W. Woods for \$1,385. Woods filed a paper with the auditor agreeing that the legacy should remain a lien on the land, or that he would mortgage the tract to secure it.

The auditor was of opinion that the land was not sold subject to the legacy; that the sale divested its lien, and that the legacy must be paid from the fund for which the land sold. The purpose of the bequest in the will should be considered. Mary Jane Foster was the sister of W. R. Graham. He owed her this money. A fair construction of the will discloses the purpose on her part to secure him from being compelled to pay this money at her decease. It was simply a benefit and favor to him. He was to have the use of it. It certainly was not intended for the benefit of a stranger. She intended this money to go to his children, but he was to have the use of it during his life. The sheriff's sale took from him all benefit that could possibly accrue to him from the bequest. It is ruled that it matters not what may be the duration

of an estate given to a trustee by will; it continues no longer than the thing sought to be secured by the trust demands. The purpose for which this life-interest was created ended on the day of the sheriff's sale. The thing sought to be secured was the use of this money to William R. Graham. The sheriff's sale took it from him. In the opinion of the auditor, the interest of W. R. Graham on these legacies has ceased, and the money due thereon should be distributed to his children. He therefore awarded \$901.60 to the children of W. R. Graham, and the balance to the other lien creditors.

Exceptions were filed by D. W. Woods to the auditor's report, as follows: "*First*. The auditor erred in not finding that the Granville tract was sold subject to the legacies in Mrs. Foster's will; the owners having given notice at the sale that it was so selling, and the purchaser and lien creditor agreeing that it should be so. *Second*. The auditor should have reported a decree impounding the legacies in Mrs. Foster's will on the premises in the same manner that they were secured before the sheriff's sale, the purchaser having filed his written consent thereto, in case he decided the legacies discharged by the sale. *Third*. The auditor erred in distributing to the persons owning the remainder of the legacies in Mrs. Foster's will the whole of the debt and interest of said legacies up to Mrs. Foster's death, as the use and interest of said legacies belong to the purchaser of William Graham's interest in said Granville tract, said Graham's being a life interest on the same." The first two exceptions were overruled, and the last sustained, by the court, in an opinion by BUCHER, P. J., wherein he said, *inter alia*:

"The facts found by an auditor must stand, unless plain and palpable error be shown. We must therefore accept the findings of the auditor that the *corpus* of these legacies, with the accumulated interest at the death of Mrs. Foster, amounts to \$901.60. This is the primary lien, and was discharged by the sheriff's sale. Although a charge on the land originally, it does not follow that the will of Mary Jane Foster giving the interest to Wm. R. Graham rendered the time of payment uncertain, so as to continue it as a fixed lien. On the contrary, it was not affected by her will, and was discharged as a lien, and it is now payable to the estate of Mary Jane Foster, to be administered according to her will. The fact that she mentions legacies in her will does not constitute a specific bequest, but is used as descriptive of the extent of her gift, rather than its kind. The notice by any one other than the sheriff, and parties in interest, that the land was selling subject to the lien, does not prevent its discharge. In *Barnet v. Washebaugh*, 16 Serg. & E. 410, it is held that the lien of legacy will be discharged unless it appears expressly that it was the clear understanding of all parties that it was to remain on the land. Mere notice or loose declarations were pronounced insufficient for that purpose, and this was afterwards reiterated in *Hellman v. Hellman*, 4 Rawle, 440, and kindred cases. But Mr. Woods did not buy subject to the legacies; *i. e.*, he was not to pay the legacy in addition to his bid of \$1,385, but merely that of this bid the legacy should be deducted off, and remain in the land. Why should this be done in so uncertain a way? The court might appoint Mr. Woods a trustee to receive the \$901.60, and pay the interest annually to Wm. R. Graham; then all will be plain and readily understood.

"The auditor held that the sheriff's sale extinguished the interest of Wm. R. Graham in the legacies. We do not see how this conclusion is reached. The sheriff's sale divested Graham's title to the land, but in nowise carried his interest in the legacies under his sister's will. The fact that the legacies were a charge on the land sold was not sufficient, had a judgment on the land been bequeathed, instead of a legacy. The legacy was not a final lien. The executor of the sister's will could have collected the legacies, and invested the moneys elsewhere, and paid Graham the interest. The accrued interest up to Mrs. Foster's death became principal,—was the fund on which he drew the interest. Then how did the sheriff's sale affect Graham's interest under

his sister's will? The interest accruing between the sister's death and the sheriff's sale was extinguished by operation of law, because he owed it to himself. Until creditors seize Graham's interest in his sister's estate, by due course of law, he still owns it. His land was sold, but not his interest in his sister's estate. The latter was never levied on. It could not be sold by any such process as sold the land. It could only be sequestered. *Cooter's Appeal*, 74 Pa. St. 146; *Brown's Appeal*, 27 Pa. St. 62; *Styer v. Freas*, 15 Pa. St. 339. And that class of cases merely decide that where a sale is postponed for the benefit of a life tenant, and the tenant declines the gift, or refuses to take under the will when a widow, the sale may take place immediately, because there is then no reason to preserve the estate for the life tenant. *Koenig's Appeal*, 57 Pa. St. 352, only determines that a trust created for the benefit of a married woman becomes inactive and ceases upon her discovery, by divorce or death of her husband; the trust being no longer needed. So, too, in *Dodson v. Ball*, 60 Pa. St. 493, and many others.

"But we are unable to see the application of these principles to the case in hand; there being in no sense a similarity of expression or purpose. All the preceding and cited cases destroyed no interest, extinguished no right; but the proposition insisted on here—namely, that the trust in Wm. R. Graham, under his sister's will, falls, because it so happens that as to \$901 of *corpus* on which her brother, Wm. R. Graham, was to receive the interest for life, happened at the time of the making of her will to be charged on William's own land, and hence the interest thereon was payable by himself to himself, that a change in the form of the *corpus*, by the sheriff's sale, which converted the charge into cash, (merely substituting the money for the land,) without his consent, and by operation of law, put an end to his interest in the bequest, deprived him of all future benefit therein, and rendered the *corpus* without delay payable to the remainder-men—is not only not supported by the cases cited, but is contrary to the reasonable sense of mankind, and would be utterly destructive of the benevolent purposes of his sister, Mrs. Foster. Wm. R. Graham, just in his direst calamity, when the life-estate in the fund is of supreme importance to his daily maintenance, is to be deprived of his sister's bounty. The principle of merger does not apply. That is a question of intention; and as Graham did not own the *corpus*, but the interest only, the interest could not merge into what Graham did not own. Had he become the owner of the *corpus*, the merger would extinguish both interest and principal. There is no trust in the technical sense. There is simply a bequest of interest in the personal estate of the testator to her brother for life. Suppose a stranger had owned this legacy, and the interest had been given to Graham for life, it would not be pretended that a sheriff's sale of the land charged would in any manner extinguish the interest. And no more does merger take place here, except that, while Graham owed the legacy, he was entitled to the annual interest, and, as he need not pay to himself, the law extinguished it. How long was Graham to profit by the bequest of his sister? Until he died, and not until he was sold out by the sheriff. The descent is to be cast at his death; not when he became bankrupt. \* \* \*

"It is clear, then, that the first appropriation filed by the auditor is what he conceives to be correct; and that opinion is correct, except that he held that the children of Wm. R. Graham were entitled to have uninterruptedly, without waiting for the death of their father, the \$901.60 of the legacies, and in this we overrule him, and hereby appoint D. W. Woods, Esq., trustee to receive said \$901.60 from himself, or from the sheriff, if already paid to the latter, the interest whereof he shall pay to the said Wm. R. Graham annually during his life, and the principal to his children, as described by the will of Mrs. Jane Foster, he to give security, to be approved by the court. As to the balance of the fund, it is hereby ordered to be paid out to the respective parties entitled, as found by the auditor, and set forth in his first scheme of

distribution; and his report, as thus corrected, is hereby confirmed absolute, unless an appeal be taken within twenty days."

Whereupon D. W. Woods took this appeal.

*Andrew Reed and D. W. Woods & Son*, for appellant.

The life-estate of William R. Graham in the legacy merged. *Babb v. Reed*, 5 Rawle, 159; *Gilkeson v. Snyder*, 8 Watts & S. 200; *Koons v. Hartman*, 7 Watts, 20; *Loverin v. Trust Co.*, 113 Pa. St. 6, 4 Atl. Rep. 191. The notice given at the sale estopped the lien creditors. *Birney's Appeal*, 7 Atl. Rep. 150; *Power v. Thorp*, 92 Pa. St. 346.

*Horace J. Culbertson*, for appellees.

The land was not sold subject to the legacy. *Barnet v. Washebaugh*, 16 Serg. & R. 414; *Hellman v. Hellman*, 4 Rawle, 440. The interest flowing from the corpus did not merge in the land. If Graham no longer had any interest in his sister's estate, the whole sum is now payable to his children. *Coover's Appeal*, 74 Pa. St. 146; *Koenig's Appeal*, 57 Pa. St. 352.

GREEN, J. It seems almost unnecessary to add anything to what has been so well said by the learned court below in this case. The two original sums of \$200 each, given by the will of John Graham to his sister, Mrs. Foster, were not continuing liens in any sense, nor were they payable at an uncertain time, nor upon an uncertain event. They were absolutely payable in August, 1860 and 1861. From those dates they became a fixed and determined debt due to Mrs. Foster, and were charged upon the land. Of course, they bore interest until Mrs. Foster's death, and the aggregate of principal and interest at that time was a distinct asset of her estate, and subject to her disposition by will or otherwise. If she had seen fit to give it to a stranger, either for life or absolutely, there could have been no question as to the correctness of the principles applied by the court below. We can see no reason for making any distinction because she chose to give it to her brother, who happened to be the former owner of the property affected by the charge for the payment of the money. That charge simply made this debt a lien on the land. It was of record, it was prior to all other liens, and it was divested by the sheriff's sale. Both the auditor and the court below have found that it was divested, and that the land was not sold subject to this lien. If it had been, the purchaser would have been obliged to pay this debt in addition to the amount of his bid, and there is no evidence to support such a claim. While notice was or may have been given of it at the sheriff's sale, the sheriff simply disregarded it, and made no contract or condition with reference to it. By operation of law, the lien of this debt was therefore divested, and it would be payable out of the proceeds. But by the terms of Mrs. Foster's will the interest of this sum is payable to W. R. Graham during his life, and there was no impropriety in securing the payment, both of the interest and principal, precisely as was done by the learned court below. It is confusing both ideas and authorities to argue that, because W. R. Graham was the owner of the land bound by the lien of this debt, it was extinguished in any part because of such ownership. During his ownership the money was payable, not to him, but to Mrs. Foster, and of course there was no merger except as to interest after her death. After the sheriff's sale, he was not the owner, but a stranger was, and hence, again, there could be no merger, and no extinguishment. But, by the legal effect of the sale, W. R. Graham paid the whole amount of the debt, principal and interest, and then the aggregated sum—which properly, perhaps, would go to Mrs. Foster's legal representative, to be administered according to her will—became subject to such disposition by the court as would effectuate the intent of the testatrix. Practi-

cally, the order of the court below was an investment of the money in accordance with the will of Mrs. Foster, and in this there was no error. We see no mystery in the case, and regard it as quite plain. Decree affirmed.

### ALLEN v. VANDERVORT.

(*Supreme Court of Pennsylvania. October Term, 1887.*)

#### WAYS—EXPRESS GRANT—EVIDENCE.

In an action for a right of way, the testimony showed that the plaintiff's grantor promised to give the plaintiff the road in question; that he said she should have the right of way; that he promised her a road all the way down, except about four rods, which he said she should get from Mrs. Dunbar; that she did get that piece of road from Mrs. Dunbar; that Marchall, a surveyor, was called upon by Mr. Rowan, the grantor, to survey the church lot on the corner, and that Mr. Rowan told the surveyor to start far enough south to leave a road to Vandervort's (plaintiff's) mill; that, after plaintiff's grantor sold the back lot to plaintiff, he moved his fence back, in order to give plaintiff a way out. The court left it to the jury to find whether there had been an express grant of the road, and the jury found for the plaintiff. *Held*, that there was ample testimony to sustain the verdict.

Error to common pleas, Butler county.

Action for a right of way.

In 1862, James Rowan owned two tracts of land which were not contiguous. If the north boundary line of the 27-acre tract was extended easterly a few rods, it would then become the south boundary line of the 18-acre tract. On the west of the 18 acres Nichol Allen owned the land to the public highway; on the south of the 18 acres was land owned by Ambrose Dunbar. The 27 acres were bounded on the north by Allen's land, and on the east by Dunbar's land, so that for a few rods the south-east corner of Allen's land was contiguous to the north-west corner of Dunbar's land. On the west of the 27 acres was a church lot, which extended westerly to the public highway. The private road in question extended from the public highway to the 18-acre tract. On its northern side was the Allen tract, and on its southern side was the church lot, then the 27-acre tract, and lastly the Dunbar tract. In 1862, James Rowan sold to Mrs. Vandervort, the plaintiff, the 18-acre tract, but the deed contained no right of way over his 27-acre tract. In going to the public highway, Mrs. Vandervort was in the habit of going through Allen's land, until 1869, when Allen fenced in his woodland, and he and Rowan agreed to leave a lane between their farms. This lane was left for their own convenience; they permitting Mrs. Vandervort and others to use it. In 1885, Allen purchased the 27-acre tract, and then placed a gate across the lane. Mrs. Vandervort demanded that the gate should be removed, as she claimed a perfectly free and unobstructed road. The other material facts appear in the opinion.

*J. M. Thompson and W. H. Lusk*, for plaintiff. *Leo. McQuistion and Thos. H. Lyon*, for defendants and appellants.

**GREEN, J.** If there was an express grant of the right of way in question when the land was sold by James Rowan to Mrs. Vandervort, it is a matter of little or no consequence whether there was a way of necessity or not. There was evidence of the most express, direct, and positive character that there was such a grant. Freeman Vandervort, the plaintiff's husband, conducted the negotiations for the purchase of the 18-acre tract on behalf of his wife. He testified that he negotiated for the purchase, and that there was a saw-mill on the tract, and that was what he bought it for. He added: "He [James Rowan] promised to give me the road; said I should have the right of way. I couldn't get to the saw-mill without a road, and I should have a right of way. *Question.* Now, where was this right of way? *Answer.* It was along-side of his farm. He promised me a road all the way down but

about four rods, that he couldn't give me, that Mrs. Dunbar owned, but he said it could be easily got, and I did get it." The road was fully identified by the witness, who said it had been in use to get to the mill before he bought it, and also that he continued to use it constantly, and to work it and keep it in repair from 1862, when the land was purchased, until it was obstructed by the defendant.

There was not a particle of contradiction of this testimony in the case. On the contrary, it was confirmed by other evidence. Kennedy Marchall was called upon by Mr. Rowan to survey a small lot of three acres which he was about to sell for a church, in 1871, off of his remaining land bordering on this road, and, when the surveyor wanted to fix the corner of the church lot, Mr. Rowan told him "to move back from that corner,—where I had fixed the corner was between Mr. Rowan and Mr. Allen,—to move back, and start far enough south to leave a road. So I did move back. I don't recollect the distance,—12 or 15 feet, or something like that,—and I started there, and ran around the church lot until we came around to the north-east corner, and then ran along parallel with the line between the two, by Mr. Rowan's location to leave a road there. \* \* \* Mr. Rowan was at the time the owner of this land, and what I was going to say was there was some person there; think it was Mr. Vandervort. I wasn't acquainted with him at the time, and they spoke about the road to the mill. I didn't know what mill it was,—he must have a road to the mill. They were in conversation about leaving this road. *Question.* Mr. Rowan said that was the road to the mill? *Answer.* Yes, sir; I didn't know what mill it was; I didn't know there was a mill in there. *Q.* And that had to be reserved in this conveyance to the church? *A.* Yes, sir."

The deposition of James Rowan, the grantor of the land to Mrs. Vandervort, was taken, and he testified to the sale, and to the existence of the road there, and its use, by all persons who desired to travel over it, for 40 or 50 years. He said he did not recollect about anything being said about that right of way at the time of the sale to Mrs. Vandervort, but there might have been something said about it. But he also testified: "After I sold to Mrs. Vandervort, I moved the fence back along my northern boundary, in order to give Mrs. Vandervort a road out. After I came back from the west in 1866, I moved my fences back, in order to give one-half the road from this property out to the road. I threw out enough of ground for a team to pass along. I would say from 8 to 12 feet I threw out. Mr. Vandervort worked on this road, and built a bridge on it, and kept it in very good order."

The learned court below left to the jury the question whether there had been an express grant of the road, and the jury found for the plaintiff. There was ample testimony to sustain the verdict, on the theory of an express grant, and it seems to us the question of a way by necessity was entirely superfluous, and that its discussion now is unnecessary. Judgment affirmed.

### MACRUM, Trustee, v. JONES.

(*Supreme Court of Pennsylvania.* October 31, 1887.)

**CERTIORARI—BEFORE FINAL JUDGMENT—WRIT QUASHED.**

Where the record brought up by writ of *certiorari* shows upon its face that no final judgment has been entered in the court below, and that the cause is still pending there, the writ will be quashed.

*Certiorari* to common pleas, Washington county.

*Thos. H. Baird* and *Wm. Macrum*, for plaintiff in error.

**PER CURIAM.** It is unnecessary for us to decide whether the first section of the act of seventeenth February, 1871, in regard to lateral railroads, repeals the latter half of the first section of the act of twentieth April, 1858,

for the reason that, under either view of the case, the *certiorari* is premature. The record which it brings up shows upon its face that no final judgment has been entered in the court below. There is now an appeal pending in the common pleas from the award of the jury appointed to assess the damages. Pending that appeal, it was improper to bring the record up, as such appeal cannot be tried in the court below in its absence. See *Hall's Appeal*, 56 Pa. St. 238. If the petitioner below files his bond, and proceeds to construct the road pending the appeal, he will do so at his own risk. We express no opinion now as to this branch of the case. The plaintiff in error will be protected in any event by this bond. Writ quashed.

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ESHENBAUGH v. BRICKER.

(Supreme Court of Pennsylvania. October 31, 1887.)

INSOLVENCY—DISCHARGE—SURRENDER OF DEBTOR TO CUSTODY OF SHERIFF.

Petitioner claimed the benefit of the insolvent law, alleging, *inter alia*, that he had surrendered himself into the custody of the sheriff, and that he was then in such custody of the sheriff. The uncontradicted evidence showed that at the time of presenting his petition, he was not in custody nor in any manner restrained of his liberty. Held, that as one of the essential allegations of his petition was clearly shown to be untrue, such an exception to his discharge should have been sustained.

Error to court of common pleas, Butler county.

*S. F. Bowser* and *K. Marshall*, for plaintiff in error. *Thompson & Son* and *McJunkin & Galbraith*, for defendant in error.

STERRETT, J. In his petition for discharge under the insolvent law, defendant in error sets forth, *inter alia*, that he was arrested on a *captas ad respondendum* issued out of the court of common pleas of Butler county, in a certain action of breach of promise to marry Ann A. Eshenbaugh, the plaintiff therein; that he thereupon gave bond in the required sum of \$1,000, with John Bricker as bail, conditioned that if he shall be condemned in said action, he shall satisfy the condemnation money and costs, or surrender himself into the custody of the sheriff of said county, etc.; that, upon the trial of said action, a verdict for \$1,000 damages was rendered in favor of the plaintiff; that pursuant to the terms of said bond he "has surrendered himself into the custody of said sheriff, etc., and that he is now in such custody of the sheriff," etc. These and other facts averred in the petition, assuming them to be true, bring defendant in error's case within the provisions of the insolvent law and entitle him to the relief therein provided; but it was denied that he was in custody at the time of presenting his petition, December 7, 1886, or that he was then in any manner restrained of his liberty. In support of that denial, it was shown that on December 6, 1886, petitioner was surrendered and committed to jail by the sheriff, and on the evening of same day, upon giving a new bond, he was discharged from custody. On the hearing of his application for discharge, Sheriff Kramer testified as follows: "On the sixth of December, 1886, John Bricker brought Perry to me. I put him in jail. Mr. Galbraith, his attorney, afterwards came to me and gave bond, and I let him out. This was on the evening of the same day. I don't remember of ever having him in custody after this. I don't remember of Col. Thompson saying to me that he surrendered Perry. If he did, I would have put him to jail."

This uncontradicted evidence establishes the fact that at the time of presenting his petition, defendant in error was not in custody, nor in any manner restrained of his liberty. It follows, therefore, that one of the essential allegations of his petition was not only unsustained by proof, but was clearly shown to be untrue, and hence the exceptions of plaintiff in error to his dis-

charge, covered by the sixth and seventh specifications, should have been sustained.

The order of June 13, 1887, discharging defendant in error, is reversed and set aside, and petition dismissed at his costs.

PLANK-ROAD CO. v. McCLOY.

(*Supreme Court of Pennsylvania.* November 7, 1887.)

1. DRAINAGE—DAMAGES FROM IMPROPER DRAIN—CONTRIBUTORY NEGLIGENCE.

In an action for damages for the overflow of water caused by defendant's neglect to construct a proper drain, the evidence showed that the surface water was obstructed by defendant's plank-road so that it flowed through a culvert upon plaintiff's premises; that when plaintiff bought the premises she had filled up an old quarry where the water formerly flowed, and had constructed a road that changed somewhat the flow of the surface water. Defendant asked the court to instruct the jury that plaintiff had herself obstructed the flow of the water and caused the injury for which the action was brought. Held properly refused.

2. SAME.

In an action for damages for the overflow of surface water caused by defendant's neglect to provide suitable drains, the evidence tended to show that, after plaintiff bought the premises, the culvert under defendant's plank-road was made larger or the drainage above changed so that much more water than usual flowed over plaintiff's land. The court charged the jury: "The question of fact then is, is there an increase in that culvert or change in the drainage above, by which a larger quantity of water is thrown on her lot than formerly?" Held not error.

Error to court of common pleas, Allegheny county.

In 1869, Clarissa McCloy purchased about four acres of land on the south side of Observatory hill. Above her property was defendant's plank-road. The water came down from above to the plank-road and ran along its upper side and was let under it and on down the hill through culverts. For eight years after her purchase not much water was thrown in on plaintiff's land from the plank-road, but about that time the plank-road company constructed or enlarged a culvert above plaintiff's premises and built a wall to turn the water through the culvert; after that plaintiff's property was overflowed at every heavy rain. Prior to the construction, or enlargement of the culvert by the defendant, plaintiff's husband had filled up an old stone quarry on the premises and had graded a road out to the plank-road, both of which changed the course of the surface water, which formerly flowed into the old stone quarry and so on down the hill. There was a judgment for plaintiff, and defendant brings error, and makes the following assignments: *First*, the court erred in not giving binding instructions to the jury, when the evidence was uncontradicted that the plaintiff below obstructed the natural flow of the water, and caused the very injury upon which suit was brought; *second*, the court erred in charging: "The question of fact then is, is there an increase in that culvert or change in the drainage above, by which a larger quantity of water is thrown on her lot than formerly?"

*Marshalls & Imbrie*, for plaintiff in error. *J. Charles Dickens*, for defendant in error.

PER CURIAM. The court below would not have been justified, under the evidence, in giving the binding instruction referred to in the first assignment. Nor are we prepared to say there was any substantial error in the three lines of the charge contained in the second assignment. The charge on the whole was fair and adequate.

Judgment affirmed.

**WOLF and others v. MACKRELL, Ex'x.***(Supreme Court of Pennsylvania. November 7, 1887.)***NEGOTIABLE INSTRUMENTS—ACTION ON—PROOF OF SIGNATURE—IDENTITY.**

In a suit brought on two notes executed with a mark, the maker, the payee, and the two attesting witnesses were dead. One witness testified that he had gone with the payee to the maker 19 years before, the payee said to collect some notes. They looked like those in suit, but witness did not see the names on the papers. *Held*, that the notes were not sufficiently identified to go to the jury.

Error to court of common pleas No. 2, Allegheny county.

This was a suit brought by certain heirs of the payee of two notes against the executrix of the alleged maker; the notes were under seal, signed by a mark, and witnessed by the daughter and son of the payee, who were both dead at the time of the trial. One note was dated 1859, payable inside of 20 years; the second was dated in 1861, and payable in 18 years. It was proven that they were in the handwriting of one who died in 1862. A witness testified that in 1866 he went with the payee to the house of the alleged maker of the notes; that the payee said they were to get money on some notes, and she had papers that looked like those in suit. He had never seen the alleged maker before that time, nor since. This visit was 19 years before the trial.

*I. A. McClung*, for plaintiff in error. *J. E. McKelvey*, for defendant in error.

**PER CURIAM.** The notes in controversy were not sufficiently proved to entitle them to go to the jury, and the learned judge could not have done otherwise than nonsuit the plaintiff. Judgment affirmed.

**OAKLEY v. MAORUM.***(Supreme Court of Pennsylvania. November 7, 1887.)***MORTGAGES—LEGAL TITLE TO WIFE'S PROPERTY IN HUSBAND—BONA FIDE MORTGAGEE.**

A husband dealt with his wife's money, and invested it in a piece of real property, taking it in his own name, and lived with his wife thereupon, and afterwards mortgaged it to a *bona fide* mortgagee without notice. *Held*, that the mortgagee's title was good, even though the husband had perpetrated a fraud upon his wife.

Error to the court of common pleas, Allegheny county.

In the early part of 1860, Mrs. Mary Ann Oakley purchased the property in dispute from Mary Davis. As she testified at the trial, her father died some time in 1835, leaving some personal and real estate, of which she inherited her share. This money was loaned out from time to time by her husband until the time of the purchase of this property, when a portion of the money was put into it. In place of taking the deed in his wife's name, A. G. Oakley took the title in his own name. In 1878, Oakley got into financial trouble, and placed a mortgage on the property, which Mrs. Oakley, the defendant, alleges was without her knowledge or consent. This property afterwards came into the possession of the Allegheny Savings Bank, of which plaintiff is trustee. The mortgage was not paid, and a *scil. fa.* was issued and prosecuted to judgment, and the property sold and purchased by Rieger, assignee of the mortgagor, who conveyed to James L. Graham, who held for the benefit of the bank. Plaintiff is trustee for the creditors of this bank, and brings ejectment. Defendant alleges fraudulent conduct on the part of her husband in taking the deeds in his name and mortgaging the property. Defendant and her husband lived upon the place.

*Marshall & Imbris*, for plaintiff in error. *W. Maorum*, for defendant in error.

**PER CURIAM.** Admitting that Oakley perpetrated a fraud on his wife in his acquisition of the property in question, yet his mortgagee knew nothing of such fraud. He found the legal title as well as the possession in Oakley, and he was bound to inquire no further.

Judgment affirmed.

## STATE (TAYLOR, Prosecutrix) v. SMITH and others.

(Supreme Court of New Jersey. November 9, 1887.)

## 1. TAXATION—SPECIAL LAW—REPEAL BY AMENDMENT TO CONSTITUTION.

The imposition authorized by the "Act to incorporate the Plainfield Fire Department," approved March 3, 1854, is of the nature of a property tax, and being obnoxious to the constitutional requirement that "property shall be assessed for taxes under general laws and by uniform rules according to its true value," was immediately repealed by the adoption of that requirement as an amendment to the constitution.

## 2. SAME—GRANT OF TAXING POWER TO PRIVATE CORPORATION.

The tax imposed under that act cannot be maintained or imposed by the court under the act of March 23, 1881, (Supp. Revision, 602,) because the Plainfield Fire Department is a private corporation, and not a political corporation or division of the state, and so the grant of the power of taxation to it was not within the power of the legislature.

(Syllabus by the Court.)

On *certiorari* from assessment for "fire" benefits.

By an act entitled "An act to incorporate the Plainfield Fire Department," approved March 3, 1854, the "owners or proprietors of dwelling-houses or other buildings, or of stores of goods, wares, or merchandise of any description, liable to injury by fire," situated within limits defined by the act in the township of Plainfield in the county of Essex, (now Union,) and in the township of Warren, in the county of Somerset, were created a body corporate by the name of "The Plainfield Fire Department." The purposes for which the corporation was created, as set out in the act, are, in general, the procuring and maintaining of apparatus and organizations for extinguishing fires. The corporation is controlled by officers, who by the provisions of the act are elected by the members. It is further provided that the members are annually to determine the amount of money to be raised by assessment for the use of the corporation for the ensuing year, and within 60 days the assessor is to return to the managers a "list of all buildings and stores of goods, wares, or merchandise, as aforesaid, within said limits, with the value thereof and the names of both the owners and occupants of the buildings and owners of goods, wares, and merchandise, together with an assessment upon each building or store, as aforesaid, of the equitable proportion of the sum voted to be raised by the corporation, making just allowances for the various degrees of hazard and liability to injury by fire to which said buildings and stores may be exposed." The act further provides that, if the sum so assessed is not paid by a time prescribed, proceedings may be taken to collect the same by a warrant issued by a justice of the peace, and served by a constable, which officers are to proceed therein in the manner prescribed by the general tax act. Supplements to the above act have altered it in particulars, not material to the present controversy, except that thereby the limits of the original act have been extended. In 1886, prosecutrix owned a house and barn within the then limits of said corporation, and was assessed for the same the sum of \$21. Not having paid that sum, a warrant was issued, and personal property of prosecutrix was levied upon. Thereupon prosecutrix sued out a *certiorari*, and thereby the proceedings to impose, assess, and collect the said sum have been brought up.

C. A. Marsh, for prosecutrix. *Suydam & Stillman* and *Stockton & Johnson*, for defendants.

MAGIE, J. Prosecutrix contends that, in assessing upon and attempting to collect from her the sum of \$21 for the use of the Plainfield Fire Department, the defendants were acting without the warrant of any valid legislation. It is quite apparent that the assessment complained of is of the nature of a tax.

The act under which it has been made calls it a tax. The officer empowered to impose it is called an assessor. The amount of the assessment imposed is to be collected by the use of the same process, issued by and to the same public officers as perform like functions in the enforcement and collection of ordinary taxes. Defendant's counsel make no debate on this subject, but seek to justify the imposition of this sum as a tax for a public purpose. It is equally plain that the tax in question is of the nature of a property tax. It is not imposed upon individuals, as a poll or franchise tax. It is not imposed by reason of any special benefit conferred upon property increasing its value and justifying a special tax therefor. The prescribed imposition falls annually by reason of a recurring benefit upon the owners and occupants of certain kinds of property, solely upon the ground of their ownership or occupation. In these respects it is identical with ordinary taxes upon property. The constitutional provision that "property shall be assessed for taxes under general laws and by uniform rules according to its true value," executed itself immediately upon its adoption, and operated, without any legislative action, as a repealer of all tax laws not in accord with it. *Bank v. Newark*, 39 N. J. Law, 380, and 40 N. J. Law, 558.

Testing the scheme of taxation prescribed by the Plainfield Fire Department act by this constitutional provision, it is at once perceived that it contains features obnoxious thereto. While it seems to be now settled that the legislature may select for taxation classes of property, without contravening this provision, yet, to sustain such legislation, the classification adopted must be based on proper distinctions, and be complete and not partial. In the law before us the property selected for taxation consists only of buildings and stores of goods, wares, and merchandise. All other property is exempted. The sole quality or characteristic which distinguished the included from the excluded property is that the former is liable to be injured or destroyed by fire. This distinction cannot in my judgment be admitted to be sufficient to justify the classification of property for taxation, even for the purpose of affording protection against fire; but, if this could be conceded, yet the classification adopted in this act is defective and partial, because it only includes such personal property as is covered by the phrase "stores of goods, wares, and merchandise," and excludes all other personal property, although equally liable to be injured or destroyed by fire. Moreover, by this act, taxation is not imposed by a uniform rule, according to the true value of the property. The standard fixed is not true value, but that value as modified by the peculiar hazard or liability to injury by fire. For these reasons, the special mode of imposing these taxes for the use of the Plainfield Fire Department was irreconcilable with the requirements of the constitutional amendment, and, upon its adoption, was thereby abrogated. This result would render unnecessary any further consideration of the questions presented by the record before us, but for the imperative provisions of the act of March 23, 1881, (Supp. Revision, 602,) which forbid the setting aside of any tax, even for illegality, if the person against whom it was laid is liable to taxation for the purposes for which it was laid; and which require the court in that case to determine and fix the amount for which such person was legally liable to taxation.

The abrogation of special tax laws by the constitutional amendment, left in full operation the general tax law then existing. *Bank v. Newark*, *supra*. Where special tax laws were obnoxious to the constitution as amended, and so repealed, the provisions of the act of March 23, 1881, have been applied and taxation justified under the general tax law. *Auryansen v. Hackensack*, 45 N. J. Law, 113. The act of March 23, 1881, however, does not confer on the court original power to tax or assess, but only to apply the provisions of existing valid laws on the subject to the case before the court. *Reynolds v. Paterson*, 49 N. J. Law, 380, 8 Atl. Rep. 113; *Elizabeth v. Meeker*, 45 N. J. Law, 157.

The court is therefore compelled to proceed to determine whether any valid assessment upon prosecutrix for the use of the Plainfield Fire Department can be made under any existing law. None of the acts relating to the Plainfield Fire Department have been or can be claimed to confer the power of taxation, except the original act creating that corporation, approved March 3, 1854. The general powers conferred by that act were to procure and maintain apparatus and to establish organizations adapted to extinguish fires. Such powers, if conferred for the benefit of the public, are doubtless of a public nature, and may be exercised by the legislature, or conferred with other powers promotive of the public welfare in localities upon local governments. Almost every municipality in the state has thus acquired power to establish and maintain a fire department. When powers of this character are conferred upon local governments, immemorial usage has justified the delegation therewith of the power of taxation, so far as is requisite to enable them to use the other powers granted. But to justify any imposition of tax upon persons or property, the purpose to be effected must be a public one. An individual or private corporation may, for the protection of their property, purchase and hold engines and organize their employees into companies. Several owners of property may unite in doing the same acts for the protection of the property of each. They may doubtless acquire a corporate capacity for that purpose. But in these instances no duty is owed to the public, or to any save those interested. No one could be compelled to unite in or contribute to such a private enterprise under the guise of a tax.

A careful perusal of the act before us leaves the mind in doubt whether the purpose designed to be effected was public or private. It does not in terms impose on the corporation or its officers any duty to the public. Its silence respecting the scope of its operation seems to justify an inference that it was solely designed for the protection of the property of its members. The provision for raising money, not by a call upon its members, but by a tax levied and enforced in modes borrowed from the laws relating to taxes for public purposes, seems to afford some indication that the purpose designed was a public one. But if it be conceded that the purpose to be subserved by this corporation was not private, but public, the validity of the imposition of a tax by it is not thereby established. Nothing has been better settled in this state than that the legislature has no authority to delegate the power of general taxation over persons or property, except to political divisions or corporations of the state, and that for the sole purpose of enabling them to exercise the powers of government conferred on them within their locality. The powers of government conferred on them may be limited. Two (or perhaps more) of such corporations, each wielding different powers, may co-exist over the same locality; but, to justify the delegation of taxing power, they must have a public character. To confer that power on individuals or private corporations has never been conceived to be within the constitutional power of the legislature. *St. Baldwin v. Fuller*, 39 N. J. Law, 576, and 40 N. J. Law, 615; *St. Hoey v. Collector*, 39 N. J. Law, 75; *St. Lydecker v. Englewood*, 41 N. J. Law, 154; *Auryansen v. Hackensack*, 45 N. J. Law, 113.

In the *Lydecker Case*, above cited, the question presented related to the validity of an act which created a board of commissioners with power to build sewers in a part of the township of Englewood, which board was to be elected by the male and female resident land-owners of the district, and the cost of the scheme was to be defrayed in part by a tax on the lands therein, to be levied and collected by the township officers. In the opinion of Mr. Justice DIXON the characteristics of the local corporations to which taxing power may be delegated were thus described: "These distinctive marks are, I think, that they embrace a certain territory and its inhabitants, organized for the public good or advantage, and not in the interest of particular individuals or classes; that their chief design is the exercise of governmental functions, and



son, until an accounting be had between the parties. A decree to this effect was granted. Afterwards, Reeves came in court and asked to have the decree modified, so as to relieve him from costs.

*Garrison & French*, for complainant. *J. W. Morgan*, for defendants.

**BIRD, V. C.** The bill in this case charges that Gleason applied to Samuel A. Reeves, an uncle of Gleason's wife, for aid in the prosecution of business, and that Reeves gave to Gleason his check for about \$530.65, ostensibly as a loan, and that Gleason executed his bond for the repayment of the same on demand, and also a warrant of attorney to confess judgment, delivering them to the said Reeves, and that Reeves immediately thereafter entered up judgment upon the said bond and warrant of attorney, when the said Gleason returned to Reeves his check, or the cash, and in truth discharged the said judgment; and further charges that Reeves caused an execution to be issued upon the said judgment, and a levy to be taken upon all the partnership goods mentioned in the bill of complaint, and caused said goods to be advertised for sale; and it also charges that nothing is due to the said Reeves on his said judgment from the said Gleason, and that the proceedings upon the part of the said Gleason and Reeves were but part of a scheme to injure and to ruin the complainant.

Reeves answers these charges, but how does he answer them? How did he answer the charge of participation in the effort to injure the complainant? He says: "Said Gleason applied for a loan from this defendant of the sum of \$530.65, and to secure the payment of the said sum of money he executed and delivered unto this defendant a bond and warrant of attorney to confess judgment." And that is all he says. This is the extent of his answer to the grave charge of entering into an arrangement to ruthlessly deprive another of his property under the forms of law. The bill charges that he was immediately repaid the amount of money which he advanced by his check to Gleason, and that immediately after he had taken the oath required by the statute, before his judgment could be ordered to be entered, the said money was returned to him. To this most grave and important charge he makes no response whatever. When a defendant answers he must answer fully, and the charges of fact which are left unanswered are always taken as confessed, as true, and as to them the complainant is entitled to a decree without submitting proofs. But in this case there are proofs. It is shown that the allegations are true so far as Gleason participated in them, he himself having made statements to a witness which established the fact beyond controversy. These facts are not questioned by Gleason. The court cannot disregard them.

The motion to modify the order charging the defendant Reeves with costs, so as to relieve him, will be denied.

### GILVERY v. TRENWITH.

(*Supreme Court of New Jersey. November 18, 1887.*)

#### 1. CONTRACT—BREACH—RESCISSION.

In an action for damages for breach of a covenant to move "mammoth swings" to lands of the defendant, and lease the lands to be occupied thereby, the payment of the costs and expenses of removal to be secured by chattel mortgage on the swings, it is no defense to such action that at the time of the agreement the plaintiff did not own the swings, but the title was in his wife, or that the plaintiff had employed another to move the swings, if the defendant was not hindered, deceived, or injured thereby. He could only rescind by showing fraud; and could not require security before performance, and the costs and expenses ascertained.

#### 2. SAME—MEASURE OF DAMAGES FOR BREACH.

Full compensatory damages may be given if, by defendant's breach, the plaintiff was obliged to take the swings apart and sell them, at a loss.

(*Syllabus by the Court.*)

Error to circuit court, Atlantic county; REED, Judge.

By a contract in writing dated December 8, 1885, Michael Gilvery released all claim of action and compromised a suit of law against John Trenwith the sum of \$500, and it was therein set forth "the said John Trenwith agrees to remove from the place where they now stand, at the option of said Michael Gilvery, the property of said Michael Gilvery known as the mammoth swings," and to erect them in good order upon the grounds of the View Excursion House, at Atlantic City, New Jersey, adjoining Phillis Ligan's show, towards the hotel, and to pay all costs and expenses incurred so doing; which said costs and expenses the said Michael Gilvery agreed to pay to the said John Trenwith within two years from the date of the contract, and in default thereof agrees that they, the mammoth swings, shall come, and shall henceforth be, the sole and exclusive property of the said John Trenwith; and further to secure the payment of the said costs and expenses, the said Michael Gilvery hereby agrees to make and execute upon said John Trenwith whenever said payments are made, a chattel mortgage upon said mammoth swings for the amount of said costs and expenses payable in two years from the date hereof, which chattel mortgage shall be a lien on said swings," etc. There was also to be a lease given for two years free of rent, of the ground occupied by the swings, for the purpose of carrying and carrying on the business of the mammoth swings; with a provision for renewal during Trenwith's extended term, if obtained, for a rent agreed upon.

The defendant, John Trenwith, did not remove the swings; Gilvery employed one Rufus Booye to remove them. Trenwith stopped Booye as the swings had been raised and blocked ready for removal. The swings were taken down and sold by Gilvery, because he had no place to remove them, and this suit was brought against Trenwith for damages. Trenwith's principal defense, on which he relied, was that at the time of the agreement the swings were in Gilvery's wife's name, and the statement in the contract that the swings were the property of Gilvery was not true; and that he was not in a position to secure the payment of the costs and expenses of removal by a chattel mortgage, because the swings were not his. It appeared that Gilvery had, by the interposition of a third person, caused the swings to be conveyed to his wife by bill of sale, yet he was the real owner, and when Trenwith raised the objection, promised to execute the chattel mortgage, and she subsequently reconveyed the property to her husband. The verdict and judgment were for the plaintiff, and the defendant by writ of error reversed the record and bill of exceptions.

*Garrison & French*, for plaintiff. *S. E. Perry* and *D. J. Pancoast*, for defendant.

**SCUDDER, J.** The first error assigned is that the court refused to grant the writ for the plaintiff. The grounds of the motion for nonsuit were the representations in the agreement that the swings belonged to the plaintiff, which was material to the defendant; that the matter was within the plaintiff's knowledge, and the defendant had the right to rely on his representation; that the defendant's refusal to remove proceeded from this ownership of Mrs. Gilvery, which he gave plaintiff notice. Also, because before the said Michael Gilvery exercised the option of removal and requested the defendant to remove the swings, he had contracted with Booye to remove them, and he had caused the removal to defendant's land; and further, because he did not execute a mortgage nor get title and notify the defendant that his objection had been removed; and because the plaintiff, by his conduct, had put his swings on a condition that when he notified the defendant to remove them he could do it without rendering himself liable to an action at law by Mrs. Gilvery, the legal owner, and by Rufus Booye, who had begun the removal, expended money on the swings, and had possession and a claim in the nature of a lien for the work done by agreement.

There was evidence tending to show that Trenwith knew that the title was in the wife, but that Gilvery was the real owner, and of her willingness to execute a mortgage when the removal was made and the cost and expenses ascertained, and that Booye was employed to hasten the removal, but Trenwith refused to permit the swings to be removed across or on his land. The court refused a nonsuit, and the reasons appear in the charge to the jury which was subsequently given. It was charged, in substance, that Trenwith was bound to remove the swings under his covenant; that Gilvery's covenant to give a chattel mortgage to secure the costs and expenses of removal was an independent covenant, and he was to give it after Trenwith had made the expenditure for removal, and the amount ascertained; and if Gilvery at that time was not in a position to perform his covenant, and did not perform it, Trenwith's remedy was an action for the breach; and that Gilvery had until that time to prepare the security agreed for. There was no error in this part of the charge, or in the refusal to nonsuit.

As to the representations in the agreement that the swings were the property of Gilvery, the court said whether this was merely a matter of description of the swings which Trenwith was to remove, or this assertion was intended to induce Trenwith to enter into the contract, and whether it was material and influential in procuring the contract through fraudulent representation, was a question for the jury. If he made a false representation, and the contract was executed by reason of it, the defendant had a right to rescind as soon as it came to his knowledge. If he had the right to rescind, he was bound to exercise it promptly when he could place the party *in statu quo*. It appears in the agreement that the removal of the swings, and the occupancy of other land by them for two years without rent, as well as the \$500 in money, were parts of the consideration to be given by Trenwith in settlement of the suit Gilvery had brought against him, and for the full release and quitclaim of all demands. The \$500 were paid, but the other parts of the contract were not performed by Trenwith, for the reasons above given.

In the requests to charge the other important matter on the question of non-performance is that the court was asked to say that Trenwith was absolved from performing his contract because Gilvery made a prior contract with another, Rufus Booye, to remove the swings, as has been stated, and that he was not obliged to employ Booye, or any person of Gilvery's selection. There would be force in this position, if it appeared that this was the point of Trenwith's objection to perform; but he did not object to Booye and his contract, but to the removal of the swings to his land, and the fact that Mrs. Gilvery owned the swings. As Trenwith was to pay for the costs and expenses of the removal of the swings, it was evidently intended by the plaintiff that Booye should act for both, and be paid by the defendant. If the defendant objected to him and the terms of his engagement, he could do so, but he did not. There is no apparent reason to believe that the contract with Booye in any way interfered with the performance of his covenant by Trenwith. He made no effort to remove the swings, and was not hindered by Booye.

The assignment of error as to damages and refusal to charge that the jury could not give damages for the destruction or loss of property, and only such as the plaintiff had suffered from the defendant at the time of the destruction of the swings, and only up to that time, is not well founded. On April 1, 1886, the plaintiff gave notice by his attorney to the defendant to remove the swings and erect them according to contract; that he was willing and able to perform on his part; that they were dangerous to themselves and to the property of others, and if he failed to comply with that notification and request he would be held responsible for all damages resulting therefrom. By bills of sale of that date the swings were reconveyed by Mrs. Gilvery to her husband, in the same manner that the original transfer was made from him to her. On March 25, 1886, by a written notice from the defendant's attorneys, Booye was

forbidden to remove the swings on the Sea View Excursion property, and was told if Mr. Gilvery advised him to continue with the moving to tell him that Trenwith's attorney forbade him, and referred him to them. The plaintiff testifies that they were dangerous as they were, that they were stopped, that Trenwith wanted the ground, and, having no place to which he could move them, he took them apart and sold them at a great loss. The court left the jury to determine the damages, after calling their attention to the notice of the defendant's attorneys, and the effect of its interpretation, as the respective counsel of the plaintiff and defendant construed it, and refused to charge directly on the fact, as the defendant's counsel requested.

The other alleged errors are contained in effect and substance in those above considered, and we find no error in the refusal of the motion to nonsuit, or denial of the requests to charge. The amount of damages we have not considered, as the evidence on this part of the case can only be reviewed on rule to show cause for new trial.

We find no error in the causes assigned, and the judgment will be affirmed.

#### SILVERTHORN and another v. BRANDS.

(Court of Errors and Appeals of New Jersey. March Term, 1887.)

##### PARTNERSHIP—ACCOUNTING—PAYMENT—BURDEN OF PROOF.

Upon an accounting between three partners, S., W., and B., the only matter in dispute was a sum of money which S. claimed he had paid to B. in the course of the firm's business, and for which he had not been allowed credit. The evidence was uncontradicted that the money had been paid to S. for the firm, and the testimony as to his having turned it over to B. was conflicting, the weight leaning somewhat against S. *Held*, that the burden of proof to establish payment to B. was upon S., and that he had failed to make out his case.

##### Appeal from court of chancery.

The decree now affirmed was advised by BIRD, V. C., the following conclusions being filed:

"In October, 1881, these parties entered into copartnership to buy and sell apples, cider, and buckwheat flour. Just how long the business was carried on does not appear, but I infer that it terminated sometime in December, 1881. In the spring of 1882 they met at the house of William Silverthorn for the purpose of settlement. They did not agree upon a settlement, but agreed to meet at the house of David B. Silverthorn soon afterwards. At that meeting William Silverthorn said to Brands that he had not given him, William Silverthorn, credit with \$799.90, which he, William Silverthorn, had paid him. To this Brands made no reply, except to say that he would not settle upon such terms as that. And that ended that attempt.

"The parties upon the witness stand, and their respective counsel, agree in saying that the only matter in dispute is whether or not William Silverthorn paid the \$799.90 to Brands. The money is traced to the hands of William Silverthorn in this way: Apples were bought at Newfoundland, Pennsylvania. The three partners were all there. A number of barrels were shipped, and William Silverthorn went to sell them. As he was about leaving, Brands handed him a check, and asked him to draw the money on it for him. William Silverthorn sold the apples for \$799.90. He took a check for that amount. He drew the money on the \$400 check. He says that he also drew the money on the \$799.90 check, in which he is uncontradicted. He carried the \$400 to Newfoundland in two packages of \$200 each. It is proved conclusively that he first paid Brands one of these packages, and turned away from him while Brands counted it, and made an entry in his pocket memorandum book, when he, William Silverthorn, paid Brands the other package, which he counted, and entered in his book. It seems to be established with equal certainty that there was no other money paid at that time. Brands swears to these facts,

and Mr. Grimm, who stood by, does also. And Mr. Simon, who was in the same room, but not near enough to the parties to hear what they said, or to witness the counting, swears that the money was paid in two parcels. I think it cannot be contended seriously that any part of the \$799.90 was paid at the time the \$400 were paid. Indeed, Mr. Silverthorn says that he thinks he paid the \$799.90 to Brands the next Tuesday morning.

"Now, it is urged as a strange circumstance that Brands should make two separate entries of the \$400. This does not seem more strange than that William Silverthorn should make two separate payments of it. William Silverthorn says that he drew both the \$400 and the \$799.90 for the purpose of paying them over to Brands. It was intimated that the fact that Brands had made two entries in his book was proof that the two sums had been paid, that is, the \$400 and the \$799.90, but that there had been a false entry. Any such conclusion as to the entry seems to be excluded; for then neither entry represents the \$400, and consequently both entries are false, and both were falsely made in the presence of Mr. Grimm, and if not in the immediate presence of William Silverthorn, he was in the same room, and so near by that detection of the false entry was likely to be made at the instant.

"It was also urged that William Silverthorn obtained the money, and carried it with him for the purpose of paying it to Brands, and that it was most natural that he should have paid it over to him, as it was understood that he was making the principal payments for the purchases made. That is true, and that consideration has had due weight with me; but it will be seen that it was most natural for him to have paid the \$799.90 when he paid the \$400, which, we have already shown, he did not do. There is no reason offered for not paying it then. There is nothing to show that William Silverthorn had any occasion to use it in the business. Indeed, as above stated, he says that he carried it with him to give it to Brands.

"The witness Grimm says that when William Silverthorn paid over the \$400, he said to Brands that he would be up every two or three days, and would bring him more money. It is urged by counsel of complainant that William Silverthorn would not have made any such remark if he had paid over, or if he intended to pay over at that visit, the \$799.90. There is force in this argument.

"When I come to apply the ordinary tests, the case seems to be against William Silverthorn. Of course the burden is on the complainant in the first instance; but having shown, as in this case, that the defendant had the possession of moneys in dispute, then the burden is shifted to that defendant to show a payment. He has not, by a preponderance of testimony, shown such payment. He says that he paid it to Brands, and thinks that he paid it on a Tuesday. In this Brands contradicts him, and there is no circumstance of any kind sufficient to overcome his denial. This guide, *i. e.*, that when all the testimony, including distinct facts and collateral circumstances, is marshaled and points in one direction, is universally acknowledged in such controversies. Hence, considering the burden upon Mr. Silverthorn, I cannot say that he has made out his case, and shown a payment of the \$799.90.

"It is insisted that, because Brands did not claim that the \$799.90 had not been paid at the second meeting for a settlement, he must have had the money. It is quite clear that he at once refused to settle on that basis. I cannot but remark that I am unable to understand why it was that William Silverthorn did not insist at the first attempt at settlement that he had made such payment. He swears that he made the payment and entered it in his book at the time. This being so, it seems incredible that they should worry over their account for several hours with the amount of this one item only unsettled without William Silverthorn seeing that he had charged it against Brands, and without also seeing that Brands had not given William Silverthorn credit for it alongside of the \$400. This perhaps does not determine the rights of

the parties, but it does render more uncertain the claim of Mr. Silverthorn. There are but a few entries in his little pocket memorandum book, and all of those on one page. He could not help seeing, at a glance, this entry, and I think every one, unbiased, would ask why did he not say at the first meeting for a settlement that the \$799.90 had been paid.

"As above intimated, upon the whole case the weight of testimony is with the complainant. I shall advise accordingly."

*Henry S. Harris*, for appellants. *L. De Witt Taylor*, for respondent.

PER CURIAM. This decree unanimously affirmed, for the reasons given by the vice-chancellor.

### FITCH v. BROWER and others.

(Court of Chancery of New Jersey. October Term, 1886.)

INTERPLEADER—BY GARNISHEE—NOTE PAYABLE IN ANOTHER STATE.

A Pennsylvania creditor proceeded against a New York corporation by attachment, and garnished F., a resident of New Jersey then in the state, as the maker of a note to the corporation, payable in New Jersey. The corporation, with knowledge of the garnishment, transferred the note before maturity, and for value, to B., a resident of New York, who took it with notice. B. then sued F. on the note in New Jersey. *Held*, that the *bona fides* of the transfer to B. being at issue, and the question of the attachability of a note payable in its very terms outside of the jurisdiction issuing the writ being an open one in both Pennsylvania and New Jersey. F., the maker and garnishee, could maintain a bill of interpleader.

Interpleader. On rehearing of motion to dismiss bill, etc.

*W. Y. Johnson*, for the motion. *C. F. Fitch*, contra.

BIRD, V. C. This bill is an interpleader. The question is: At the time of filing the bill, were there such claims upon the complainant as a stakeholder as justified him in coming into this court for aid?

The complainant resides in New Jersey; the defendant Brower in New York, and the defendant the Express Publishing Company in Pennsylvania. The complainant purchased a printing-press of the Campbell Printing-Press & Manufacturing Company of New York, and gave his note therefor, dated October 9, 1882, payable in three months, for \$1,050.10, at the Phillipsburg National Bank. On October 19, 1882, the said Express Publishing Company issued an attachment out of the court in Pennsylvania against the said Campbell Printing-Press Company, and had it served on the complainant, who happened at the time to be within the jurisdiction of that court. By virtue of this attachment the plaintiffs therein claimed to have seized upon and attached, under the law, all the right, title, and interest of the said Campbell Printing-Press Company in or to the said note, it being served in due form upon this complainant. This suit in attachment is still pending and undetermined. The defendant therein, the Campbell Printing-Press Company, refuses to make any defense to said action in attachment. But the same note was transferred to Brower, and, as far as it appears, for a valuable consideration, and before maturity. This fact was communicated to the complainant, January 10, 1883, after which he was informed that the said note was transferred on December 9, 1882, about six weeks after the attachment had been issued and served. The complainant offered to pay Brower the amount due upon the note, provided she would indemnify him against the attachment; but on this proposition they did not finally agree. The bill alleges that complainant immediately informed the said Campbell Printing-Press Company of the service of said writ of attachment. The complainant says he is desirous of paying the amount due on the note to the person entitled to receive it. But he says that while the defendant Brower claims the amount due on said note by virtue of the transfer before its maturity, the

said the Express Publishing Company also claims it by virtue of said attachment, and *insists* that although she (Brower) took the note before maturity, she is not a *bona fide* holder. Brower has commenced suit in New Jersey against Fitch, the complainant, for the recovery of the amount due on the note.

These are the complications which lead to the filing of this bill. Do they make a case? The parties defendant have answered. After the answers were in, it was agreed between counsel that a motion should be made, as on demurrer, to dismiss the bill for want of equity. Counsel were heard. I thought then that this case came so nearly within *Briant v. Reed*, 14 N. J. Eq. 271. that I ought to follow it. I thought a cautious man would not feel safe in paying either claimant. But counsel for Brower came in and urged a rehearing. It was thought the court had misunderstood the force of the argument on one important point, viz., that the note which represented the rights or interests which were attached was *payable at Phillipsburg, New Jersey*, and not in Pennsylvania, where the attachment issued, and that these things being so, the attachment did not, and could not, bind Fitch in any sense, and that he was not, and could not, by any legal procedure, be placed under any obligations to the plaintiff in attachment. Then it appears that on the first discussion two points were urged; the one above stated, which it is thought the court did not fully comprehend, and also that a note duly transferred to a *bona fide* holder before maturity is not the subject of an attachment. The latter proposition is not disputed, so far as I am aware. It seems to be very reasonable, and in strict accord with the law governing commercial paper; but I thought it did not devolve on the complainant to show that Brower was such *bona fide* holder for value. I thought the law did not impose such a burden on him. I thought that he might justly ask this court to help him in this regard, and that this court would be justified in compelling both claimants to stay their hands as against Fitch until they should settle that question as to the *bona fides* of the transfer between themselves. And I thought then that there was difficulty enough on the other point to warrant me in retaining the bill. And I still think the bill should stand. My mind does not rest so contentedly on this branch of the case as on the other; but I have been, and am, impressed with the view that these attachment proceedings, having been served on the defendant, create such a *claim* as also to bring the case within the learned opinion in *Briant v. Reed*. It is not what I might, or what any other judge might, decide under the facts as given, as to the very right of the parties in the law, *but whether there is such a claim made* as ought to impel this court to say to the parties claiming, "You must settle this between yourselves." I might believe that the law is with Brower, and that it would be safe for me to dismiss this bill, and thereby send the complainant to contest the demand of the plaintiff in the attachment in another state; but then, since this point has not been decided in either New Jersey or in Pennsylvania, I might possibly be in error, which again, as I think, brings the case within *Briant v. Reed*.

The counsel of Brower says that Fitch gave his note, which Brower holds, and that the note is made payable at Phillipsburg, a place outside of the jurisdiction in which the attachment issued, and that it is necessarily beyond the power of the court in a foreign jurisdiction to change the terms of the contract, and to compel Fitch to pay anywhere else than at Phillipsburg. The attachment proceedings, it is urged, are a nullity as to the amount due upon the note, and so absolutely so as to dissipate the thought that the plaintiff therein makes any claim whatever against Fitch worthy of the attention of this court. In *Tingley v. Bateman*, 10 Mass. 343, in *Nye v. Liscombe*, 21 Pick. 263, and in other cases in Massachusetts, and New Hampshire, and Vermont, under their statutes, the question raised has been decided in accordance with the view of Brower's counsel. But it has not been settled, as I understand

the law, in Pennsylvania in such a way as to leave no room for doubt. I admit the reasonableness of the rule. I think it ought to be adopted in general terms. I think the views expressed as to commercial paper in Drake, Attachment, (see chapter 28, § 573,) are just, but the labors of that learned editor most conclusively show how wide is the field of discussion generally, and how divergent are the views of the different courts in the union as to the attachability of commercial paper. And as to the exact point now pending, the attachability of a note payable in its very terms outside of the jurisdiction issuing the writ, the views of the same author are reasonably convincing. (see chapter 19, § 37;) but, as intimated above, that very important question is not, even in Pennsylvania, beyond the domain of legal controversy. I am not sure that this complainant could resist the attachment in Pennsylvania on the ground that it was payable in New Jersey by its very terms, notwithstanding I say I think it ought so to be. The bill shows that the note was still in the hands of the defendant in attachment at the time the writ issued. It also shows that the said defendant knew of the existence of the attachment, and of its service on this complainant. There are cases which declare that, after such knowledge, the defendant could not assign or transfer the note without fraud; but the bill also declares that the assignee took the note with knowledge. Now, then, under these complications of facts and allegations, which allegations on this motion I must take as facts, and the uncertain or contrary declarations of the courts of Pennsylvania on the subject of such attachments, ought this court of equity in New Jersey to compel one of its citizens to take his chances before a foreign tribunal, and thereby settle these conflicting claims?

In the first place, in *Ludlow v. Bingham*, 4 Dall. 47, the court said commercial paper could not be attached before it became due. But in *Kieffer v. Ehler*, 18 Pa. St. 388, it was determined that such note could be attached in the hands of the maker before maturity, subject to the rights of a *bona fide* holder before such maturity. In *Childs v. Digby*, 24 Pa. St. 23, 27, the court says that any one having the possession of goods or effects may surrender them in obedience to a judgment in a foreign attachment, although he may happen to be in a foreign jurisdiction at the time the writ issued. But this case is criticised in the same court, (*Railroad Co. v. Pennock*, 51 Pa. St. 244, 253,) and, I should suppose, would not be followed in that state. But in the last case referred to the thing sought to be attached was a chattel, and not a mere credit, as in the case in hand. And the court said that if the thing attached were the proceeds of the goods, (a credit,) instead of the goods, a different question would be presented. *Noble v. Oil Co.*, 79 Pa. St. 354, is very much relied on, but in that case the discussion was more particularly on the precedence to be given to an assignment in Pennsylvania, or to an attachment in New York. Certain general principles are recognized in the case, as they are everywhere. The case does not decide that Fitch would not, in any event, be bound as garnishee, since the obligation which he was under to the defendant in attachment was to be discharged in New Jersey by its very terms.

It still seems to me that this is a fair case for an interpleader bill; that there is such reasonable doubt arising from this claim as to justify the court in requiring the defendant to settle it, and not to put the complainant to the risk and cost. It is not the mere assertion of the right, without more, but it is a claim through the process of a court which has jurisdiction by statute in such cases generally; and I think the defendants in this suit should proceed to determine whether in this case such court has acquired jurisdiction of the thing sought to be attached or not, so as to compel Fitch to pay as garnishee or otherwise. In other words, there is the same sort of claim as controlled Chancellor GREEN in *Briant v. Reed*, *supra*.

## HOWELL and others v. TOMKINS, Ex'r, etc., and others.

(Court of Chancery of New Jersey. October Term, 1886.)

WILL—DEVISE—ELECTION TO TAKE LAND INSTEAD OF PROCEEDS—INJUNCTION TO RE-  
SRAIN SALE.

The testator's farm was left to his grandson, in trust, for the use and support of the trustee's mother, E., and his sister, S., "and to her and her heirs after her." Upon the death of S., under 21, and without issue, "the devise in trust was to be equally divided between the surviving children" of the trustee. The trustee was also appointed one of the two executors whose judgment was to determine when, if at all, the farm was to be sold. *Held*, (1) that upon the maturity of S., with children living, she took the whole estate in the land subject to the life trust in favor of E.; and (2) that, while E. remained alive, both she and S. could elect to take the farm, instead of the proceeds from its sale, and could enjoin the executor from making such sale.

Bill for injunction. On motion to make restraining order perpetual.

*John W. Taylor*, for complainants. *Robert McCarter*, for defendants.

**BIRD, V. C.** James Tomkins died, leaving a will. He gave to his grandson, James S. Howell, his farm, lying in the county of Morris, his horses, cattle, and farming utensils, on condition that he should secure and provide a comfortable maintenance and support for Eliza, the daughter of the testator, and mother of James, and to Sarah, a granddaughter of testator and a sister of James. He also gave to James all the furniture in his house on said farm, "to him and his heirs forever. \* \* \* Which I give and bequeath to him, my said grandson, in trust, for the use of his mother during her life-time, and to his sister, Sarah Jane Howell, during her minority." He also gave him a bond and mortgage for \$1,900, directing the interest to be appropriated for the use and support of his said daughter and granddaughter. He then says: "And when my grandson, James S. Howell, shall arrive at the full age of twenty-one years, he shall have full power and authority to sell and dispose of any or all of the above-named real and personal estate devised and bequeathed to him, or any part or parcel thereof, by and with the consent of his mother, Eliza Howell. And in case my said grandson, James S. Howell, shall not survive his mother, Eliza Howell, then I do order that the aforesaid severally named bequests to the said James S. Howell shall revert back to my son, Floyd W. Tomkins, to be held in trust by him, in all respects, in the same manner and in the same use as was intended the same should have been done by James S. Howell, to-wit, for the use and support of my said daughter, Eliza, and Sarah Jane, her daughter, and to her heirs after her. But if the said Sarah Jane die before she arrives at the age of maturity, and without issue, then it is my will, and I do order, that the said legacies in trust be equally divided between the surviving children of my son, Floyd W. Tomkins, share and share alike." He named Floyd W. Tomkins sole executor. The will bore date March 31, 1855. On February 14, 1859, he made a codicil, in which he revoked the provision requiring the consent of the mother to the sale of the real and personal estate, and said: "And do hereby order and direct the same to be sold, by and with the consent of my executors, if they think proper." And concluded the codicil thus: "*Lastly*. And whereas my grandchild, James S. Howell, has arrived at full age since my making my last will and testament, I hereby constitute and appoint the said James S. Howell co-executor jointly and together with my son, Floyd W. Tomkins, as named in my last will and testament."

James S. Howell died in April, 1866. The said Sarah Jane has arrived at the age of maturity, has been married eleven years, and has two children. The said Eliza, since the death of her husband, has occupied the said farm, and enjoyed the rents and profits, and desires to continue so to do during her natural life. Both Eliza and Sarah Jane, the mother and daughter, claim to

be the beneficial owners of the rents and profits of said farm, and consequent of the right to the possession thereof during the life-time of the said Eliza and the said Sarah Jane claims that, having arrived at the age of maturity under the law, the fee of the said farm is vested in her absolutely. And this be not so in strict law, they have the right of election, and in the exercise of that right to continue to take the rents and profits, or to take the fee absolutely, discharged of the trust named in the will. Such right they claim to have exercised, and insist that this court shall declare and give effect to that right by decreeing that they are entitled to the rents and profits, not only during the life-time of Eliza, but to the actual possession and control of said farm without the interference of the said executor, and that, at the death of the said Eliza, the said Sarah Jane, her heirs and assigns, will be entitled to the fee. The determination of this question has been precipitated by the desire of the executor to sell the farm, to restrain which a preliminary injunction was granted. Should this injunction be made perpetual? The court might have been so framed as to have obtained the aid of the court in preventing a sale, upon the ground that it would be more beneficial to the *cestui que trustent* to possess and enjoy the farm, and the rents and profits, than to receive the interest of the consideration money in case of the sale. But the bill is not so framed. Its construction is such as to go to the root of the matter, and to warrant the court in putting such an interpretation upon the will as will determine the rights of the parties thereunder. With this in view the question arising was discussed before me.

The defendant insists that the title is vested in Floyd W. Tomkins, and that he is entitled to the whole estate, subject only to the trusts imposed during the life-time of said Eliza and Sarah Jane. This I think is a forced construction, and not in accordance with the meaning of the testator. It seems to me that in one event—that is, the death of Sarah Jane before maturity, and without issue—the said estate would have passed, not to Floyd W. Tomkins, but to his children; but in the event of Sarah Jane arriving at the age of maturity or having issue before her death, she was entitled to the whole estate at the death of her mother. And this clause, it seems to me, justifies such construction, viz.: "And in case my said grandson, James S. Howell, shall survive his mother, Eliza Howell, then I do order that the aforesaid several named bequests to the said James S. Howell shall revert back to my son, Floyd W. Tomkins, to be held in trust by him, to be appropriated, in all respects in the same manner, and for the same use, as was intended the same should have been done by James S. Howell, to-wit, for the use and support of said daughter Eliza, and Sarah Jane, her daughter, and to her heirs after her death. But if the said Sarah Jane die before she arrives at the age of maturity, without issue, then it is my will, and I do order, that the said legacies in trust be equally divided between the surviving children of my son, Floyd W. Tomkins, share and share alike." I can only read this as saying that, in case James S. Howell did not survive his mother, then the testator gave and devised the said farm to his son, Floyd W., to be by him held in trust for Eliza and Sarah Jane during the life-time of Eliza, and, after the death of Eliza, for Sarah Jane absolutely, in case she arrived at the age of maturity. Certain it is, that, in case Sarah Jane should have died before arriving at that age, the whole estate was given absolutely to the surviving children of the testator's son, Floyd W. It was absolutely given; there was nothing left of it to be disposed of; nothing for the executor or trustee, as such, and nothing for the son, Floyd W. These are the last expressions of the testator upon the subject; and they are clear and distinct, and, though not in all respects technical, seem to convey an unmistakable intent.

But it is said that the fee did not and cannot pass under this will except by the act and co-operation of the executor to whom the fee is devised, with power and authority to appropriate the rents and profits to the use of Eliza

and Sarah Jane. It is insisted that the application of the doctrine arising under the statute of uses cannot be called in to aid the complainants. Speaking with reference to general principles, this is true. If there is any active duty imposed upon the devisee of the legal estate in carrying out the purposes of the devise in favor of the *cestui que use*, which requires him to be vested with the legal estate, it becomes a trust to her, and the *cestui que use* is, in modern language, a *cestui que trust*, the legal seizin and the estate vesting in the trustee. 2 Washb. Real Prop. 434; 2 Jarm. Wills, 148. Whether the present case is within this rule or not, I need not now determine. It being a devise, and not a conveyance by deed, does not prevent the operation of the statute. 2 Washb. Real Prop. 433; 1 Greenl. Cruise, 336; *Hance v. West*, 32 N. J. Law, 233. But to proceed to more certain ground:

It is also insisted that the title is so placed by the peculiar phraseology of the will as to bar the complainants from every right under the doctrine of election. In other words, it is said that the complainants have no such interest in this land under the will as entitles them to say they will take the land itself, out of which the proposed legacies are to be raised by sale, rather than the legacies themselves. Since I have concluded that the whole estate or interest in the land passes to Sarah Jane after her mother's death, it is not necessary for me to decide the interesting question whether the complainants could elect to take the land during their lives, and so resist effectually a sale, or not, during that period. Can the complainants take the land, and so prevent the executor from selling it at any time, is, I think, the question in this case. In my judgment this question should be answered in the affirmative. The right to elect, when a proper case arises, is not questioned. *Fletcher v. Ashburner*, 1 Lead. Cas. Eq. 1118; *Fluke v. Fluke*, 16 N. J. Eq. 478; *Current v. Current*, 11 N. J. Eq. 186; *Scudder v. Stout*, 10 N. J. Eq. 377; *Craig v. Leslie*, 3 Wheat. 563. But it is virtually claimed that the right of election, in all cases, springs from the doctrine of equitable conversion, and that there can be no election here because there has been no equitable conversion. This contention is made upon what seems to be a well-settled rule,—that there is no equitable conversion in such cases, unless the order or direction to sell, and thereby convert, be inoperative or out and out, which has not been done by the testator in this instance, he only having ordered the sale to be made by and with the consent of the executors "if they think proper." I recognize this doctrine in all its length and breadth. The heir at law can claim its protection. A devisee would perhaps enjoy the benefit of it over and above a legatee. But I can find no case in which the court has allowed the person to whom the land has been devised in trust, for the use and benefit of others, with a power of sale for their benefit, to defeat the right of election because the doctrine of equitable conversion could not be applied. It would be a strange doctrine to hold, in such case, that the legatee could not take the land. If such be the law, then, in every case like the present, the trustee can defeat the plainest intentions of the testator. This case affords an apt illustration of the severity, if not the absurdity, of the rule sought to be applied. For example, had Sarah Jane died before reaching the age of maturity, or without issue, this trustee could have prevented a distribution of the estate among his own children, by saying that they were only entitled to the proceeds of sale, and that there could be no sale unless he saw fit to make it, and that he did not see fit to make it. But the executor sees fit to sell. He sees fit to convert. Now, therefore, if he be allowed to sell and to convert, who is entitled to the proceeds? Eliza and Sarah Jane are entitled during the life of Eliza, and Sarah Jane to the fund upon the death of Eliza. It seems clear to me that in such case the rule which allows a legatee to take the land instead of the money arising from the sale applies. It is said that, since the legatee, if she desires the land, can take the money and buy the land, the courts will not oblige her to pursue that useless and expensive form, but will

give her the land at once. This, I think, is a most reasonable and commendable rule. I conclude that it should be applied to this case.

Again, it is urged by way of objection that the legatee is a married woman, and cannot elect. I cannot understand why she cannot accept what the testator gives; but if she be under any such disability, in my judgment a court of equity can, when called upon, give the necessary aid and protect her interests.

I think the complainants are entitled to the relief sought for by their bill, and will so advise.

### ROGERS and others v. TRAPHAGEN, Adm'r.

#### TRAPHAGEN, Adm'r, v. ROGERS.

(Court of Errors and Appeals of New Jersey. November Term, 1886.)

#### EXECUTORS AND ADMINISTRATORS—DISBURSEMENTS TO INFANT DISTRIBUTEES—ALLOWANCE.

An administrator from time to time, both before and after the passing of his final account, supplied the two infant distributees, for whom no guardian had been appointed, with board and clothing; paid certain grocery bills for them; and rented to one of them, a girl, who married before she became of age, one of his own houses. *Held*, that although the disbursements were so irregular as to call for the closest scrutiny, yet they were all, with the exception of the rent, such as would have been sanctioned by a court of equity had the administrator occupied the position of a guardian; and in the absence of proof of bad faith on his part, they should be charged against the distributive shares; the rent being disallowed on the ground of the liability of the distributee's husband.

Appeal from the court of chancery.

Bill for an account. On exceptions to master's report.

The exceptions were referred to Joseph D. Bedle, Esq., advisory master, who filed the following conclusions:

"I think the jurisdiction of the court of chancery to deal with this case equitably is clear, although no question is raised upon it. The claim of the complainants is subject to equitable adjustment and control. The administrator has kept his accounts in such a way, and mingled the funds of the estate with his own in such manner, as to make the examination of the case very difficult, and for that reason he is entitled to no liberal consideration in a court of equity. Still it is not the right of the complainants in any way that they should profit by his errors. I detect no actual fraud in the management of the estate. The management has been loose, and from a mistaken judgment palpably so; yet in the settlement of the equities and the subjection of the administrator to proper liability the object of the court should be to do equity to these complainants,—to give them what they are fully entitled to under the circumstances. Although the management has been loose, yet, in some respects, I think it may be said that it is not unlikely that they will get more out of the estate than if the management had been better. If there had been a guardian appointed for these minors, who were very young when their father died, and the expenses of the guardianship, and the disbursements of the moneys made through the hands of a guardian, it is not unlikely that these complainants would have received less than they will receive now. The view I take of it is that they should not profit by the mistakes and looseness of management of the administrator, but that they should, by an equitable adjustment, be entitled fairly to what their interests require in this estate. Now I will take up these exceptions: In regard to the first, second, and the seventh and eighth, these being the exceptions applicable to the two children, and concerning the claim on the part of the administrator for board after the death of the father and up to the final accounting, and also for clothing, my judgment is that the final account, settled May 6, 1872, does not include the allowance of these claims. It would not have been proper to include in the final account any of these matters. Whatever advancements have been made

to those who are entitled to a distributive share of the estate are not proper matters to go into the final account at all. The account must be settled without reference to any advance, and the fact of an advancement, preceding the final account does not conclude an allowance therefor. There is an error in a good many settlements, but the final account takes in all transactions previous to it. These moneys that are advances on the distributive interest are to be taken out of the balance when settled in the final account; and, therefore, I do not regard that these exceptants are concluded by the final account, and do not see any reason why these allowances should not be made up to the final account as claimed for the board of the children and the clothing. They were of tender years, and the amount claimed seems to be not unreasonable both for the board and clothing. I therefore shall allow these exceptions, viz., the first, second, seventh, and eighth, and these amounts should be taken right out of the balance found in the final account. They need not disturb the system of calculating interest by the master, except only so far as they will reduce the amount that he starts with.

"Now that brings us to the third and ninth exceptions. I shall disallow these exceptions. The facts do not warrant them.

"Now I take up the fourth exception. Speaking generally, the master has stopped any allowances on the account of Charles since 1880, or rather there are no allowances after that time, being about the time of his marriage. In the account of the administrator in regard to Charles, there is a gap between November 22, 1879, and April 29, 1881, and this exception is to the non-allowance of a claim for groceries between that date, April 29, 1881, and July 1, 1884. The question is as to whether that exception should be allowed during the time the mother was living with Charles and his wife, Charles having been married in or about the month of October, 1880. The evidence is clear that Charles got these groceries. He admits it, and it is evident that they were obtained through the instrumentality of the mother. I have examined this testimony several times on this point, and the conclusion that I have reached is that those groceries, so much a month, were actually received by Charles, and there is no controversy in the case about the facts with reference to it. I therefore think that he should be charged with them; I do not see any reason why he should not be. He was then married. He had his wife, and they were living together; the mother was living with them, and he got the benefit of these groceries. I think the equities are all most decidedly in favor of allowing this claim.

"I now take up the tenth exception and also the eleventh. The tenth exception is a claim for rent from March 1, 1879, to March 1, 1882, at \$10 per month. The eleventh exception is a claim for rent from March 1, 1882, to July 1, 1884, at \$10 per month. Emma became of age October 5, 1881. The allowances on the account of Emma cease, under the master's report, September 6, 1877, which I understand to be the date of her marriage. I have concluded not to make any allowance for rent previous to October 5, 1881, the time she became of age, and my reason is that, although there are some equities in favor of it, from the fact that she did, with her husband, actually occupy this house, yet I do not think that, in the light of her minority and the fact of her having a husband, I should make this allowance. I think that the administrator should be at whatever loss he has sustained by reason of that; but the proof is, in substance, and there does not seem to be any controversy in the testimony about it, that she was there occupying these premises under an understanding that they were to be paid for out of her share of the estate. The administrator swears to that, and she herself admits it distinctly, in forms of expression like this: That she had received nothing except rent. She repeats that several times over and over again, and it is quite clear, from the general run of her testimony, that she regarded herself as in there under an arrangement that she should meet the rent out of her estate. Now, when she

became of age, I do not see any difficulty in her making such an arrangement and I think the facts warrant my deciding that that was the fact, and I do not feel willing to deprive the administrator of his claim for that rent under those circumstances, when she, an adult, taking it from the time of her coming of age, was occupying this property under an understanding that the rent should be satisfied out of her distributive share of that estate. I have read the testimony several times upon that point, both the testimony of Emma and Mr. Traphagen, and that is the conclusion which irresistibly forces itself upon me. I therefore think that, notwithstanding her husband, but treating her as of age October 5, 1881, and she occupying the premises and getting the benefit of it, under an arrangement that it should come out of her distributive share, the administrator should have an allowance for it here. The two exceptions then will be allowed, so far as they cover the rent from October 5, 1881, the time that she became of age, up to the end of the claim for rent. The tenth and eleventh exceptions both have reference to Emma, and they are allowed as stated.

"The twelfth exception is disallowed. The fifteenth exception, which covers the claim for commissions, is disallowed.

"Now, the other exceptions cover the question of interest. In regard to interest, as I understand the mode adopted by the master, up to the period of time when he ceased to make allowances, he calculated interest at the end of each year, deducting the allowances or payments, commencing six months after the final accounting. I think that that principle is right, but, so far as any question of compounding after that is concerned, I disallow it. Practically, a readjustment of the account will result in this: These allowances that are now made cover a later period of time, and up to near the commencement of the suit. My decision is that the same system of calculation adopted by the master during the period of time that he made allowances be continued during the whole period covered by the allowances now made by me, and that the balance be not compounded, but draw only simple interest. And my reason for that is this: that the allowances or payments were such that it would be unjust to adopt any compound system. The amount of the interest is not such as to require the administrator to keep it invested under the penalty of having it compounded against him, and besides, the payments will absorb the interest.

"The administrator is to pay the costs out of his own pocket."

*S. B. Ransom*, for Henry Traphagen, administrator. *Parmley, Olenka & Fisk*, for Charles E. Rogers.

REED, J. These are cross-appeals from a final decree fixing the extent of the liability of Henry Traphagen as administrator of Charles E. Rogers. Charles E. Rogers died December 7, 1870, leaving a widow and two children, Charles E. and Emma A. Letters of administration were granted to Henry Traphagen on December 24, 1870. On May 6, 1872, Mr. Traphagen filed his final account as administrator with the surrogate of the county of Hudson, which was duly passed, showing a balance in his hands of \$6,897.54. He paid to the widow the one-third part of said balance, and held the children's portions of \$2,132.51 each in his own hands, no guardian of the estate of the children having been appointed. The administrator, at different times, and in various ways, made payments of money to and for the benefit of the children up to the time when they attained their majority. On February 18, 1884, the children filed their bill in the court of chancery for an account, and on October 15, 1884, an account was ordered. The master to whom the matter was referred reported that there was due to the complainant Charles E. Rogers the sum of \$2,210.44, and to Emma A., the sum of \$2,824.78. The exceptions were, by Mr. Traphagen, filed to this report, which exceptions were referred to Advisory Master Bedle, who advised a decree allowing a num-

of the exceptions and disallowing others. From these conclusions of the master, appeals are taken by both parties to the suit.

In the consideration of the counter-contentions as to the amount of the allowances which should be permitted to the accountant, it is observable that the administrator made the disbursements to the infants and for their benefit in a manner entirely irregular. The functions of his office as administrator were entirely ended when he had filed his account and received the orphans' court's approval thereof, with the one duty still subsisting, namely, that of paying over the balance in his hands to the persons by law entitled thereto. The persons entitled by law would have been the regularly appointed guardians of the infants. Payment by a trustee to an infant, without the sanction of the court, is irregular, and the trustee may be compelled to pay again to the infant when he comes of age. *Dagley v. Tolferry*, 1 P. Wms. 285; *Philips v. Paget*, 2 Atk. 80; *Davies v. Austen*, 3 Brown, Ch. 178; *Lee v. Brown*, 4 Ves. 362; *Furman v. Coe*, 1 Caines, Cas. 96. The court sometimes, where the amount is small, for the purpose of saving the expense of taking out letters of guardianship, will direct a payment to a relative of the infant. *Farrance v. Viley*, 21 Law J. Ch. 813; *Ker v. Ruxton*, 16 Jur. 491. It is not, however, an inflexible rule that payment directly to an infant, without an order of the court which supervises the trust, results in a forfeiture of all benefit arising from the payment made. Nor do I perceive any reason why, in the absence of bad faith on the part of the person making the payment, he should not be allowed the benefit of all disbursements, which would clearly have been sanctioned by a court of equity had the administrator occupied the position of guardian. His conduct should, undoubtedly, be scanned with the closest scrutiny, but if his acts appear to have been *bona fide*, and to have been attended by a benefit to the infant *cestui que trust*, then he is equitably entitled to the same degree of relief as if his conduct had been marked by the strictest conformity to the rules of legal or equitable procedure. The advisory master in the present case recognized this equitable rule in dealing with the several questions presented for his consideration. Regarding the cause from the same point of view, the question is presented whether the court of chancery, in so dealing with the accounts, failed in certain particulars to reach correct results.

The counsel of Mr. Traphagen first insists that he should be allowed a bill for groceries which were delivered to Emma A., and paid for by Traphagen. Emma was at this time married, and living with her husband and her mother, although she was yet an infant. Her husband was presumably able to support her, and it was his duty to do so. The disallowance of this payment was correct. Next the counsel objects to the manner in which the advisory master dealt with a claim for the allowance of \$324 for three years' rent. It appears that Emma A. removed with her husband in March, 1879, into a house belonging to Mr. Traphagen, and lived there till July 1, 1884. Mr. Traphagen prayed an allowance for \$9 per month rent, during a period from March 1, 1879, to March 1, 1882, and for \$10 per month for the rest of the period of occupancy. Emma arrived at her majority on October 5, 1881. The advisory master sustained the claim for an allowance for rent from the time Emma was of age, but disallowed it for the time previous to that event. The disallowance is based upon the fact of her infancy and her marriage, and the consequent liability of her husband to support her. The allowance is grounded upon a contract made by her after she attained her majority, by which the rent was to be deducted from her distributive share. I think there is in her testimony that which justified the conclusion of the master in finding the existence of such an agreement, and the law places no obstacles in the way of such a contract on the part of a married woman. If the renting was to her, it was her own contract, and valid by the terms of our statute. In regard to that part of the rent, the allowance of which was refused, it is urged

that the master erred. It is insisted that Emma, by remaining in possession of the premises after October 1, 1881, ratified an agreement to pay rent made while she was an infant. The position of Emma is likened to that of a person who has purchased land while an infant and remains in possession when of age; and of one who, having taken a lease for years, remains in possession after attaining his majority. But whatever may be the effect of the retention of possession by an adult of the subject of his infantile contract of sale or letting, it is apparent that the facts in the present case bear no resemblance to either of the samples. There was no contract of letting for a term of years proven, which expired after the arrival of October 5th. There is nothing to show the terms under which she agreed to hold the house. Mr. Traphagen says that he charged so much a month, and she says that she received nothing from Mr. Traphagen but rent. Upon this slender foundation is built up an agreement to pay rent accruing after she arrived at her majority, but certainly no contract for any specific time can be deduced from it. The agreement to pay after arriving at maturity seems to be merely an admission of a liability to pay for a previous use and occupation. Certainly the possession of Emma cannot be said to have been the ratification of any precedent contract.

It is also a ground of objection that there is a compounding of interest, against the express views of the advisory master, who ordered simple interest. On the other hand, it is objected that the part of the decree which directs that there shall be no compounding is erroneous. The advisory master ordered yearly rests, so long as there were payments made by Mr. Traphagen, and interest to be computed upon the balances; but he directed that only simple interest should be computed after the disbursements ceased. I am not clear but this was an equitable adjustment of this branch of the case under all the circumstances, and that it should stand.

The counsel for the complainants below upon their appeal, insists that there was error in permitting the administrator to claim an allowance for disbursements made to the infants previous to the settlement as administrator. It is said that the presumption is conclusive that such payments were included in that account. But there is no such presumption, because such payments would have no legitimate place in such accounting. They can be regarded as payments in advance of a part of the distributive shares in the estate, and can be deducted whenever such shares are claimed. As the claims are made by way of this bill for an accounting, it is the right of the defendant to claim the benefit of any legal disbursements to the distributees, made at any time upon the credit of the future shares to be distributed. There is a claim allowed, however, about which I have had some doubt. It is a sum of \$294.03, claimed to have been paid to the mother of Charles, for his benefit, by groceries delivered to her, and charged to Mr. Traphagen. At this time Charles was married, and was earning wages, and his mother was living with him. The groceries, Charles says, he got the benefit of. This amount was all that he received during this period from the administrator. It seems to have been a great assistance to him. It was not in excess of the interest charged against the administrator during that period, so no inroads were made upon the principal of the infant's estate. I think if a guardian had made this expenditure it would receive the sanction of the supervising court. So I incline to an allowance of this item.

I think the conclusions reached by the advisory master in other respects should stand, and that the decree below should be affirmed, without costs. Decree unanimously affirmed.

## BALDWIN v. VREELAND and others.

(Court of Chancery of New Jersey. November 19, 1887.)

## WILL—DEVISE—ELECTION TO TAKE LAND INSTEAD OF PROCEEDS.

A testator, by a codicil to his will, left to his wife a house and lot, "she to have the use and occupation, and to receive the rents and profits for and during her life," and directing the sale thereof by his executors upon the death of the wife, the proceeds to be equally divided between his three sons. The widow and devisees agreed to make sale, and convey title to the property, but the effort to sell was ineffectual, and no further attempt to sell was made. One of the son's mortgaged his interest, and it was sold under assignment, he having become bankrupt. *Held*, that the agreement between the widow and devisees did not constitute an election to take the land instead of the proceeds, and that the mortgage and sale of the son's share did not affect the right of the executor under the will on the death of the widow to sell the place, and distribute the proceeds in accordance with the will.

## Bill for construction of will.

*Blake & Freeman*, for complainants. *H. G. Copeland*, for Bulkley heirs. *Robert McCarter*, for Nellie E. and Harry M. Vreeland. *George B. Kingsley*, for William H. Vreeland.

**BIRD, V. C.** The complainant is the executor of the last will and testament of William Vreeland, deceased; and he desires the court to instruct him as to the extent of his power arising under said will, and particularly so far as it emanates from the clause in these words: "I hereby direct, authorize, and empower my executors hereinbefore named, or the survivors of them, to sell or convey all, or any part, of my real and personal estate not hereinbefore devised to my said wife, Mary W. Vreeland; and the proceeds of all my estate, as aforesaid, either real, mixed, or personal, I do hereby order and ask to be equally divided between my wife, Mary W. Vreeland, and my three sons, namely, Owen S. Vreeland, William H. Vreeland, and James M. Vreeland, share and share alike; and the respective shares belonging to my said wife, Mary W., William H. Vreeland, and James M. Vreeland, to be paid to them as soon as conveniently can be after the sale of my estate;" and in connection therewith the codicil made to said will, in and by which the testator directed, in addition to the bequests given in said will to his wife, to be given to her, "for and during her natural life, a house and lot formerly occupied by him, situate on Centre street," etc., "she to have the use and occupation and to receive the rents and profits for and during her life," and directing the sale thereof by his executors upon the death of the wife, and the proceeds to be equally divided between his three sons above named.

It appears from the pleadings and the proofs that, before the death of the widow, the devisees and the widow agreed to make sale, and to convey the title to these lands. It does not appear that any one had as yet agreed to purchase. It also appears that this effort was ineffectual, or, at least, there was no effort beyond the declared intention of the widow and legatees to pass the title, except so far as the interest of James M. Vreeland is concerned. But it is in evidence that, after this attempted sale, James M. Vreeland became insolvent, and was adjudged a bankrupt, and that all his right, title, and interest in all his real estate whatsoever was sold by the assignee, under and by virtue of the bankruptcy laws of the United States, and that a deed was made by such assignee, intending to convey the property mentioned in this bill to the extent of his interest. This sale in bankruptcy was made in said proceedings according to the law and by virtue of a mortgage given by said Vreeland to Erastus Bulkley, who was a creditor and proved his claim against the estate of the said bankrupt, for the sum of \$3,000. The value of the mortgaged premises was ascertained, and the interest of the bankrupt thereunder fixed at \$972, which amount was taken from the claim of the said Bulkley, and the said premises conveyed to him by the assignee in bankruptcy.

*In re Grant*, 5 Law Rep. 303. After these proceedings in bankruptcy, the bankrupt died, leaving two children, Nellie E. and Harry M., and the widow, all of whom claim an interest in the said land. Since then the said Bulkley has died, having made a will, which has been admitted to probate, disposing of all his real and personal estate, giving the same to his children and to others.

It is claimed that by virtue of the said agreement between said devisees and heirs at law and the said James M. Vreeland, to unite in making sale of the said house and lot given to their mother during her life-time, that they deprived the executors of the said will of all power of sale or disposition thereof, they thereby having elected to take, and did take, the said house and lot to themselves. But the executor, believing that he had a duty to perform as such executor in the disposition and sale of said house and lot, because of the directions in said will and codicil, took charge of the same, and undertook to make sale thereof, when the said devisees, or some of them, gave out and pretended that the executor no longer had any right or power of sale; and the question is whether, under the circumstances, in the execution of the trust confided to him, it is his duty to proceed to make sale and disposition of the said lands. That the said devisees, including their mother, the life-tenant, could elect to take the said lands instead of the proceeds thereof, no longer admits of a doubt, since it has been repeatedly so held in this court, whether they proceeded to make sale thereof or not. And I think it is equally clear that either of the said devisees could sell or incumber their interests, by mortgage or otherwise, at any time before the death of their mother, the tenant for life, without her consent, or without the consent of the executor. That James M. Vreeland attempted to convey his interest by way of mortgage on the thirtieth day of January, 1872, does not admit of a doubt. It has been insisted that this mortgage was not properly acknowledged to be admitted of record in this state, the execution thereof having taken place in the state of New York. Nevertheless, it was admitted that the mortgage was made and executed, and as no questions of priority arise, I am not to determine whether or not the mortgage could be recorded according to law or not, but whether or not James M. Vreeland conveyed his interest to Erastus Bulkley or not. So far as appears by an inspection of the paper, it has all the elements of a complete and perfect conveyance as between the parties thereto. The interest which Bulkley took, as between him and the mortgagor, was a complete title, and cannot be impeached by Vreeland or those who are privy with him in estate; no one claiming a conveyance for a valuable consideration, and *bona fide*, in hostility to the claim of Bulkley. This being so, and the assignee in bankruptcy making sale of the property described in the mortgage for a valuable consideration, and conveying the equity of redemption, an effectual and complete conveyance of the title is accomplished.

That the title to the fee in remainder was vested in James M. is shown by *Guest v. Flock*, 2 N. J. Eq. 108; *Fluke v. Fluke*, 16 N. J. Eq. 478; *Snowhill v. Snowhill*, 40 N. J. Law, 391; *Probasco v. Crevelling*, 25 N. J. Law, 449-452. And these same cases make it equally clear that he could dispose of his interest, and that the purchaser is entitled to all of his rights. At all events, the execution and delivery of the mortgage for a valuable consideration operated as an equitable assignment which it is the duty of this court to recognize and maintain.

Having reached the conclusion that the interest of James M. was vested, and that he could sell it or mortgage it, and also that he did mortgage it, it still remains to be determined whether by any act of the parties in interest, before James M. made such mortgage, the power given to the executor under the codicil was destroyed. It is said that the agreement referred to was sufficient to effect that destruction, for thereby the legatees elected to take the land, which was ordered to be sold, for their benefit, instead of the money to

be realized from a sale by the executor. Was the execution of that agreement an election in contemplation of law? It recites the right of the parties in the land under the will and codicil, and says, "which the parties desire and have consented to sell, and, for that purpose they do agree to sell the said house and lot for the best price that can be obtained for the same, and upon said sale they agree to join and execute a deed therefor," and then arrange as to the disposition of the proceeds. Nothing else was done; no sale was made. The widow remained in possession and enjoyed all her original rights under the will, from the date of this agreement in the year 1871 until her death in 1886. Those who claim the interest of James M. under his mortgage, insist that the execution of the said agreement was an election; the other parties in interest deny that the agreement is proof of any such result. Notwithstanding the fact that courts are desirous of allowing the legatee to take the land out of which his legacy arises, when that can be done consistently with the rights of others, and he has clearly expressed or manifested his intention so to do, yet, I think, when the act relied on as a manifestation of such intention, is susceptible of a different construction, and such act is for a long period of time entirely disregarded by the parties, to hold that there has been no election will be in accordance with the authorities. This agreement was made at a period when the executor could not exercise his power, *i. e.*, in the life-time of the widow. She survived the execution of the agreement at least 15 years, and after the first few months, during the whole of that time, nothing was ever attempted to be done under it. I think that agreement can only be regarded as an expression of desire or willingness to sell, but nothing more, and that that was afterwards entirely abandoned. But supposing that the object had in view was an election to take the land instead of money, that was not effected; the agreement was executed, it is true, but there was no sale, which was by its very terms the purpose of it. And this brings me to what so distinctly appears, that is that the purpose of the agreement was not to elect to take land in lieu of the legacy, but simply to anticipate, as far as possible, the action of the executor in converting the land into money as designed by the testator; in other words, to accelerate events. When these considerations are given reasonable weight, it seems to me that it cannot be said that the parties had the slightest intention to take the land instead of the legacy. Some light is derived from the case of *English v. English*, 3 N. J. Eq. 504, in which it was held that to constitute an election by a widow to accept a legacy in lieu of dower, there must be something more than a mere intention to elect. In that case the widow signed a petition to the legislature, asking for the sale of real estate in which she had an interest in dower, to raise money to pay legacies; this was not enough to cut off her dower.

I conclude that the executor has the power of sale under the will, and that it is his duty to exercise that power, and to make distribution of the proceeds of such sale according to the directions of the will, the interest of James M. to be paid to the executors of Bulkley. The costs of this proceeding will first be paid out of the fund.

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### STATE (WHITE, Prosecutrix) v. HATHAWAY.

(*Supreme Court of New Jersey. November 16, 1887.*)

#### JUSTICE OF THE PEACE—RIGHT TO JURY TRIAL—WAIVER.

The New Jersey justice's court act, § 33, provides that either party in any action, after the defendant has pleaded, and before the justice has begun to inquire into the merits of the action, may demand a jury. Section 41 provides that, if the jury disagree, other writs of *venue* may issue in the cause until a verdict is obtained. In an action where the jury disagreed, neither party asked for a new jury. The justice pro-

ceeded to try the case. *Held*, that the failure to call for a new jury was a waiver of the right to it, and the justice had power to proceed in due course to trial and judgment.<sup>1</sup>

On *certiorari* from justice's court.

*Hawkins & Durand*, for plaintiff. *Samuel A. Paterson*, for defendant.

KNAPP, J. This writ removes into this court the judgment of a justice of the peace of the county of Monmouth against the plaintiff in *certiorari* in favor of the defendant. This cause was twice tried before the justice; first with a jury, summoned on the demand of the plaintiff in *certiorari*, and the jury failing to agree were discharged. The cause was then continued by adjournments until the sixth day of December, 1886, when, the parties appearing, the plaintiff moved his case before the justice. No new jury being demanded by either party, the justice took cognizance of the cause against the defendant's objection to his jurisdiction, heard the testimony of the plaintiff's witnesses, the defendant offering none, and on their evidence rendered judgment for the plaintiff.

The ground for attacking this judgment, as assigned in the reasons presented by the plaintiff in *certiorari*, is, that the justice proceeded below, after a disagreement of a jury in a former trial of the same cause, without issuing a new *venire*, and calling a new jury; such justice having no jurisdiction to hear the cause without a jury after one had failed to agree. The only question to be considered is whether, under the state of facts thus set forth, the justice had jurisdiction to try the cause without a jury.

All causes made cognizable in the court for the trial of small causes may be heard and proceeded in to judgment by the justice alone, unless a jury shall be demanded of him by one or both of the parties. The thirty-third section of the justice's court act makes it the right of either party in any action, after the defendant has appeared or put in his plea to such action, and before the justice has proceeded to inquire into the merits of the cause, to demand a trial by jury, and thereupon the justice is required to award his *venire* for a jury. The forty-first section enacts that, "if the jury disagree, other writs of *venire* may issue in the same cause until a verdict be obtained." Whether or not the position of the plaintiff in *certiorari* be tenable depends upon the effect to be given to the forty-first section of the act. Before its adoption as it stands in the Revision it had been decided in this court that, in a trial before a justice's court upon a disagreement of a jury and its discharge by the justice, as no *venire de novo* was authorized by the statute, an end was put to the justice's jurisdiction to try the cause without consent of the parties. *Gutlick v. Van Tilburgh*, 16 N. J. Law, 417; *Waddell v. Physick*, 17 N. J. Law, 331. The section was directed against this difficulty, and with the design wholly or in part to remove it. It does not in terms provide for the unqualified continuance of the cause. It undoubtedly does continue jurisdiction in the justice to retry the cause if there be brought to his aid a new jury. But to limit the newly-conferred jurisdiction to this latter condition, and to say that, notwithstanding this provision of law, the cause still ends unless the parties will ask or accept a jury trial, is to suppose the legislative purpose to grant a partial and almost profitless measure of relief against a plain defect in the law; when conjecture will fail of a reason why, when once undertaken, the remedy should not have been radical and complete. The evil to be remedied was that a disagreement turned the plaintiff out of court, and drove him to a new suit, with its expense and delay. It was in the knowledge of the

<sup>1</sup> As to the right to trial by jury, and its waiver, see *Biggs v. Lloyd*, (Cal.) 11 Pac. Rep. 831, and note; *Lewis v. Klotz*, (La.) 1 South. Rep. 539; *Railroad Co. v. Morris*, (Tex.) 3 S. W. Rep. 457; *Railroad Co. v. Martin*, (Tenn.) 2 S. W. Rep. 381. See, also, *Caldwell Co. v. Crocket*, (Tex.) 4 S. W. Rep. 607.

law-maker that loss of jurisdiction was because of inability in the court to find in the law any provision for a new *venue*. Had that existed, it is plain that the court would have adjudged differently in the cases cited. This provision for a new *venue* the legislature supplied by the enactment of this section. It was the appropriate remedy for the entire mischief, and at that it was, doubtless, aimed. The design of the section was to restore to the justice's court the jurisdiction over the cause for all purposes, until final judgment be rendered. Either party had the rights reserved to him to demand and have a jury whenever, under the act, a jury is given him. If a party desires a jury to decide on his facts he must, under the act, demand it, or, failing in that, his right is waived, and the justice may proceed in due course to trial and judgment. In this case the plaintiff in *certiorari* declined to ask or have a jury for the trial of the cause. She thereby waived her right to that mode of trial, and no course was left to the justice other than to hear and decide the cause himself on the evidence presented to him.

The plaintiff presents no valid ground of complaint against the judgment rendered, and it is affirmed with costs.

### BRADY, Adm'r, v. POTTS, Adm'r.

(*Supreme Court of New Jersey*. November 11, 1887.)

#### LIMITATION OF ACTIONS—DEBTOR ABSENT FROM STATE.

In an action on a due-bill dated October 15, 1879, it appeared that the maker was absent from the state for two months in 1885, paying rent for his office at the time, but not for room and board. On October 13, 1885, he left home again, and in May, 1886, died in Denver. Action was begun November 23, 1886. *Held*, that during his absences from home the maker was not a resident of the state within the terms of the statute of limitations, and as to those times the statute did not run.<sup>1</sup>

Tried before Justice SCUDDER, a jury being waived, at the September term, 1887, of the Middlesex county circuit court.

A. H. Strong, for plaintiff. C. H. Voorhees, for defendant.

SCUDDER, J. This action is on a due-bill, dated October 15, 1879, to William Sawyer, for \$82, signed by M. C. Britton.

There are two pleas filed: (1) general issue; (2) statute of limitations. The following facts were proved by the plaintiff, Merrit C. W. Britton, who signed the above due-bill by the description of M. C. Britton. He was an unmarried man, who boarded at the house of Mrs. Eliza Longstreet, in Jersey City. He was a physician, and had an office in her house. He went, as he said, west, July 13, 1885, and returned in the latter part of September, being absent about two months. He paid rent for his office, but not for rooms or board, during his absence. He again left October 13, 1885, leaving furniture in his office, but giving up his room and board, and went to Boulder City, Colorado. He died at Denver, May 2, 1886. The summons was issued November 23, 1886. It was seven years, one month, and eight days after the date of the due-bill, and action on the case will be barred unless the plaintiff is entitled to the benefit of sections 8 and 9 of the statute of limitations.

I find that the plaintiff is entitled to six months' allowance, for *six months* next succeeding the death of M. C. Britton, under section 9, and for the absence of *two months* from July 13, 1885, and of *six months and twenty days*, from October 13, 1885, to May 2, 1886, the time of his death, under section 8 of the statute. During these times of absence I find that he was not a resident of this state, within the terms and construction of this statute. The total

<sup>1</sup> Respecting the suspension of the running of the statute of limitations by absence from the state, see Wood v. Bissell, (Ind.) 9 N. E. Rep. 425, and note; Stewart v. Spaulding, (Cal.) 13 Pac. Rep. 661; Watkins v. Reed, 30 Fed. Rep. 908. See, also, Engel v. Fisher, (N. Y.) 7 N. E. Rep. 300; Miller v. Lesser, (Iowa,) 32 N. W. Rep. 250.

time allowed by the statute on these facts would be 7 years, 2 months, and 20 days, which makes the time of issuing the summons within time, and action is not barred by the statute of limitations.

The objection that the plaintiff married after the letters of administration were issued to her, and thereby her power to such administration ceased, and was suspended, under section 122 of the orphans' court act, will not avail under these pleadings. If a legal defense to the action, which is not conceded, but doubted, it is a matter in abatement, and must be so pleaded, or made the subject of a special plea in bar, if such be its effect. There was no notice of non-joinder of the plaintiff's husband under the practice act, and this cannot be made a defense at the trial of the cause. I find, therefore, for the plaintiff, and assess the damages at \$82, the amount of the due-bill, and interest thereon from date, October 15, 1879, to date, \$39.70, making the total sum of \$121.70.

### LLOYD and others v. HANN.

(*Supreme Court of New Jersey. November 26, 1887.*)

#### 1. FALSE IMPRISONMENT—IMMUNITY OF SHERIFF—EXECUTING WRIT.

The sheriff and constables, in executing the writ of a court of general jurisdiction having cognizance over the class of cases to which it appertains, are entitled to immunity for every act done necessarily in putting it into effect.<sup>1</sup>

#### 2. SAME—PROSECUTOR OF PLEAS.

A like immunity is possessed by a prosecutor of the pleas who directs such officers to execute such a writ calling for the arrest of a person.

(*Syllabus by the Court.*)

Tried before the Gloucester county quarter sessions.

Trespass by Edmund S. Hann, for assault, battery, and false imprisonment. On motion for new trial.

The three defendants, Milliard F. Lloyd, Daniel J. Parker, and Belmont Perry, pleaded the general issue, with notice appended that they arrested the plaintiff by force of the writ described below.

At the trial it was shown that a *subpoena ad testificandum*, tested the tenth September, 1885, directed to plaintiff, was issued out of the court of general quarter sessions of the county of Gloucester, and that on the following day a warrant was issued out of the court of oyer and terminer, commanding the sheriff, etc., to take the body of plaintiff, and to have him before "the court of oyer and terminer, and general jail delivery, to answer any questions that may be propounded to him in the trial of a certain indictment therein pending against," etc. This latter writ was given to a constable, who arrested the plaintiff under it, and he and the sheriff detained him until he was discharged by *habeas corpus*. An hour or two after this arrest another writ was placed in the hands of the sheriff, issued out of the sessions, commanding the officer to bring in the plaintiff to answer for certain alleged contempts of court, etc. The jury was instructed to find for the defendants.

*J. J. Crandall*, for plaintiff. *D. J. Pancoast*, for defendants.

**BEASLEY, C. J.** The plaintiff was arrested on a writ which at the argument was styled "Compulsory Process," issued out of the court of oyer and terminer, of the county of Gloucester, commanding the sheriff or constables of the county to bring him before the court to testify as a witness on behalf of the state in the trial of a certain indictment. By force of this process the plaintiff was kept in custody by the constable and sheriff, two of the defendants, until discharged by *habeas corpus*.

In looking through the case it is obvious that the validity and legal effect

<sup>1</sup>See note at end of case.

of this writ are the only questions to be adjudged, because, as the plaintiff was first arrested and detained under it, the existence of the subsequent precept, founded on the contempt, could not validate the original imprisonment of the plaintiff. Granting that the process from the oyer and terminer on which the plaintiff was taken was illegal, the plaintiff was entitled to some damages, even though the subsequent writ justified his detention from the time it reached the hands of the officer. The jury at the trial was instructed to find in favor of the defense, and such instruction is justifiable only on the theory that this writ proceeding from the oyer was, so far forth as these defendants are concerned, valid process. The purpose of this precept was to bring into the court a recusant witness, so that he might be compelled to testify in a criminal case then pending. Under the laws of this state the mode of constraining a witness to appear in such case is by an attachment for his disobedience of the mandate of the court whose subpoena he has contemned, or by an indictment for such misconduct. The former of these proceedings must be founded on sworn proof that a subpoena has been issued and properly served, and that it has not been obeyed; and upon that basis, and upon that basis only, should compulsory process be resorted to. This is the method to be pursued as well in criminal as civil proceedings. With respect to civil cases, there are several decisions in this court to that effect, the leading case being that of *State v. Trumbull*, 4 N. J. Law, 140. The usual course of practice in this respect in the English courts is marked out by Chitty in his book on Criminal Law, p. 14. As there was no testimony at the trial upon this subject, the legal presumption is that the writ in question was founded on the proofs thus shown to be requisite. The oyer and terminer is a court of general jurisdiction, and therefore, in view of the state of affairs as evidenced at the trial, the apposite maxim was: *Omnia præsumuntur rite esse acta*. It is true that on the part of the plaintiff an attempt was made to show that this writ was not in point of fact issued by the court out of which it purported to proceed, by proving that such court was not in session on the day the writ was tested. But this endeavor was founded in the fallacy of supposing that if the court was not in session on the date of the issuing of the writ, that the inference was admissible that the process was not judicially authorized. But the only deduction that could be legally made from such a premise was that the test was erroneous. The want of consistency between the date of the writ and the sitting of the court could not countervail the testimony to the authenticity of the process inherent in the seal of the court and the attestation of its clerk. At all events, it was not incumbent on the ministerial officers of the court, before they executed such a writ, to ascertain that the court was actually sitting, and ordered the process to be issued. Such officers are justified in acting in accordance with the face of the precept. The result, therefore, is that we have a writ, duly authenticated, coming from a court of general jurisdiction that was vested with cognizance over the class of cases to which it appertained, placed in the hands of the proper officials for execution. It is the legal rule that under such conditions the judicial precept must be implicitly obeyed by those to whom it is thus directed. This is a principle essential to the orderly administration of the law, and the consequence is that the officers to whom the writ is addressed will not be responsible for anything necessarily or properly done in its execution. Such ministers of the law need not show the grounds on which the interval in issuing the process proceeded, for they can rely on the writ done, without the production of the judgment record on which it is presumed to rest. It is not necessary to refer to books in support of a doctrine that no one will controvert. Plainly the judge was right in holding that the writ was a complete vindication of the conduct of these ministerial officers for the arrest and detention of the plaintiff.

With respect to its effect on the rights of the other defendant M. Perry, the legal situation is not so plain. He handed the writ to the constable, and

directed him to arrest the plaintiff under it. But in doing so he was acting, not in a private, but in a public, capacity. He had the writ in his possession as prosecutor of the pleas of the county, and when he transferred it to the constable he acted within his official province in instructing the officer as to his official duty with respect to it. The fact that the plaintiff was present when such instruction was given cannot alter the legal posture of affairs; for, if he had the right to instruct the constable at all, he did not forfeit his immunity by giving such instruction in the presence of the person to be arrested. Besides this, it did not appear that at the time in question the process had been judicially quashed or vacated; and, until such event, it is a protection to every person who assists in its execution. Mr. Addison, in his work on Torts, § 921, thus states the doctrine of the law on this head: "Generally speaking, however, so long as the process has not been set aside, it is a protection to the attorney who has issued it, and to the client by whose commands it has issued; and though when it has been set aside it is no longer a justification to them, yet it always remains a justification to the sheriff and his officers who had no option but to obey it." Under the circumstances stated, the prosecutor of the pleas, with respect to what he did, was invested with an immunity similar to that which was possessed by the constable and the sheriff.

With respect to the position that it appeared that the plaintiff was not only arrested and detained, but was harshly treated and unduly imprisoned, it is sufficient to say that such matters were not within the issue that was tried or that was triable. The notice appended to the plea set up the writ as a defense. If the plaintiff intended to avoid this defense by showing an abuse of the process, it was necessary for him, by force of the practice act to give notice of such intention to the defendant. The result, therefore, is that this court is of opinion that the judicial instruction at the trial was in all respects proper, and the rule must be discharged.

#### NOTE.

**SHERIFF—WHEN PROTECTED IN THE EXECUTION OF PROCESS.** Process, which will protect an officer in the proper execution of it, must proceed from an officer or court having authority of law to issue such a writ; and it must be legal upon its face, containing nothing to notify or fairly apprise the officer that its issuance is unauthorized. *Hines v. Chambers*, (Minn.) 11 N. W. Rep. 129; *Henke v. McCord*, (Iowa,) 7 N. W. Rep. 623. See, also, *Bean v. Loftus*, (Wis.) 4 N. W. Rep. 334. But if the writ is issued by a court of competent jurisdiction, the fact that there are defects upon its face which render it voidable merely will not excuse the officer from executing it according to the command thereof. *Phillips v. Spotts*, (Neb.) 15 N. W. Rep. 332. In proceedings for contempt in disobeying an order of court, the order should be recited in the writ. And if the order is void upon its face for want of jurisdiction in the officer making it, the writ can afford no protection to the officer serving the process. *Smith v. Weeks*, (Wis.) 18 N. W. Rep. 778. In the execution of process the officer is bound to obey the commands of the law; and a failure to return process to the court to which it is made returnable will be fatal to his justification under it. *Wright v. Marvin*, (Vt.) 9 Atl. Rep. 601.

STATE (ASSOCIATES OF THE JERSEY CITY CO., Prosecutors) v. MAYOR,  
ETC., OF JERSEY CITY.

STATE (NATIONAL STORAGE CO., Prosecutors) v. SAME.

STATE (PENNSYLVANIA COAL CO., Prosecutors) v. SAME.

(Supreme Court of New Jersey. November 26, 1887.)

#### 1. TAXATION—ASSESSOR'S VALUATION—PAYMENT—REVIEW BY COMMISSIONERS.

Payment of tax on the assessor's valuation of property will not deprive the tribunal of review to which an appeal is given by statute from discharging the duties imposed upon it by law.

**2. SAME—UNDERVALUATION.**

Payment of tax to the collector before the time designated for the meeting of the commissioners of appeal in cases of taxation does not take from the commissioners when they meet the right to consider a complaint of undervaluation by the assessor, and the power to add to the assessor's valuation.

**3. SAME.**

Such payment is made subject to the provisions of the statute giving the right to make complaint and to appeal, on the ground of undervaluation.

**4. SAME—PAYMENT CREDITED ON INCREASED TAX.**

The money paid to the collector should be credited on the taxes as increased by the commissioners' valuation.

(*Syllabus by the Court.*)

On *certiorari*, to set aside action of commissioners of appeal in cases of taxation.

*J. B. Vredenburg*, for prosecutors. *J. A. Blair*, for defendants.

PARKER, J. A tax was laid on certain lots of the prosecutors situated in Jersey City, based on the valuation of the assessor, in the year 1884. The assessor's duplicate, in due time, went to the board of finance and taxation, by which body it was passed on the twenty-ninth day of October, 1884. On the next day it was delivered to the city collector. On the thirtieth day of October, the prosecutors paid the taxes to the collector according to the assessor's valuation. At the meeting of the board of finance and taxation on the twelfth day of December, 1884, a resolution was passed requesting the city collector to make complaint to the commissioners of appeal in cases of taxation concerning the undervaluation of said lots. After giving legal notice, the city collector did, on the twenty-fourth day of January, 1885, make a complaint to the commissioners of appeal in cases of taxation that the said property of the prosecutors had been assessed at too low a rate. After the examination of the complaint, the commissioners of appeal added the sum of \$2,000 to the valuation of each of said lots. These writs of *certiorari* are prosecuted to set aside, as illegal, such action of the commissioners of appeal in cases of taxation.

A number of reasons are on file, but only one is urged and relied upon by the prosecutors. It is insisted that the increased valuation is not legal, and should be set aside, because the prosecutors paid in full the taxes on the property, upon the assessor's valuation, before any proceedings were taken on the part of Jersey City to increase the valuation of the property. By the general tax law (Revision, p. 1149, § 56) it is enacted that if any person or persons, body politic or corporate, shall be assessed at too low a rate, or be omitted in the assessments, it shall be lawful, upon complaint made, for the commissioners of appeal, in cases of taxation, after notice to the parties interested by the party complaining, and after due examination of the facts and consideration of the case, to make such addition to the assessment as shall be agreeable to the principles of justice, and that the judgment of the said commissioners shall be final and conclusive. The time fixed by law for the first meeting of the commissioners of appeal in cases of taxation is the fourth Tuesday of November, annually. Power is also given them to meet on other subsequent days, on notice. Revision, p. 1148. The first day on which complaint of undervaluation could be made to the commissioners of appeal in these cases was November 25, 1884. In the mean time (October 30th) the tax as fixed by the assessor's valuation had been paid by the prosecutors.

Upon the above statement of facts the question arises whether payment of tax to the collector, after the duplicate has come in his hands, but before the time designated for the meeting of the commissioners of appeal in cases of taxation, takes from said commissioners when they meet the right to consider a complaint of undervaluation by the assessor, and the power to add to the assessor's valuation. If the question be answered in the affirmative, the sec-

tion of the statute which empowers the commissioners to add to an assessment would, in effect, be repealed. Such construction would give rise to gross injustice by taking away the power of appeal. The law does not contemplate making the judgment of the assessor final upon the question of valuation.

Payment of taxes on the assessor's valuation will not deprive the tribunal of review to which an appeal is given by the statute from discharging the duties imposed upon it by law. When the prosecutors paid the tax fixed on the assessor's valuation they knew of the provision in the statute whereby complaint was authorized to be made to the commissioners of appeal in cases of taxation of undervaluation of the property, and that they paid the money to the collector subject to such provision of the law. The tax receipt delivered to the prosecutors at the time they paid the money has upon it a printed notice to the effect that the commissioners of appeal in cases of taxation would, on the fourth Tuesday of November, 1884, meet at a certain hour and place therein stated, for the purpose of correcting erroneous assessments. The taxes as increased by the commissioners should stand, and the money that was paid to the collector should be credited thereon.

The action of the commissioners of appeal in cases of taxation in the case of the Associates of the Jersey City Company against Jersey City is affirmed; also in the case of the National Storage Company against Jersey City. For like reasons the same result has been reached in the case of the Pennsylvania Coal Company against Jersey City.

#### DAVIS v. TOWN OF GUILFORD.

(*Supreme Court of Errors of Connecticut. June Term, 1887.*)

##### 1. HIGHWAYS—DEFECTS—ACTION FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

In an action for damages arising from a defect in a highway, it was shown that plaintiff was driving in a wagon with a chained wheel, sitting on the top of a load partly of hay and partly of straw, according to the finding, "properly placed," when the wheel fell into a hole in the road, in going down a hill, and plaintiff was thrown off. *Held*, that in view of all the circumstances, and that the unsafe state of the road was wholly responsible for the injuries, it cannot be said that plaintiff could not safely drive as he did over a road in a reasonably good condition.<sup>1</sup>

##### 2. SAME—EVIDENCE—RELEVANCY—CROSS-EXAMINATION.

In a suit for damages caused by a defective highway, plaintiff testified that, after the injury, he applied to the selectmen of the town to repair it, and determined if they did not, he should sue the town for damages. He was asked on cross-examination, if he meant to say that if the town had repaired the highway he would not have sued. *Held*, that the question was properly excluded, as its answer could in no wise assist in determining the amount of plaintiff's injury.

##### 3. PLEADING—ALLEGATIONS OF COMPLAINT—PROOF—VARIANCE.

In an action for injury from a defective highway, the complaint alleged that plaintiff was riding on a load of hay, that the wheel dropped into a hole, the wagon was overturned, and he and the hay were thrown upon the ground. The proof showed that only a portion of the hay was thrown off and the wagon was not overturned. *Held*, that, as the complainant sufficiently advised defendant of the charge he was required to meet, and did not induce him to omit any matter of preparation for defense, the variance was not fatal.

*C. K. Bush* and *H. J. Newton*, for appellant. *H. L. Hotchkiss*, for appellee.

**PARDEE, J.** This is a complaint for injuries occasioned by a defect in a highway. The case was tried to the court, and judgment rendered for the plaintiff. The defendant has appealed for the following reasons: That the court erred in holding the plaintiff entitled to recover, on the facts found; in

<sup>1</sup> As to what is contributory negligence in the use of defective ways, see *Hampson v. Taylor*, (R. I.) 8 Atl. Rep. 331, and note; *Township of Crescent v. Anderson*, (Pa.) 8 Atl. Rep. 379; *Ailine v. City of Le Mars*, (Iowa,) 83 N. W. Rep. 160; *Gordon v. City of Richmond*, (Va.) 2 B. E. Rep. 727.

imposing upon the defendant a duty greater than that required by law; in holding that, on the facts found, there was a defect in the highway for which the defendant was liable; in holding that the plaintiff's injury was caused by a defect in the highway for which the defendant was liable; in holding that the complaint was sufficiently proved and supported by the facts found to entitle the plaintiff to judgment; in holding that the plaintiff was not guilty of such negligence as would defeat his right to recover; in admitting the evidence as to the condition of the road being the subject of conversation among the neighbors; in excluding each of the defendant's cross-questions to the plaintiff; and in admitting the testimony as to the gentleness of the plaintiff's horses.

The plaintiff was injured while descending a steep hill. The defendant had constructed two bridges or water-breaks diagonally across the way near the top of the hill, for the purpose of turning water into gutters. Such breaks properly made and repaired are found to have been necessary at the place in question, because rocks prevent the making of gutters above. The finding, also, is that during June and July, 1886, the water had washed over the top of the hill and down to the first break, making ruts through it where the wagon wheels and the horses' feet had broken it away, and from the first break had washed down in the center of the road to the second break, the base of which had been washed away, and the height of the break increased by the water, which at this point had turned off to the side of the road. In the afternoon of July 29, 1886, the plaintiff started to cart his last load of hay from his meadow, using therefor the same horses and wagon he had been using all the season. The load consisted of meadow grass placed upon the wagon in the same manner as loads of hay which the plaintiff had carted down the hill during previous years, and during the same summer, except that a place was left on the back part of the load upon which was placed about 200 pounds of rye-straw rakings, the straw lapping a little over the top and center of the load. The entire load weighed about 2,000 pounds. In driving, the plaintiff was seated upon the top of the load, as was his custom in carting hay, and as is the custom of farmers in the neighborhood. The stake in front of the wagon was intended to prevent the load from sliding when descending the hill, but the load was not bound to the wagon, the plaintiff having never bound a load of hay or straw in carting down the hill to his barns. On reaching the top of the hill the plaintiff caused an iron shoe to be attached to the wagon, and placed under the rear wheel to check the speed of the wagon in descending the hill. The plaintiff had carted loads of hay down this hill for about 30 years, and had carted nearly fifty loads down the hill during the summer of 1886, but had not before carted hay and grain, or straw rakings, upon the same load. In attempting to avoid the stones at the top of the hill the wagon wheels slipped into a part of the road washed by the rains through the upper break, causing the weight of the load to be thrown forward, and giving a greater impetus to the wagon, so that when the forward wheels of the wagon struck the second and lower break, which had been made abrupt by washing, it was with so great a shock that the plaintiff was thrown forward to the ground by the side of his horses, and directly in front of his forward wheels. He held on by the driving lines, and was dragged a distance of 10 or 12 feet before the horses were stopped. By this fall the plaintiff's knee, back, and neck were injured, and he was incapacitated for work for a number of weeks, and had not fully recovered at the time of the trial in January, 1887. When the wagon struck the second break, throwing the plaintiff to the ground, about 100 pounds of hay and straw came off the load with him. The load was properly placed upon the wagon, and the accident was caused by the washing of the highway on the hill, and at the base of the lower break.

We cannot assent to the claim that there is a fatal variance between allegations and proof. The complaint points out to the defendant its duty in the

premises, where, when, and wherein it failed in performance; the order of the events which terminated in the injury to the plaintiff, and the character and degree of that injury. Of course, in such a matter it is impossible that the proof should be a literal and exact reproduction of the allegations; therefore, the law forgives variances which, although they may magnify the injury, and misstate attendant circumstances, neither raise any doubt in the mind of the defendant as to the charge which he is required to meet nor induce him to omit any matter of preparation for defense. The complaint states that the plaintiff was riding upon a load of hay; that a wheel dropped into a hole; that the wagon was overturned; and that he and the hay were thrown upon the ground. The proof is that the wheel dropped into a hole, and that he was thrown to the ground, but that the wagon was not overturned, and only a portion of the load was thrown off. But all questions of importance to either party arise upon the allegations that the way was dangerously defective because of the hole; that the defendant is responsible for all resulting injuries; that the dropping of the wheel into the hole threw the plaintiff from the load to the ground, and that thereby he was hurt. These state a complete cause of action. The additional descriptive statements that the wagon was overturned, and that the whole, rather than a part of the load, was thrown off, are unnecessary. The plaintiff might himself safely disprove them, and yet establish his right to receive, and the defendant's obligation to pay, damages. They neither increase nor change the burden of defense.

The plaintiff was injured in July, and instituted this action for damages in September, 1886. In the intervening August he with others made their complaint to the county commissioners, to the effect that the highway in question was out of repair, and asked that it might be repaired. The commissioners denied the request, giving as the reason, that a portion of it had been repaired, and that the use of the remainder was so rare as not to call for any repair. Upon the trial the plaintiff testified that, at the time of the hearing, he determined to sue the town if it did not treat him fairly, and repair the road. Upon cross-examination he was asked if he intended to say that he should not have sued the town if he had succeeded before the commissioners. The question was excluded, upon his objection, and properly. Of course it was the privilege of the plaintiff to refrain from suing the town for his injuries if it would furnish him a safe highway for the future; of course, too, his legal right to redress remains to him, even if revenge is an element in his effort to enforce it. The defendant's right in this part of the case is limited to proof either that the plaintiff suffered no injury, or if any, less than he claimed; that he was more solicitous concerning the judgment than concerning the truth. But without effort the defendant had the benefit of the fact that the witness was also plaintiff. His interest and bias were open and unlimited. Neither party to a cause is entitled to a new trial, because he is not permitted to prove that his adversary is interested in the result. If the evidence was offered for the purpose of proving that, in the opinion of the plaintiff, success in his effort before the commissioners to compel the defendant to repair the road would have been full and adequate compensation for the injuries to his person, it was properly rejected. By no possibility could it assist the court in properly measuring those injuries in money. The road was not repaired; and the money value of the combined pleasure and material benefit which would have resulted to the plaintiff if it had been repaired, must of necessity remain unknown.

Upon the finding the defendant asks us to decide that the plaintiff brought this injury upon himself by negligence. But we are unable to declare that a judgment for him, based upon such finding, is erroneous; we cannot say that he transcended the limits of care and prudence which might reasonably have been required of a person in his situation, by driving along the highway in

question a pair of horses hitched to a wagon having a chained wheel, while sitting upon a load, partly of hay and partly of straw, over a ton in weight. We cannot say that contributory negligence resides in the combination of the facts, namely, that the ton of hay was surmounted by 200 pounds of loose straw, and that the whole was unbound, in presence of the finding that the load was "properly," that is, carefully and prudently, "placed," in view of all surrounding circumstances; and that the unsafe state of the way was wholly responsible for the injuries. We cannot say that, as the result either of experience or observation, or of both, it has come to be generally believed by men of ordinary intelligence and prudence that a man cannot safely drive as the plaintiff did over a road in a reasonably good condition.

Notwithstanding the objection of the defendant, the court permitted the plaintiff to testify that he had heard some of his neighbors say to others of them, during the five months preceding the injury, that the way was out of repair, as tending to prove that the defect was a matter of general knowledge, and as laying the foundation for an inference by the court that therefore there had been knowledge and negligence upon the part of the selectmen. For this the defendant appeals.

We are not called upon to justify the reception of this testimony. The finding is that, about 30 days prior to the accident, actual notice of the defect was given to a selectman. The record affords no ground for the supposition that the defendant made any claim to the contrary. The plaintiff's case stood upon the solid foundation of actual notice. That he availed himself of the permission of the court to weaken it by attempting to impute knowledge should not be a reason for a new trial. The actual notice remains, and must in any event control the case upon this point. Again, although it is true that a safe highway may be made unsafe in the space of a few minutes by an unusual rainfall; that a traveler may therefrom receive injuries before knowledge could by any possibility come to any selectman, and therefore, before any responsibility for such injuries could rest upon the town; and that the law allowed a reasonable time for knowledge, and further reasonable time for action,—yet the law imposes upon the town reasonable supervision of the highway, and a want of knowledge by its selectmen of a defect does not constitute a legal excuse for inaction, if ignorance is the result of negligence in supervision. If the defect was plain to the eye of any person who would look, and had existed for a great length of time, the law would permit the court to impute either negligent, and therefore culpable, ignorance to the defendant in reference to it, or culpable delay in reparation after actual knowledge. The finding is that the defect had existed during the space of about two months previous to the injury. Upon this, without more, the court could lawfully impute knowledge and negligence; and in view of this, testimony as to what individuals said about the defect during the lapse of time must be quite without effect in the matter of imputed knowledge.

The finding is to the effect that, since the construction of a new road, a large part of the travelers who theretofore passed over the road in question have passed over the former, but that the old one is still used for business purposes, to some extent, and in the summer to a considerable extent by parties driving for pleasure. It is the claim of the defendant that the court wrongfully imposed upon it the duty of keeping an almost disused road in such repair that the plaintiff could safely drive over it in the manner undertaken by him. Of course a town owes more of care to a road used much than to one used little. As to neither is it an insurer; as to both, its duty is to keep them in a condition of reasonable safety. With less than this it may not invite one traveler, or many, to pass over any road. Every traveler is entitled to a road along which he may pass in safety by the use of a reasonable degree of care and prudence, having in view his manner of use and the condition of the way. The import of the finding is that, in view of the degree

of use of the way, the defendant failed to keep it in a reasonable degree of safety. There was use of it both for business and pleasure to a "considerable" extent; it was "unsafe for travel." Upon this we cannot say that men of intelligence and prudence would unite in the belief that the defendant reasonably and properly adjusted the degree of care to the degree of use.

The plaintiff was asked if the defendant paid him for repairing the way upon the hill, in May, 1886. Upon objection this was excluded. Immediately thereafter the defendant was permitted to prove all work done by the plaintiff upon the road upon the hill, and all payments to him therefor, for the five years immediately preceding July, 1886. If it should be concluded that the court erred in the rejection, it would seem that ample reparation had been made; and it is both the privilege and the duty of the trier of fact to correct a mistake if he can do it so speedily and completely as that no injustice remains to any one.

There is no error in the judgment complained of.  
(In this opinion the other judges concurred.)

### DUNHAM v. CITY OF NEW BRITAIN.

(*Supreme Court of Errors of Connecticut. May Term, 1887.*)

#### 1. MUNICIPAL CORPORATIONS—POLICE POWER—PROHIBITING USE OF RESERVOIR—TRACT RIGHTS—INJUNCTION.

A town purchased of plaintiff and his father certain land in which to construct a reservoir, and the officers of the town, after getting a deed, gave an agreement allowing plaintiff and his father to use the reservoir for fishing and sailing. The town, acting under legislative authority, in order to prevent the pollution of the water of the reservoir, passed an ordinance prohibiting its use for those purposes. *Held*, that it was a valid exercise of the police power of the state, and, whether or not, it was not error to deny an injunction prohibiting its enforcement, as, if the ordinance was invalid, the plaintiff's remedy was at law.

#### 2. EVIDENCE—PAROL, TO VARY TERMS OF DEED—REFORMATION.

Plaintiff and his father sold certain land to a town, taking back an agreement writing allowing them certain privileges in the property. In an action to reform the deed, by inserting in it the privileges as set out in the agreement, plaintiff offered parol testimony of the conversations in relation thereto. *Held*, that it was not inadmissible, as the parol agreement was all merged in the written one, and no mistake was claimed to have been made in the deed, it could not be reformed.

#### 3. TITLE—BY PRESCRIPTION—LICENSE FOR LIFE.

Plaintiff had a license from the officers of a town to use a reservoir for fishing and sailing during his natural life. *Held*, that he could not by the use of the license obtain an absolute title by prescription to last forever.

*W. C. Case*, for appellant. *F. L. Hungerford*, for appellee.

**LOOMIS, J.** The material facts found by the trial court in this case are in substance as follows: In 1857 the water commissioners of the town of New Britain, acting under an act of the legislature passed that year, purchased of the plaintiff and of his father, Harvey Dunham, now deceased, and of some other parties, certain lands for the construction of a reservoir for supplying the borough with water for public and private purposes. Sundry absolute warranty deeds were executed and delivered to said borough of said lands, and possession was taken by the latter and a reservoir was constructed upon the lands purchased and filled with water and used by the borough until the present city of New Britain was chartered, which succeeded to all the rights, privileges, and property rights of the borough. Ever since the reservoir has constituted the sole water supply of the city, it is largely used for domestic purposes. It was agreed that the borough paid money consideration for the lands bought of the plaintiff and his father, but there was no evidence of the amount paid, except the statement of the plaintiff in the several deeds. It is not found that the money consideration

was in fact inadequate; but it is found that the Dunhams so regarded it, and that they were induced to part with the title to the land referred to, in part because of an agreement in writing signed and delivered to them by two of the water commissioners, and in part because they thought that the establishment of the reservoir and the use of its waters for fishing and pleasure would render their adjacent lands more valuable. The agreement referred to was as follows:

"Whereas, the warden and burgesses and freemen of the borough of New Britain, are about to pond a shuttle meadow on the mountains in the east of Southington, for the purpose of supplying water to the inhabitants of New Britain under the charter granted to them by the last legislature; and a large portion of the land to be covered by the water of said pond has been sold, and conveyed to said warden, burgesses, and freemen of the borough of New Britain by Harvey Dunham and Robert C. Dunham of Southington: now, therefore, the said warden, burgesses, and freemen of the borough of New Britain, in consideration of the sale and conveyance aforesaid, do hereby give and grant unto the said Harvey Dunham and R. C. Dunham the right to sail on said pond and take fish therefrom at all times, said privilege not to be enjoyed by them exclusively, but to secure to them in common with the grantors and such other persons as said grantors shall license during their natural lives.

"In witness whereof the grantors, by the hands of their water commissioners, duly appointed according to the provisions of said charter, have hereunto affixed their name and seal this first day of December, 1857.

"THE WARDEN, BURGESSES, AND FREEMEN  
OF THE BOROUGH OF NEW BRITAIN.

[L. S.]

"F. T. STANLEY,

"G. M. LANDERS,

"Water Commissioners."

Soon after this, the Dunhams established upon the shore of said reservoir, better known as "Shuttle Meadow Lake," upon land owned by them, or one of them, contiguous to the land conveyed to the borough, a pleasure resort, and the frequenters of the place have used the lake for boating, sailing, and fishing in boats hired of the plaintiff or his father, and in this way a profitable business was established, which at the commencement of this suit belonged wholly to the plaintiff. A large number of other persons have also been in the habit of using said lake for boating, sailing, and fishing. The use of the waters of the lake for boating, sailing, and fishing is not in itself injurious, nor a nuisance, and the agitation of the surface of the water is beneficial, but, as a necessary incident to or concomitant of such use, a considerable quantity of impure, and objectionable, and decayed, and decomposing matter, filth, and various *excreta* of the human body is, from day to day, deposited in the water of said lake. But such deposit has not been and is not at present in sufficient quantities to be appreciable in its effect upon said waters, but the knowledge on the part of the public of such deposit produces disgust and tends to prevent the use of said waters by the public for domestic purposes. If the germs of infectious or contagious diseases should be deposited at or near the entrance of the supply pipes, such diseases might be communicated to the people of said city using said waters for domestic purposes. Under these circumstances the common council of the city of New Britain, acting pursuant to power given it by the legislature in 1885 to make such orders and ordinances as it should see fit for the better protection and preservation of the waters of said lake, passed the ordinance set forth in the finding, prohibiting under a penalty, among other things, boating, sailing, and fishing on said lake. The passage and enforcement of this ordinance is what has given rise to this suit. It has had the effect to keep the public away from the lake and thus the plaintiff loses the profit of such pleasure resort, and in this manner only

the acts of the defendants substantially impair the plaintiff's business and depreciate the value of his property. That said ordinance is reasonable is found by the court below as a matter of fact and so held by it as a matter of law.

The plaintiff seeks in this suit to enjoin the city from enforcing said ordinance; he also claims damages for its enforcement, and further claims that the deeds of conveyance from him and his father, through whom he claims his present title, should be reformed so as to reserve to him the privilege of boating, sailing, and fishing on said lake, or that said deeds should be set aside and declared void. The decision of the court below was adverse to the plaintiff on all of his claims, and the only grounds of this appeal are (1) the exclusion of certain testimony by which the plaintiff claimed to be able to prove that in the negotiations for the sale of his and his father's land to the borough for the purpose of a reservoir, it was agreed by certain members of the board of water commissioners that the Dunhams should have the privilege of boating and fishing on said lake forever, and that this privilege instead of being reserved in said deeds as the Dunhams wished, should be secured to them by a separate agreement; (2) the refusal of the court to hold as a matter of law upon the evidence that the plaintiff had acquired, by prescription, the right to fish and boat upon said lake.

The assignments of error restrict the questions for review to a very narrow compass. No complaint is made that the court, upon the facts as found, denied the injunction and the reformation of the deeds, or refused to set them aside, or to award damages, nor is there any complaint because the court held the ordinance a valid one. To prevent the possible implication that it might have been better for the plaintiff had these matters been assigned for error, we will say in passing that in our opinion the decision of the court upon these points upon the facts as found was correct. The ordinance, having for its object the preservation of the public health and being adapted to that object and having been authorized by the legislature, was a proper and valid exercise of the police power of the state; and even if the ordinance was invalid, it is obvious there would have been an adequate remedy at law, so that in either event no error could have been predicated upon a denial of the injunction. *Burnett v. Craig*, 30 Ala. 135; *Garrison v. City of Atlanta*, 68 Ga. 64. And whatever the record may suggest as to a possible claim for damages on the part of the plaintiff, the facts as found do not lay an adequate foundation for such a judgment.

We proceed, then, to the consideration of the only errors assigned, and as to these, we think it is clear that the plaintiff's position is untenable. The parol evidence of the conversation and negotiations between the Dunhams and the water commissioners, which was excluded by the court, was undoubtedly relevant to that part of the complaint which prayed for a reformation of the deeds and was admissible upon that issue, but it is manifest that if the evidence had been received the result would have been the same, for upon the facts which the plaintiff offered to prove, taken in connection with the other conceded facts, the deeds could not properly have been corrected. No foundation for such relief was laid or even claimed. There was neither a mutual mistake nor even a mistake on the part of the plaintiff concerning the deeds. The deeds were knowingly made and executed on the part of the Dunhams, precisely as the water commissioners insisted they should be, without any reservation or provision concerning the plaintiff's right to use the lake for boating and fishing. And besides, the parol agreement was all merged in the written agreement signed by the water commissioners, which was accepted by the Dunhams without any objection or claim then or since that it did not truly embody the agreement of the parties on that subject, and it was this agreement which the court finds in part induced the plaintiff and his father to execute and deliver the deeds, and it is very significant that the complaint does not even ask for any correction of this instrument. It is manifest,

therefore, that whatever express rights relative to this reservoir the plaintiff has must now be found in the terms of this written agreement.

And this brings us to the only remaining question whether the court ought to have found upon the facts that the plaintiff had acquired by prescription the right to fish and boat upon the lake. Several independent answers might be made to the plaintiff's claim under this head. It surely can make no difference with the result whether the plaintiff's sole right is under the agreement or under a prescriptive right. Either title would be insufficient to lay the foundation for an injunction against the enforcement of an ordinance which is a valid exercise of the police powers of the state. But there is a direct answer to the plaintiff's claim which we prefer to rest the case upon. Upon the facts found the plaintiff's use of the reservoir lacks one indispensable element of a prescriptive title, it was not adverse. The court has found that the plaintiff relied upon this agreement, which was an express license to do the acts relied upon. Under this license the plaintiff acted and he has never repudiated it in any way; and he cannot now by such use convert the license of a personal privilege limited to his life into an absolute title to last forever. But in this connection the question will naturally be suggested whether the agreement was valid. The court finds there was no vote of the borough authorizing its execution or delivery, and there was no vote or act of the board of water commissioners acting as a board. But it was signed: "The Warden, Burgesses, and Freemen of the Borough of New Britain. F. T. Stanley, G. M. Landers, Water Commissioners." And the act of 1857, which authorized the establishment of the reservoir and the taking of land and water rights for the purpose, directed the borough to elect three persons as water commissioners, and authorized such water commissioners to purchase and take conveyances for and in the name of the borough of all property necessary for the purposes of the act. This is sufficiently broad to include as a necessary incident the right to fix the terms and conditions of the purchase. If then, as claimed by the plaintiff, this license to boat and fish was to take the place in part of money compensation for the land conveyed, the borough, having accepted the land, ought not now, it would seem, to be heard in repudiation of the agreement. In confirming the judgment of the court that upon the record the plaintiff is not entitled to the redress sought, we do not intend to decide or even to express any opinion upon the claim made by the plaintiff that the rights and privileges of which he has been deprived constituted a part of the payment agreed to be made for the price of his land, and that for the loss of these he is entitled to compensation.

There was no error in the judgment complained of.

(In this opinion the other judges concurred.)

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STATE v. CENTRAL SAV. BANK OF BALTIMORE.

(*Court of Appeals of Maryland.* November 7, 1887.)

For opinion of the court in this case, see 10 Atl. Rep. 290.

BRYAN, J. The requirement of the act of 1874, c. 483, § 85, is that the president or other proper officer of a savings bank shall pay to the treasurer, "out of the interest due the depositors, the state tax on said deposits." The language is certainly clear, and free from all ambiguity. The subject-matter on which the tax is levied is stated to be deposits, and the payment is to be made out of the interest due the depositors. The savings bank holds the deposits for the benefit of those persons who placed them in its keeping; they are the real owners of the sums deposited; the statute simply directs that the state tax on these sums shall be paid out of the money of the persons to whom the deposits belong. If there were any doubt about the meaning of these words, it would be removed by the latter clause of the section in question. It is as

follows: "And they shall likewise furnish to the county commissioners, or appeal tax court, as the case may be, of the county or city where said corporation is situated, a list of the depositors in said institution, with the amount deposited by them at the time of the annual meeting of those bodies for levying county or city taxes; or shall agree with the county commissioners or appeal tax court to pay taxes on such amount of deposits as may be agreed upon between them and the said county commissioners, or appeal tax court, without resort to the individual depositors." The county commissioners, or appeal tax court, as the case might be, were to receive a list of the depositors and the amounts of their deposits so that they might resort to them for payment of the county or city taxes, unless a satisfactory adjustment should be made by the savings bank in discharge of the individual depositors. The section which we are considering is found in the general revenue law of the state of Maryland; and it was the object of this law, as we learn from its second section, to tax all the property within the state, except such as was exempted by the third and fourth sections. The tax was laid on the deposits in savings banks. It is not supposed that any one would attempt to draw a distinction between the deposits and the property in which they are invested. As was said by the supreme court in the *Bank Tax Case*, 2 Wall. 208. "It is not easy to separate the property in which the capital is invested from the capital itself. It requires some refinement to separate the two thus intimately blended together. The capital is not an ideal, fictitious, arbitrary sum of money set down in the articles of association; but, in the theory and practical operation of the system, is composed of substantial property, and which gives value and solidity to the stock of the institution. It is the foundation of its credit in the business community. The legislature well knew the peculiar system under which these institutions were incorporated, and the working of it; and when providing for a tax on their capital at a valuation, they could not but have intended a tax upon the property in which the capital had been invested. We have seen that such is the practical effect of the tax, and we think it would be doing injustice to the intelligence of the legislature to hold that such was not their intent in the enactment of the law." The remarks which I have quoted were made in reference to banks of issue and deposits; but they show very clearly the identity of the deposits in a savings bank with the property in which they are invested. If such property is exempt from taxation, the deposits must be exempt. This is the decision of this court in *State v. Sterling*, 20 Md. 502. If such property has once paid the taxes duly levied, it would be in violation of the declaration of rights to levy them again on the deposits.

The record shows that the deposits on which taxes are claimed in this suit are invested in ground-rents in the city of Baltimore, reserved on leases for 99 years, renewable forever; and that the respective tenants of the leasehold interests in the lots of ground on which the rents are reserved have paid taxes on the fee-simple value of the land. It is very usual in the city of Baltimore for an owner of land in fee-simple to lease it for 99 years, with a right of perpetual renewal in the tenant; and it is customary to stipulate that all taxes on the whole fee-simple value of the land shall be paid by the tenant. The full taxes are paid on the property, and the agreement for paying them is mutually satisfactory to landlord and tenant. As a matter of course a larger rent would be exacted from the tenant if he were not required to pay the taxes. If the owner of land were to lease it for one year, and to stipulate that the tenant should pay the taxes, the tenant would not be willing to pay his landlord as large a rent as if the latter should pay the taxes. Precisely the same reason applies where the leases are for 99 years, with the right of perpetual renewal. In both instances the landlord, in reality and effect, pays the taxes on the property. It would be as unjust to tax the rent received in one case as in the other. When the landlord sells his interest in the land, which is

the reversion in fee with the rent as incident thereto, the purchaser from him occupies exactly his position. He knows that he is purchasing fee-simple property, on which, for valuable consideration, another person has contracted to pay the taxes. His right to have these taxes paid by the tenant is something which he buys and pays for, and which belongs to him as completely and justly as the coat which he purchases from his tailor, or the barrel of flour which he buys from his grocer. It will be seen that the ground-rent measures the landlord's interest in the property, and the taxes on this, and on every other interest in it, that is to say, the entire fee-simple value, are paid by the tenant. Now these ground-rents in question are absolutely identical with the deposits with which they were purchased, and as a matter of course the deposits cannot be taxed when the ground-rents have paid the taxes.

We have been referred to *Society for Savings v. Coite*, and *Provident Inst. v. Massachusetts*, both reported in 6 Wall. 594, 611. Three of the eight judges of the supreme court who heard these cases dissented from the opinions delivered. The decisions affirm the judgments of the highest courts of the states from which they came. It may be useful to make some examination of these cases. In *Coite's Case* certain statutes of Connecticut were construed. These statutes required savings banks and societies for savings to pay to the treasurer of the state a sum equal to three-quarters of one per cent. on the total amount of deposits in such institutions on the first day of July in each year; and this tax was declared to be in lieu of all other taxes upon said institutions and the deposits therein. It appeared that a large amount of the deposits of the Society for Savings had been invested in securities of the United States. If the tax in question was regarded as laid on the property of the savings society, it was conceded that it was void, so far as it affected the deposits invested in United States securities. The court held that it was imposed on the corporation, and not on its assets; that it was imposed on the bank in consequence of its doing, under favor of the state, certain business which that favor rendered profitable; that it was an equivalent exacted in the payment of a tribute in return for privileges conferred. It was further said: "It is hardly more a tax upon property than would be a contribution demanded by a military commander of a captured city as the price of his protection." It was therefore held that the deposits invested in United States securities were subject to the tax. *Coite v. Society for Savings*, 32 Conn. 173. Whatever may be thought of this decision, it was afterwards declared by the same court that it went "to the verge of the law." *Nichols v. New Haven*, 42 Conn. 103. Some expressions in the opinion of the court could hardly be considered as in harmony with the views of taxation entertained in this state. They say that "taxes are at best arbitrary and unequal;" and they speak of "this kind of legislation" (meaning on the subject of taxes) as "arbitrary, partial, cumulative, and capricious." And we may suppose from the argument of the counsel who sustained the validity of the tax, that there is a great diversity between the system of taxation in Connecticut and our own. He is reported as saying "that, except as prohibited by the constitution of the general government, the legislature of this state possesses the sovereign and absolute power of taxation, and that the remedy for unequal, unjust, or oppressive taxation is wholly legislative and not at all judicial."

The *Case of the Provident Institution* arose in Massachusetts; the decision of the supreme court of the state is reported in 12 Allen, 312; but the court refer to and adopt their previous opinion in *Com. v. Bank*, 5 Allen, 428. A statute required every savings bank to pay to the treasurer of the commonwealth a tax, on account of its depositors, of one-half of one per cent. per annum on the amount of its deposits, to be assessed, one-half of the tax on the average amount of its deposits for the six months preceding the first day of May, and the other half on the average amount of the deposits for the six months preceding the first day of November. And it provided that, if in de-

fault, the corporation should be liable to an action of contract for the amount of the tax; and that it might be enjoined from the exercise of its franchise until all taxes were paid. The court held that, if regarded as laying a tax on money in the hands of the corporation belonging to depositors, the statute would be contrary to the constitution of Massachusetts; but that if it could be regarded as an excise or duty levied on the privilege or franchise of the corporation, it would be valid. It said that it would not declare the statute to be a violation of the fundamental law, unless its invalidity was established beyond a reasonable doubt; and on consideration it decided that it was valid. It was held that the tax was not levied on each deposit at a certain rate in proportion to its amount, but was designed to be a corporate charge. *Com. v. Bank*, 5 Allen, 483. In the opinion in 12 Allen, *supra*, it is said that the tax is not on the property belonging to, or held by, the corporation, but is in the nature of an excise or duty on its franchise, or the right granted to it by the legislature to use, exercise, and enjoy corporate privileges.

It will be seen that the statutes which have been mentioned differ in some material respects from ours. But if they were identical, I think it would be our duty to maintain the law as decided by our own court. The decision in *State v. Stirling* meets with my entire approval. In no portion of the act of 1874, c. 483, does the legislature use terms which indicate a purpose to require payment of money for the privilege of carrying on business, either by an individual or a corporation. By other statutes, however, licenses are required for various descriptions of business. Savings banks have no peculiar or exclusive privileges. They receive money and lend it out for the benefit of the depositors, without any profit to the corporations. Their whole purpose is in the highest degree beneficent. Any private individual is at liberty to devote his time and labor to the public good in the same way, if he feels disposed to do so. A tax on the franchise of a savings bank may be laid by statute; that is to say, a tribute may be exacted for the privilege of existing and exercising its functions.

It is for the legislature to decide whether this shall be done; but in all discussions on this subject it is well to bear in mind the wise and weighty words of the learned Cooley: "A tax on a corporate franchise may or may not be just or politic. If the business is one of which corporations have a monopoly, a tax on their franchises, however heavy, would not be burdensome, because the result would only be to add to the cost of whatever the corporations supplied to the public, so that the tax would really be paid by the community at large. If, on the other hand, the business is one open to free competition between corporations and individuals, and in respect to which corporations would enjoy no especial privileges or advantages, a tax upon the privilege of conducting the business under a corporate organization would be wholly unreasonable and unjust." Cooley, Tax'n, 34.

#### STUMORE v. SHAW.

(Court of Appeals of Maryland. October Term, 1887.)

#### 1. PRINCIPAL AND AGENT—COMMISSIONS—CONTRACTS FOR SHIPMENTS—"JUNE LOADING."

The Lilburn Tower sailed from Newport, England, for Montreal, on the eleventh of June. The usual time of her voyage was 12 or 14 days. The agent in Montreal, advised of the probable date of her departure, made contracts for a return cargo for "June loading," by which was meant that the shippers could cancel the contracts if the vessel was not ready to receive their shipments in the month of June. The ship, being delayed, was not ready to receive the cargo in June, and the contracts were canceled. The agent accepted a reduced rate of freight, conceded, however, to be the highest then obtainable at that port. The owner refused to pay the agent for services rendered and advances made, objecting that the agent made the contracts with too early a canceling date, and therefore was chargeable with negligence. *Held*, that the agent was entitled to recover for his services and advances.

**2. SAME—EXPERT EVIDENCE.**

The agent offered ship-brokers as experts to testify as to whether, under the circumstances, it would have been reasonably prudent for a broker, as consignee of the vessel, to engage outward cargo from Montreal for June loading; whether it would have been prudent for such broker to engage grain and cattle for June loading; and whether it was possible for that vessel to be loaded and sail from Montreal in June. *Held* that, as the question was one of which the court or jury could decide the facts, it was not a case for the admission of expert testimony.

**3. SAME—INSTRUCTIONS TO AGENT AFTER VESSEL HAD SAILED.**

In such a case the telegrams by cable and letters by mail between the parties had been offered in evidence, subject to exception. The agent prayed the court to withdraw from the consideration of the jury all the letters of instruction received by him from the principal after the sailing of the vessel from Montreal. *Held*, that the prayer was properly granted.

Appeal from superior court, Baltimore city.

*Robert H. Smith and Alfred S. Niles*, for appellant. *John H. Thomas*, for appellee.

MILLER, J. The plaintiff in this case was a ship-broker in Montreal, and the defendant a ship-owner in London. The suit is to recover for services rendered and advances made by the plaintiff in the disbursement and on account of two steam-ships, the Lilburn Tower and Maulkins Tower, consigned to the plaintiff by the defendant in June, 1884. The amount claimed, including commissions, was £646 9s. 5d. For this sum the plaintiff drew a draft on the defendant, which the latter refused to accept or pay. The declaration contains the common counts only. The plea was *non assumptit*, and the verdict was in favor of the plaintiff for the full amount of his claim. The steamers were sent to Montreal, the one laden with iron rails, and the other in ballast, with the expectation of receiving return cargoes, chiefly of cattle and grain; and the defense set up at the trial, stated in general terms, was misconduct, neglect of duty, and violation of instructions on the part of the plaintiff, in regard to procuring this freight in Montreal. There were several exceptions to the rulings of the court as to the admissibility of evidence, and one as to instructions to the jury. The latter will be noticed first.

1. There is no evidence legally sufficient to show that the defendant was induced to send either of his steam-ships to Montreal by any untrue representations made to him by the plaintiff. Hence there was no error in granting the plaintiff's first prayer, and no objection was made to it by appellant's counsel in argument. As to the defendant's three prayers which were rejected, it appears to us plain that discussion of the legal propositions they contain is needless in view of the instructions given by the court, and the verdict of the jury under them. The court of its own motion instructed the jury "that if they find that the plaintiff in the transaction of the defendant's business violated his instructions, or failed to give him timely information of facts important for him to know, or to exercise that degree of fidelity, skill, and diligence which similar agents ordinarily employ, or might reasonably be expected to employ, under similar circumstances, and that the defendant suffered loss in consequence thereof, then the defendant is entitled to have recouped from the plaintiff's claim such damages, if any, as the defendant may have actually sustained thereby." This placed the case before the jury in a light more favorable to the defendant, perhaps, than the proof warranted, and the plaintiff excepted to it on that ground. The court, however, adhered to the instruction, and the plaintiff thereupon offered his third prayer, to the effect that, if the jury think they ought to make any deduction by way of damages from the plaintiff's claims, it should only be for such as the defendant may have actually sustained by violation of instructions or neglect of duty, as stated in the court's instruction, if they believe there was any such violation or neglect, and such amount, if any, as they may think ought to be deducted from the commissions charged. The court granted this prayer also,

as an addition to, or in explanation of, its own instruction; and, being thus instructed, the jury by their verdict made no abatement whatever from the plaintiff's claim, but gave him the whole of it, with interest. From this the inevitable conclusion is that they found from the evidence that there had been in fact no neglect or violation of instructions by the plaintiff, and that he had transacted the defendant's business with reasonable skill, fidelity, and diligence. This verdict exonerates the plaintiff from all blame; and that being the state of the case, there is no occasion to consider the question whether, if there had been any violation of instructions, or gross negligence, or misconduct on the part of the agent, the jury would have been bound to reject his commissions *in toto*, and be at liberty also to recoup the damages suffered by reason of such negligence and misconduct, as stated in the defendant's first and second prayers, or whether the proposition contained in his third prayer is correct. In view of this finding by the jury, these legal propositions become mere abstractions. The appellant suffered no injury by their rejection, even if they may have been (a point on which we express no opinion) abstractly right.

2. The Lilburn Tower sailed from Newport, England, for Montreal, on the eleventh of June, loaded with a cargo of iron rails. The usual time for her voyage was from 12 to 14 days. The plaintiff, being advised of the probable date of her departure, made contracts in Montreal with shippers of grain and cattle for a return cargo, "for June loading," by which is meant that the shippers could cancel the contracts if the vessel was not ready to receive their shipments during the month of June. The steamer was delayed on her voyage, and did not arrive until the twenty-eighth of June; and, not being ready to receive her return cargo during that month, the cattle men refused to ship at the contract rates, or to ship at all, except at a greatly reduced rate of freight. The plaintiff accepted the reduced rate, but the undisputed testimony is that he obtained the highest rate then obtainable in that port for such cargo. The objection of the defendant is that the plaintiff made these contracts with too early a canceling date, and was therefore chargeable with negligence. To sustain this objection he called to the stand several Baltimore ship-brokers and shipping merchants, who were acquainted with and had experience in such business in Baltimore, and, putting to them the hypothesis that the Lilburn Tower, loaded with iron rails, sailed from Newport, England, for Montreal, on the eleventh of June; that it ordinarily requires from 12 to 14 days to make the passage; that upon her arrival she would have to discharge her cargo, and then be fitted to load grain in her hold, and cattle on deck,—proposed to ask each of them whether or not, under such circumstance, it would have been (1) reasonably prudent for a broker, as consignee of said vessel, to engage outward cargo from Montreal for June loading; (2) would it or not be prudent for such a broker to engage grain and cattle for June loading; and (3) whether or not it was possible for that vessel to be loaded and sail from Montreal in June. Upon objection made by the plaintiff, the court refused to allow these questions to be put, and to these rulings the defendant excepted.

There is a general concurrence of authority and decisions in support of the proposition that expert testimony is not admissible upon a question which the court or jury can themselves decide upon the facts, or, stated in other words, if the relation of facts and their probable results can be determined without special skill or study, the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury. *Lawson, Exp. Ev. 203; Rog. Exp. Test. 11.* And this court, in considering this question in a recent case, has said: "It is proper to lay before the jury all the facts necessary to enable them to form a judgment on the matters in issue; and, when the subject under investigation requires special skill and knowledge, they may be aided by the opinions of persons whose pursuits, or studies, or experience have given them a familiarity with the matter in hand. But where the question can be de-

cided by such experience and knowledge as are ordinarily found in the common business of life, the jury are competent to draw the proper inferences from the facts without hearing the opinions of witnesses. *Turnpike-Road Co. v. Leonhardt*, 66 Md. 77, 78. In our opinion, the present case is within the rule thus stated. If, in addition to the facts stated in the hypothetical question, it had been proved how long it usually took to unload such a cargo, and to fit up a vessel for the reception of grain and cattle, and what were the facilities for such unloading and refitting in Montreal, the jury, with these facts before them, would have been quite competent to determine whether it was prudent or reasonably prudent for the plaintiff to make the contracts complained of, and whether it was possible for the steamer to have been loaded, and to have sailed in June. These additional facts could have been easily proved so as to place all the circumstances in view of which the plaintiff acted clearly before the jury, and if that had been done they would have required no aid from the opinions of others in drawing the inference as to whether he acted prudently or otherwise. No question of science or nautical skill was involved, nor did it require a course of previous habit or study in order to attain sufficient knowledge to answer these questions. Waiving, then, consideration of other reasons urged in argument in support of these rulings, we affirm them on the simple ground that this is not a case for the admission of expert testimony.

8. The remaining question arises thus: The telegrams by cable and letters by mail between the parties had been offered in evidence, subject to exception, and, after the testimony had been closed, the plaintiff prayed the court to withdraw from the consideration of the jury all of the letters from the defendant to the plaintiff which were received by the plaintiff after the sailing of the two ships from Montreal. This prayer the court granted, the defendant having declined modification thereof embracing similar letters written by the plaintiff. The undisputed facts are that both vessels were loaded and sailed on the tenth of July. At that time everything in regard to providing them with cargoes had been done, and the vessels had left Montreal homeward-bound. The plaintiff could not then recall them in obedience to any letter he may have afterwards received from the defendant. His duty had then been discharged, and his liability for negligence, if he had been guilty of any, was then fixed, and neither his rights nor his liability could be affected by any communication he may have subsequently received from the defendant. The simple statement of the facts places the correctness of this ruling beyond the pale of argument. It is not a case where the rule that where the whole of a correspondence is called for the whole of it must be admitted has any application. Judgment affirmed.

TISE, by Her Next Friend, and others v. SHAW, Guardian, etc.

(Court of Appeals of Maryland. November 18, 1887.)

**ABATEMENT AND REVIVAL—DEATH—SUBSTITUTION OF INFANT—CONTINUANCE DURING INFANCY.**

Code Md. 1860, art. 2, § 1, (Rev. Code 1878, art. 64, § 32), provides that no action for ejectment, waste, etc., shall abate by reason of the death of the parties. Code 1860, art. 75, § 40, (Rev. Code 1878, art. 64, § 102), provides that when, in a suit to recover land, or in which the title is involved, a party to it shall die, and the person to be made a party in place of the one dying is an infant, such action shall not be tried during such infancy, unless the guardian satisfy the court that the trial would benefit the infant, but the action may be continued during infancy. The defendant in an ejectment suit died, leaving minor heirs, who were made parties, and a guardian *ad litem* was appointed, who pleaded their infancy in abatement. The plaintiff demurred. *Held*, that article 2, § 1, and article 75, § 40, being formerly sections 1 and 2, respectively, of chapter 80, Act 1785, and being both re-enacted in the Code of 1860, neither has superiority over the other, and they must be construed as they were in the act of 1785,—the second section as an exception to the first,—and the demurrer was properly overruled, and a continuance during infancy was proper. ALVEY, C. J., dissenting.

Appeal from circuit court, Prince George's county.

C. C. Magruder, for appellants. Charles H. Stanley, for appellees.

IRVING, J. This action of ejectment was instituted against one Charles Parker, who died, and on motion of the plaintiff his infant children (all of whom, by the agreed statement of facts, were under the age of 16 years) were made parties defendant, and Zachariah Shaw was appointed guardian *ad litem* to defend for them. He appeared by attorney, and pleaded their infancy by way of plea in abatement, and insisted that it was not for the benefit of the infants to have the action tried during their infancy. This plea in abatement was duly verified by the affidavit of the guardian *ad litem*. It seems to have been pleaded at the imparlance term, and the court overruled a motion of *ne recipiatur* based on the contention that it should have been filed by the rule-day. The rules of the court are not in the record, and we must assume the court in its action properly interpreted the requirement of its own rules.

It also appears by the record that a demurrer was filed to this plea in abatement, which demurrer was first sustained by the court, but afterwards this ruling was stricken out, and the demurrer was overruled, and judgment was given thereon for the defendants; and then the court ordered "that this case shall not be tried until all the infants arrive at full age." Appeal was at once taken to this court. There having been no final judgment in the cause, but only an order for a continuance till the infants reach full age, we do not see how an appeal can be sustained. But as the appeal was designed to test the validity and operative character of the statute under which the order of the court continuing the cause was passed, we will consider the question, which is one of great importance.

The fortieth section of article 75 of the Code of Public General Laws is in this language: "Where a party in any action brought to recover lands, or in which the title thereof is involved, shall die, and the proper person to be made a party in the place of the person so dying shall be an infant; such action shall not be tried during such infancy, unless the guardians or next friend of such infant satisfy the court that it will be for the benefit of the infant to have the action tried during his infancy; but the action may be continued till the infant arrives at full age." The order of the court continuing the cause rests for its authority on the imperative language of this statute, which says that in a case of infancy the case *shall not be tried*, but, instead of abating it and putting an end to it entirely, also provides the suit may be continued until the infant shall attain majority. At the common law the "parol demurred" in such case, (Tidd, Pr. 635; Alex. Br. St. 122;) and this statute was, in effect, but making the common law a statutory provision.

It is contended that this provision is no longer operative, and is so far inconsistent with the provisions of article 2, § 1, of the Code, which are so general that it cannot be enforced. Section 1 of article 2, and section 40, art. 75, both come from the same act, the act of 1785, c. 80. The first is section 1, and the second is section 2, of that act. After making the general provision that suits should not abate by reason of death, an exception was made in the event named in the second section. The two sections of this act of 1785, having been both re-enacted in 1860, when the Code was adopted, neither can have superiority over the other, and they must be construed together, and both made to stand, as they did in the act of 1785—the second section as an exception to the first. For convenience sake they have been separated in the Code, and no longer stand in juxtaposition as in the original; but having been re-enacted at one and the same time, they must be construed as if they had been continued side by side. We find no instances in our reports where the statute has been enforced, but it has several times been recognized as the law. In *Hammond v. Hammond*, 2 Bland, 336, Chancellor BLAND says, formerly the parol demurred both in law and equity, but there had been a change by stat-

ute as to equity; and that the statute allowing sales of decedent's real estate for the payment of debts was passed to give the chancellor power to decree sale after the infant heir had been summoned and answered. He quotes the language of this section under consideration as being the law enforceable at law in the cases provided for. He so recognized it in *Watkins v. Worthington*, 2 Bland, 509-519, and in *Tessier v. Wise*, 3 Bland, 28, 29. In *James v. Boyd*, 1 Har. & G. 1, the judgment below was sustained because it did not affirmatively appear at the trial that the heir was not then of full age. The law was evidently not thought a wise one; but inferentially the court recognized its binding authority, if the condition of things justified or required its application; and the court assigned a reason why that case did not require a reversal of the judgment appealed from, because of its provisions, viz., that it did not appear the party was a minor when the case was tried.

It was contended in argument that its enforcement will operate harshly, and that because of its apparently long disuse it should be treated as obsolete. In the days of feudal tenures and the rights of *primogeniture*, it may have served a useful purpose, but in the changed condition of things in the present day it seems to us to operate as an obstruction of justice rather than as a protection of rights; and in our opinion it should no longer have place on the statute book. But the statute is plain, imperative, and unambiguous, and was re-enacted as part of the written law of the state as lately as 1860, when the Code was adopted, and it cannot be disregarded. It is not our province to repeal it. Having been so long the law, and unchallenged as void, because it is in derogation of common right, we cannot so declare it. The legislature must deal with it if it is hurtful. Appeal dismissed.

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NEWELL v. WILGUS.

(*Supreme Court of Pennsylvania*. November 7, 1887.)

**TRIAL—DISREGARD BY JURY OF INSTRUCTIONS—REFUSAL TO ACCEPT VERDICT.**

In a suit to recover money won at "casino," the judge charged the jury to disregard a "poker" game previously had between the parties. The verdict showed that the jury disregarded the instruction. The court refused to receive the verdict. Held correct.

Error to court of common pleas, Allegheny county.

Action of debt to recover money lost at a game of cards, under an act entitled "An act for the prevention of vice and immorality, and of unlawful gaming, and to restrain disorderly sports and dissipation." In the afternoon of July 31, 1885, the plaintiff and defendant and two others were playing "stud-horse poker," in which plaintiff won \$150, and defendant lost \$460. In the evening, plaintiff and defendant played "casino," and plaintiff claimed to have lost \$1,525. The defendant's testimony showed that he won \$630. The court charged the jury that the plaintiff could recover, and that all they had to do was to find his loss, from the testimony, in the "casino" game, and that the "poker" game should be disregarded by them. The jury returned with a verdict of \$250 for plaintiff, which the court refused to receive, as being plainly against the instructions of the court in regard to the "poker" game.

Wm. Reardon, for defendant, appellant. Geo. R. Lawrence, for appellee.

**PER CURIAM.** The instructions which the court below gave to the jury in this case were lawful and correct, and they ought to have been obeyed. When, therefore, the court refused to accept a verdict which was obviously wrong, and contrary to the charge, it was proper to send the jury back to correct the verdict. Judgment affirmed.

## SHIEB and Wife v. TOWNSHIP OF COLLIER.

(Supreme Court of Pennsylvania. November 7, 1887.)

## MUNICIPAL CORPORATIONS—CONSTRUCTION OF BRIDGE—NOT LIABLE FOR MISTAKE OF JUDGMENT.

The plaintiffs brought action to recover damages caused by the overflow of water produced by a bridge put up by defendants under the direction of their supervisor. Held, that a municipal corporation is not liable for damages caused by an honest mistake of judgment, made by a public officer in the discharge of his duty.

Error to court of common pleas No. 2, Allegheny county.

This was an action brought to recover damages caused by the overflow of water. The plaintiffs owned a farm bounded and divided by the stream in question, and over which stream defendants so constructed a bridge as to obstruct the flow of the water, which overflowed, and swept away rich soil and a crop of potatoes from plaintiffs' land. A compulsory nonsuit was ordered, and, upon motion to take it off, the court, EWING, P. J., delivered the following opinion:

"The evidence of plaintiffs showed that the bridge complained of by them as the alleged occasion of the injury was located and built by the supervisor of the township after consideration, and was even enlarged, in process of building, by his direction and assent, to meet what was supposed to be the wants of any ordinary flood. Immediately after the flood which caused the injury, the bridge or the planking that had been washed off was replaced, and the bridge ever since has proved sufficient. We are unable to see that there was any negligence in the manner of building. With some personal knowledge of the stream, we would have supposed the passage way sufficient. The township is not responsible for a mistake of judgment of the supervisor, if there was a mistake. And now, sixteenth of December, 1886, the court *in banc* refuses to take off the compulsory nonsuit heretofore entered."

Whereupon, the plaintiffs brought error.

*W. C. Erskine and John C. Thompson*, for plaintiffs in error.

Where there is a wrong, there must be a remedy. The damage was caused by negligence. The case should have been submitted to the jury. *Fritsch v. Allegheny*, 91 Pa. 226; 2 Dill. Mun. Corp. § 1038.

*Miller & McBride*, for defendant in error.

The nonsuit was properly entered. A municipal corporation is not liable for damages that may be occasioned by an honest mistake of judgment made by a public officer. *Collins v. City of Philadelphia*, 93 Pa. St. 272; *Fair v. City of Philadelphia*, 88 Pa. St. 309; *Mills v. City of Brooklyn*, 32 N. Y. 497.

PER CURIAM. If the bridge constructed by the township authorities was insufficient to carry off the entire volume of water, it was an error of judgment on the part of the supervisor. It has been repeatedly held that a municipal corporation is not liable in damages for an injury which is the result of an honest mistake of judgment made by a public officer in the fair discharge of his duty. It is sufficient to refer to *Carr v. The Northern Liberties*, 35 Pa. St. 324; *Collins v. City of Philadelphia*, 93 Pa. St. 272. This question ought not to be open to further discussion. Judgment affirmed.

## Appeal of ALSTON and others.

(Supreme Court of Pennsylvania. November 7, 1887.)

## WILL—DEVISE TO HEIRS—PER STIRPES.

A clause in testator's will was as follows: "This is my will: That my brother, Robert Kingan, shall have and hold for his own special benefit all my property,

real and personal, for and during his life; and at his (my brother Robert's) death, the real estate to be divided among my legal heirs, share and share alike." Held, that testator's heirs would take *per stirpes*, and not *per capita*.

From decree of the orphans' court, Allegheny county.

This is a proceeding in partition, and involves the construction of the will of Samuel Kingan, who died in 1877 at the age of 83 years. He left as his heirs one brother and two sisters. One of the sisters had one son, and the other two. The families of deceased brothers and sisters were much more numerous. Samuel and his brother, Robert, were partners in business, and had for many years kept house with a maiden sister. After her death and Robert's marriage they lived in the latter's house, where Samuel died. His will, made on his death-bed, is as follows:

"This is my will: That my brother, Robert Kingan, shall have and hold for his own special benefit all my property, real and personal, for and during his life; and at his (my brother Robert's) death, the real estate to be divided among my legal heirs, share and share alike.

"SAMUEL KINGAN." [Seal.]

Complainants prayed for partition *per stirpes*, which was decreed accordingly. The present appellants subsequently filed a petition for the amendment of the record and decree, which was dismissed; the court rendering the following opinion: "This case is not distinguishable in principle from *Baskin's Appeal*, 3 Pa. St. 304. In the gift of the remainder of his estate to his 'legal heirs,' testator had in view the statute of distributions, and consequently the *per stirpes* rule. 'In his eye, and by intendment of law, those who took by representation took as one heir.' It is natural to suppose he would prefer those who were nearest of kin to those more remote; as, for example, a sister to a nephew. The foundation of the *per stirpes* rule of distribution rests in a large measure on the presumption that, when beneficiaries are in equal degrees of relationship to the testator, his affection for each is equal, and therefore he will desire to benefit each equally. *Osburn's Appeal*, 31 Leg. J. 247. The expression 'share and share alike' is applicable as well to individuals as classes. *Id.* No case has been found in which, standing alone, it has been construed by the supreme court of this state to limit or modify the operation of the statute of distribution in respect of the proportions the next of kin should take; on the contrary, in *Baskin's Appeal*, *supra*, and in *Wood's Appeal*, 18 Pa. St. 478, distribution *per stirpes* was made, notwithstanding this and stronger expressions were used. Particular expressions must yield to the general intent manifested in the will. The first and main object of the testator was to provide for his brother during life, and after that the manifest purpose was that his 'legal heirs' should 'share and share alike' in accordance with the statutes of distribution; and therefore *per stirpes*. This, as was said in *Baskin's Appeal*, *supra*, 'produces equity.'"

A bill of review embodying the same specifications of error, and claiming a partition *per capita*, was then filed, and was dismissed in the following opinion: "The questions raised by this bill of review were fully argued and considered upon the application to amend the petition for partition of the decedent's real estate; and, while there is some doubt as to the proper construction of his will, the weight of authority seems to support the construction then given to it. The will gave a life-estate to the testator's brother, and directed that at his death the real estate should be divided among his legal heirs, share and share alike. Reference must be had to the intestate laws to ascertain the persons the testator intended as his beneficiaries. There they are classified, and the reasonable presumption is that the testator had this classification in view; and as the words 'share and share alike' apply as well to classes as to individuals, it seems he intended that each class should share equally, and the heirs would therefore take *per stirpes*. For these and other reasons given in the opinion heretofore filed, the bill for review must be dismissed."

*D. M. Alston and W. Macrum*, for appellants. *James Bredin*, for appellees.

PER CURIAM. As to the power of the court below to entertain this bill of review we say nothing; since on the main question—that of distribution under the will of Samuel Kingan—the opinion of the court below, though brief, is so complete, and so fully expresses the law governing the controversy in hand, that we can do nothing better than concur in it. Appeal dismissed, and decree affirmed, at costs of appellants.

### HOPKINS v. STOCKDALE.

(*Supreme Court of Pennsylvania*. November 7, 1887.)

#### ASSIGNMENT—OF PART OF UNDIVIDED JUDGMENT.

Plaintiff was the assignee of a part of a judgment. The other part, remaining unpaid, was assigned to a third party. Plaintiff sought to obtain a separate judgment for his part of the original judgment by means of a *sci. fa.*, and to obtain an independent right to process for its collection. *Held*, that the undivided judgment could not be so separated into distinct and independent parts.

Error to court of common pleas, Washington county.

WILLIAMS, J. The court below properly refused to enter judgment for want of a sufficient affidavit of defense in this case. The plaintiff held, by an assignment from Smith & Son, the sum of \$374.19 of the amount of a judgment which Smith & Son had obtained against Stockdale for \$751. The balance of the judgment was soon after assigned to another, so that no part of it remained the property of Smith & Son. The judgment was not payable by installments, but was entered for an entire sum then due and payable from Stockdale to Smith & Son. In December of the same year, Hopkins sued out a writ of *sci. fa.* against the defendant, in which, after reciting the original judgment, the defendant was called upon to show cause why a judgment should not be rendered against him, and in favor of Hopkins, "to the extent of his interest for his debt and damages." In other words, the assignee of part of an entire sum secured by the judgment sought to obtain, by means of the writ of *sci. fa.*, a separate judgment for his part of the money due from the defendant, and an independent right to process for its collection. The court below held the proceeding regular, but put the refusal to enter judgment upon that part of the affidavit which alleged payment.

For this holding the learned judge cited *Peterson v. Lothrop*, 34 Pa. St. 223. In that case the judgment had been entered upon bonds which recited and were given to secure, *inter alia*, certain claims held by Brunot. When the *sci. fa.* issued, which served as a model for the writ issued in this case, there appears to have been nothing due upon the judgments except the claims of Brunot, which were recited in the bond; and within a few days thereafter the plaintiff in the judgment satisfied both of them "so far as they covered or secured any claim of his against the defendant, and no further." The *sci. fa.* was issued in the name of the legal plaintiff for the use of Brunot. The defense was that Brunot was not a party to the record, and had no right to process of any sort upon the judgment; that the bond was given to Lothrop, the judgment entered in his name upon it, and that he had entered satisfaction upon the record. The question thus raised was whether the judgment could be revived, for the balance actually unpaid, at the instance of Brunot, to whom it was due under the provisions of the bond on which the judgment was originally entered. The opinion of this court was delivered by Justice STRONG, who said: "The court will look beyond the mere legal party, beyond the trustee, to the *cestui que trust*. *A fortiori* will this be done when the legal plaintiff is a naked trustee, or when a judgment has been given, as in this case, to se-

cure the payment of debts due to others than the legal judgment creditor." It will be seen that the question now raised was not involved in the case of *Peterson v. Lothrop*.

In *Dietrich's Appeal*, 107 Pa. St. 174, the question was raised and decided. The writ of *sci. fa.* in that case was sought to be made use of to subdivide one judgment into several, so that each part owner might have his separate judgment against the defendant. This effort failed; and in the opinion of the court, delivered by Justice PAXON, the case of *Peterson v. Lothrop* was spoken of thus: "That case does not decide, nor do we decide now, that, when a judgment has been assigned to sixteen different persons, each owner of a part of the judgment may have his separate *sci. fa.* to revive."

The rule undoubtedly is that, if one confesses a judgment for a sum of money payable by installments, a writ of *fi. fa.* may issue upon each installment as it becomes due, if necessary. The writ may issue to the use of the real owner of the installment at the time it falls due. Such use of process imposes no hardship on the defendant not fairly within the contemplation of the parties when the judgment was confessed; and the costs of collection are the same whether the writ issues at the instance of the original creditor, or one to whom he has assigned the particular installment. But if the judgment is for an entire sum, payable at one time, part owners cannot issue separate writs of *fi. fa.* for the collection of their separate interests. The judgment cannot be subdivided by the part owners, either for the purpose of collection or revival. The *sci. fa.* issues upon the judgment, and, as was distinctly ruled in *Dietrich's Appeal*, must follow the judgment. After service, or its equivalent, the court may render judgment in favor of the plaintiff, and against the defendant, that the lien be revived and continued, and that the plaintiff have execution for the amount thereof. Such a judgment revives the lien for the benefit of all persons interested in the judgment who may use the name of the legal plaintiff for this purpose, and his consent is not necessary. The effort of the use plaintiff, in this case, to split the judgment on the line of his own interest in the entire sum for which it was rendered, and get a separate judgment therefor, was properly set up as a defense, and justified the ruling of the court below.

The remaining part of the affidavit alleged payment of the judgment. It appears, however, that the payment consisted in the possession by the defendant of claims against the plaintiff. One of these was for advertising in a newspaper; the other was for the non-delivery of an engine and boiler in accordance with an agreement between the parties. The affidavit does not allege that these items have been settled, and the amount due upon them ascertained, nor that any agreement exists for their application on this judgment.

Payment is the act of the debtor; set-off is by operation of law. Defenses growing out of the original transaction, such as the sweeping away of the property for which the judgment was given by title paramount, are allowed as matters of equity; but upon what principle an open account, or a claim for unliquidated damages, arising from breach of an entirely independent contract, can be regarded as a defense to a *sci. fa. sur* judgment, we cannot understand. We think the true reason for refusing the judgment in this case was found in that part of the defendant's affidavit which denied the right of the plaintiff to make use of the *sci. fa.* for the purpose of dividing an entire judgment, and carrying out of it separate judgment for the sum due him under the assignment from Smith & Son. Judgment affirmed.

v.11A.no.4—24

## STEWART v. COMMONWEALTH.

(Supreme Court of Pennsylvania. November 7, 1887.)

## CONSTITUTIONAL LAW—RIGHT TO BE HEARD BY COUNSEL.

The defendant was indicted for selling liquor without a license. At the trial of the evidence the defendant asked the court to permit him to be heard by his counsel before the jury. The court refused, giving as a reason that "there is nothing in the judgment of the court to justify wasting time arguing." He asked the court to deny altogether the right to be heard by counsel was beyond the power of the court.

*Certiorari* to the court of quarter sessions, Butler county.

Indictment for selling liquor without license.

*Lev. McQuistion* and *W. A. Porquer*, for defendant. *Chas. A. McPherson*, for the Commonwealth.

**WILLIAMS, J.** An examination of the record discloses but one error interfering with the verdict and sentence in this case. This is brought to our attention by the fifth assignment of error. It appears that at the conclusion of the evidence the defendant asked the court to permit him to be heard by his counsel before the jury. This the court refused to do, giving as the reason that "there is nothing in the judgment of the court to justify wasting time arguing." The case was then left to the jury, under the direction of the court. In this action of the court an exception was taken at the time and a bill duly sealed. We have therefore to determine whether the defendant's right to be heard by his counsel before the jury is subject to the discretionary power of the judge presiding at the trial.

The right to be so heard is expressly provided for in the constitution of the Commonwealth. The declaration of rights asserts in the plainest terms "that in all criminal prosecutions the accused hath the right to be heard by himself and his counsel." The constitution is the law paramount, which governs all departments of the government. The legislature cannot take away what the constitution guaranties, nor can the courts. On the contrary, it is the duty of the judges to obey the constitution, and to enforce observance of its provisions on others. Courts may regulate the manner and time for the exercise of the right to be heard by counsel, and may limit the number and the length of the addresses to be made to the jury by general rule, or by an order made in a particular case. These subjects are within the exercise of judicial discretion, and merely regulate the exercise of the constitutional right. To deny the right altogether is beyond the power of the courts. In *Cathcart v. Commonwealth*, Pa. St. 108, a similar question was raised, and in the opinion of the court Justice STRONG said: "The right to be heard by himself and his counsel is doubtless a constitutional right, and if it had been denied it would have been an error." In the present case the right was denied. The facts that it was denied by the accused, and that the court refused to allow its exercise to appear clearly upon the records, and we have no alternative. For this reason, which seems to have been fairly tried in other respects must go for retrial.

Judgment reversed, and *venire facias de novo* awarded.

## KRAFT and another v. SMITH.

(Supreme Court of Pennsylvania. October 3, 1887.)

## 1. TRIAL—POINTS FOR CHARGE—ANSWERS.

Where a party on the trial of a case presents certain hypothetical facts, and asks the court which there is evidence to sustain, and requests the instruction of the jury upon the effect of those facts if believed by the jury, it is error for the

charge simply that the question is one of fact for the jury, and that its weight is entirely for them. The party is clearly entitled to an affirmation or denial of the propositions of law submitted by him.

2. TRUSTS—RESULTING TRUST *EX MALEFICIO*—STATUTE OF FRAUDS.

A parol agreement by a purchaser of real estate at a sheriff's sale to hold the same, and to convey it to the defendant in the execution, whenever he shall repay to the purchaser his advances, does not raise a resulting trust enforceable within the proviso of the Pennsylvania act of April 22, 1856, § 4, (P. L. 533,) unless fraud is clearly shown to have been perpetrated upon the defendant in the execution at the time of the sale. In such case only, can a trust *ex maleficio* arise, the evidence to establish which must be clear, explicit, and unequivocal.

Error to court of common pleas, Blair county.

Ejectment by Peter Smith against Jacob Kraft and Philip Kimmel, to recover a lot of ground in the city of Altoona.

On the trial before JOHNSTON, P. J., the following facts appeared:

In 1878 the plaintiff was the owner of a lot in question. On a judgment entered against Smith, the property was sold by the sheriff of Blair county on twenty-seventh April, 1878, and purchased by Lawrence Kimmel. Lawrence Kimmel in May, 1879, sold the one-half of the lot to his son, Philip Kimmel, one of the defendants. Jacob Kraft, the other defendant, is a tenant under Lawrence Kimmel. The plaintiff below claimed that under a verbal arrangement made between him and Lawrence Kimmel, at or about the time of the sheriff's sale, Kimmel was to purchase the property, and that on repayment by the plaintiff of the amount of the bid, and other claims which Kimmel was to pay, aggregating some \$600, that Kimmel was to reconvey the property to him; that this agreement was to have been reduced to writing and signed by the parties the evening of the day of sheriff's sale, at office of H. T. Heinsling, Esq., who was attorney for the Smiths, and that this was not done. No payment was made by Smith prior to the date of the conveyance to Lawrence Kimmel. Immediately after said conveyance, Lawrence Kimmel entered upon the land and began the erection of a dwelling-house thereon. In June, 1879, the wife of Smith called on Lawrence Kimmel, tendered \$600, and demanded a reconveyance of the land. No offer was made to compensate Kimmel for the improvements. The tender was refused. The present suit was begun April 20, 1883.

The defendants claimed that at the time of the sheriff's sale aforesaid, Smith was indebted to both the Kimmels, father and son, for which they had no lien, and that when the property was advertised for sale by the sheriff, they thought if the property sold cheap they might buy and save their claim; that on the nineteenth April, 1878, the day the property was first offered by the sheriff, Lawrence Kimmel and his son attended and bid on the property; that it was not then knocked down, but adjourned until April 27th; on this second day of sale, Lawrence Kimmel did verbally agree to purchase and give Smith a chance to repurchase it; that by this verbal agreement the Smiths were to pay \$25 per month, and to allow Kimmel to receive the rent of the premises until the sum of \$600 was made up. The \$600 was intended to cover the amount paid by Kimmel to the sheriff, Kimmel's account, a mechanic's lien which one Kline had against Smiths before the sheriff's sale, some taxes, etc., which Kimmel had to pay in addition to his bid under the arrangement at time of sheriff's sale. The defendants denied that there was to be any written agreement; that if such had been the case, the sheriff's deed was not acknowledged until August 26, 1878, so that there was ample time to reduce it to writing if such had been the agreement. They also stated that about Christmas, 1878, Mrs. Smith, plaintiff's wife, came to Altoona, and told Kimmel that she knew they had failed in their agreement, but that if he would agree to wait until Easter, they would pay the whole amount, and if they did not they would let the property go; Mr. Kimmel replied: "I'll do better than that, I will wait until first May." The Smiths having failed to

pay by the first May, Kimmel concluded they had abandoned all idea of purchasing it, and then sold one-half the lot to his son Philip. The evidence in the case is set forth at length in the opinion of the supreme court.

The plaintiff requested the court to charge, *inter alia*, as follows:

"(6) The alleged arrangement between Mrs. Smith and Kimmel that the money should be repaid to Kimmel at or about Easter of 1879, and if not by that time then Smith to make no further claim, even if such arrangement were proved, is of no effect, because not made with Smith himself, nor with any authority, and because there was no consideration for it." *Answer*. Affirmed. (Fourth assignment of error.)

"(7) If the jury find that it was agreed between Smith and Kimmel about the time of the sheriff's sale that the property should be knocked down to Heinsling, and the sheriff's deed made to Kimmel; that Kimmel should pay the purchase money, and the record debts of Smith; that Kimmel should hold the property of Smith until Smith should repay the money advanced by Kimmel, and then reconvey to Smith,—then the transaction was a mortgage, and if Smith tenders to Kimmel an amount sufficient to pay him the money advanced, with interest, allowing for what Kimmel received for rents and profits of the property, the plaintiff is entitled to recover." *Answer*. Affirmed; if the jury are satisfied that all the facts alleged have been proven. (Second assignment of error.)

The defendants requested the court to charge, *inter alia*, as follows:

"(1) That under the act of assembly of April 22, 1856, 'all declarations of trusts in lands are required to be in writing and signed by the party holding the title therefor, else are void; except resulting trusts which the law implies.' " *Answer*. Denied as applying to this case. (First assignment of error.)

"(8) That if the testimony of Philip Kimmel, Lawrence Kimmel, and Mary Soler is believed, viz., 'that Mrs. Smith, representing her husband, stated that if they did not pay or reimburse Kimmel by Easter they would want the property,' and the money was not paid before that time, or before the first of May to which Lawrence Kimmel extended it, that this would be evidence of Smith having abandoned the purpose of redeeming the property, a verdict must be for the defendants." *Answer*. This point raises a question of fact for the jury. Its weight is entirely for them. (Third assignment of error.)

"(11) That the evidence in the case fails to make out such a fraud on the part of Lawrence Kimmel as to invalidate the sheriff's sale, and the verdict must, therefore, be for defendants." *Answer*. Refused. (Sixth assignment of error.)

The court submitted the case to the jury upon the facts. Verdict against the plaintiff. Defendants bring error.

*H. M. Baldrige and A. V. Dively*, for plaintiffs in error.

The act of 1856 was applicable. The mere agreement by Kimmel to repay Smith until Smith repaid him his advances could not raise a trust enforceable without writing in the absence of fraud. *Barnet v. Dougherty*, 32 Pa. St. 393; *Fox v. Heffner*, 1 Watts & S. 372; *Jackman v. Ringland*, 4 Watts & S. 393; *McGinity v. McGinity*, 63 Pa. St. 38; *Plumer v. Guthrie*, 76 Pa. St. 441. The fraud which will convert a purchaser at sheriff's sale into a fraudulent purchaser *ex maleficio* must have been fraud at the time of the sale, not in any subsequent breach of a mere promise. *Kellum v. Smith*, 33 Pa. St. 164. It is the duty of the trial judge, if the case be insufficient in equity, to take it from the jury. *Elbert v. O'Neil*, 102 Pa. St. 305. Especially when the plaintiff induced his opponent to believe that the contract was rescinded, he is entitled to specific performance. *Washabaugh v. Stauffer*, 81 Pa. St. 497.

cific performance will not be decreed in case of laches and material change in the circumstances. *Dohnert's Appeal*, 64 Pa. St. 311; *Porter v. Dougherty*, 25 Pa. St. 405.

*D. J. Neff* and *N. P. Mervine*, for defendant in error.

The evidence was ample to submit to the jury. *Faust v. Haas*, 73 Pa. St. 295; *Sechrist's Appeal*, 66 Pa. St. 237; *Heath's Appeal*, 11 Wkly. Notes Cas. 317; *Christy v. Sill*, 95 Pa. St. 387; *Cook v. Cook*, 69 Pa. St. 443; *Gilbert v. Hoffman*, 2 Watts, 66. The case was within the exception of the act of 1856, and that act was therefore inapplicable. Kimmel while in possession was virtually a mortgagee, and was not entitled to compensation for improvements. *Eberts v. Eberts*, 55 Pa. St. 110; *Oldenbaugh v. Bradford*, 67 Pa. St. 104; *Heister v. Madeira*, 3 Watts & S. 388; *Mellon v. Lemmon*, 17 Wkly. Notes Cas. 71, 2 Atl. Rep. 56.

GREEN, J. The third assignment of error must be sustained because the reply made by the learned court below to the defendant's eighth point was no answer to it. The defendant presented certain hypothetical facts in the point and requested the instruction of the court upon the effect of those facts if believed by the jury. The answer given by the court was: "This point raises a question of fact for the jury; its weight is entirely for them." This was no answer at all, as it gave the jury no instruction as to what they might or should do if they believed the facts submitted in the point. There was evidence supporting the truth of the facts stated, and, therefore, the defendant was entitled to an affirmance of the point if the facts were believed. But the answer was neither an affirmance nor a denial, nor did it submit any question whatever to the jury, and it was therefore erroneous. The answer to the plaintiff's sixth point was still more erroneous because it contained a binding instruction upon the very same facts covered by the defendant's eighth point, and took away from the jury the consideration of those facts, notwithstanding the court also told the jury the facts were for them. The answers to these two points are in direct antagonism, and therefore misleading, but they are also incorrect on their merits. For this reason the fourth assignment of error is also sustained.

The second assignment must be sustained because the transaction in question was in no point of view a mortgage, and in fact it was presented in the general charge as a sale exclusively, and not as a mortgage, and to say it was both, upon the same facts, was necessarily confusing and misleading to the jury. The plaintiff could only recover upon the theory that Lawrence Kimmel was a trustee, *ex maleficio*, for the plaintiff because of fraud in the making of the parol agreement to convey the land to the plaintiff. Upon that theory the case was tried, and there was none other upon which it could have been tried. The sale to Kimmel was a judicial sale made by the sheriff, who, of course, had no power to accept a mortgage. The character of such a transaction is well determined in the case of *Fox v. Heffner*, 1 Watts & S. 372, where we said: "It is now settled by repeated decisions that if one buys property at sheriff's sale and verbally agrees to hold it in trust for the defendant, with a right of redemption in defendant within a limited period, it is a contract resting in parol merely, and not transferring any title in the land." It was claimed in that case that the transaction might be regarded as a loan of money, but we said: "The deed was from the sheriff, who could not, by law, accept a mortgage; he was bound to make an absolute deed to the purchaser of all the title of the debtor to the land." In the case of *Jackman v. Ringland*, 4 Watts & S. 150, which was also a judicial sale, we said: "To hold this to be a mortgage when in truth it is a sale, would be a virtual repeal of the act of frauds; besides the same attempt was made in *Fox v. Heffner*, without success." The first assignment is sustained because the de-

defendant's first point is undoubtedly true as a legal proposition, and it is certainly applicable to the facts of this case.

The eleventh point of the defendants raised a question which was vital to the whole of the plaintiff's case. It was in these words: "That the evidence in the case fails to make out such a fraud upon part of Lawrence Kimmel as to invalidate the sheriff's sale, and the verdict must, therefore, be for defendants." The answer was: "Refused." After a patient and critical study of the whole testimony in the case, we are of opinion that this point should have been affirmed and the cause withdrawn from the jury. The *status* of this class of cases is well defined by the decisions of this court. In construing the fourth section of the act of twenty-second April, 1856, we held in *Barnet v. Dougherty*, 32 Pa. St. 371, that the plain meaning of the enactment is that a trust in land can now be proved in no other way than by writing. The proviso excepts from its operation resulting trusts such as the law implies, and these are raised only from fraud in obtaining the title, or from payment of some part of the purchase money when title is acquired. In the case of *Kellum v. Smith*, 33 Pa. St. 153, we held that a promise to purchase real estate at a sheriff's sale, and to convey it to the defendant in execution whenever he should repay to the purchasers their advances to him does not raise a resulting trust in favor of the defendant. Such agreement vests in the former owner no interest in the land which can be taken in execution by a judgment creditor, unless there was fraud in the purchase. Mr. Justice STRONG, in delivering the opinion of this court, and referring to the ruling of the court below in regard to raising a resulting trust upon a parol agreement at a sheriff's sale to hold in trust for the defendant, said: "A resulting trust cannot be raised in such a way. Such a trust can arise only from the payment of the purchase money or from fraud in the purchase; fraud perpetrated by the grantee. Here the purchase money of the sheriff's sale was paid by Bell & Co., and consequently the beneficial interest as well as the legal estate, went to them. Had there been fraud in that purchase they might have been held trustees *ex maleficio*. But the fraud which will convert the purchaser at a sheriff's sale into a trustee, *ex maleficio*, of the debtor must have been fraud at the time of the sale. Subsequent covins will not answer, any more than subsequent payment of the purchase money will convert an absolute purchase into a naked trust. When the purchaser at a sheriff's sale promises to hold for the debtor, and afterwards refuses to comply with his engagement, the fraud, if any, is not at the sale, not in the promise, but in its subsequent breach. That is too late. It is abundantly settled that equity will not decree such a purchaser to be a trustee, unless there is something more in the transaction than the mere violation of a parol agreement." Both of the foregoing decisions were reaffirmed by this court in *Kistler's Appeal*, 73 Pa. St. 393, in which Mr. Justice AGNEW fully reviewed the whole subject and all the authorities, and also defined the character of the testimony which is necessary to establish a trust *ex maleficio* in this class of cases. On pages 399, 400, he said: "The evidence to establish a resulting trust, especially one arising *ex maleficio*, which is an imputation of fraud, should be clear, explicit, and unequivocal. *McGinity v. McGinity*, 63 Pa. St. 38; *Nixon's Appeal*, Id. 279; *Lingenfelter v. Richey*, 62 Pa. St. 123."

Applying the foregoing principles to the facts of the present case let us inquire whether there is enough to sustain the verdict of the jury, and therefore to warrant the submission of the cause to them. It is entirely undisputed, indeed it is alleged by the plaintiff that Lawrence Kimmel purchased the property in question at sheriff's sale, that he paid the whole of the purchase money, none of it being contributed by the plaintiff, and that the agreement of Kimmel to buy and hold the property for Smith, the plaintiff, was a verbal agreement only. It is alleged by Smith, but denied by Kimmel, that a written agreement was to be signed after the sale, but none such ever was

signed, and the case, therefore, stands upon a verbal agreement only. In order to bring the case within the decisions, an allegation of fraud in the inception of the title is set up. It is founded upon three alleged matters of fact, to-wit: (1) That trickery was practiced in obtaining the sheriff's deed without first executing a written agreement; (2) payment of part of the expenses, and (3) inducing persons not to bid at the sheriff's sale, who otherwise would have done so. The last of these is the most important, and if it was sustained by testimony, the case was properly given to the jury. The only bidders alleged to have been deterred were Karl Olmes and Richard Schantz. As to Olmes he does not pretend to say upon his examination in chief that he was induced by Kimmel to abstain from bidding or even to be absent from the sale. On cross-examination he testified as follows: "*Question.* You never saw either of the Kimmels before the sale at all? *Answer.* No, sir. I saw them but I never spoke to them before or since on this subject; not since, excepting his son came over and asked me if I was subpoenaed, and I told him I was. *Q.* There was nothing said about not going to the sale or anything of that kind? *A.* No, sir, not to me. Nobody tried to keep me away from the sale." Schantz testified to a conversation not with Lawrence Kimmel, who bought the property at sheriff's sale, but with Philip Kimmel and his wife, as follows: "*Question.* State whether you intended to go to the sheriff's sale, and if you didn't go, why you didn't go. *Answer.* Well, Mr. Kimmel and Mrs. Kimmel came to my place and said we ought not to run this property up, they were going to pay us; on account of them going to buy it in for Smiths, wanted to buy it as low as they can on account they were poor. *Q.* Did you go to the sale? *A.* No, sir." Having said that Mrs. Philip Kimmel and her husband had told him about wanting to buy the property in for Smiths he was asked: "*Question.* Did ever old Mr. Kimmel tell you that? *Answer.* No, sir; he never came to my place. *Q.* They did not tell you not to bid? *A.* That's what they said, they didn't want to put up the property because they wanted to buy it back for Smiths. *Q.* And this Mrs. Kimmel and Philip told you and you never saw Lawrence, the man that bought it? *A.* No, sir. *Q.* Were you going to buy? *A.* Well, I guess we would have saved that bit of money, it went so cheap. \* \* \* *Q.* Did you ever ask old Mr. Kimmel afterwards? *A.* No, sir. *Q.* You never said anything to him about the claim and your money? *A.* No, sir. *Q.* Had you any agreement with him that you were to be paid? *A.* No, sir." It will be seen at once that the foregoing testimony of these two witnesses fails entirely to connect the purchaser Lawrence Kimmel with any effort to deter bidders. Neither of them ever had any conversation with him in regard to the sale. Olmes says that nobody kept him from the sale, and Schantz fails to say that he intended to be present at the sale or to bid any sum whatever for the property. There is, therefore, no foundation in testimony for the allegation that the purchaser induced any one to be absent from the sale or deter any one from bidding. As to the alleged payment of part of the expenses it amounts to nothing but an assertion by the Smiths that some one or more of them paid railroad fares for themselves and the Kimmels to go from Altoona to Hollidaysburg to attend the sale, and paid also for some beer and cheese lunch. As to the lunch they admit that Philip Kimmel "set up" the entertainment the same as they did, and as to railroad fares the Kimmels deny it and say they paid their own fares, but however the fact may be, it is immaterial since these fares constituted no part of the costs or expenses of the sale.

In regard to the verbal agreement that a written agreement should be signed, the evidence is so indefinite, so uncertain, so shadowy as to what its terms were to be, and is so emphatically denied by both the Kimmels that it cannot for one moment be regarded as either clear, explicit, or unequivocal. As to what the agreement was the only persons who claimed to have directly communicated with Lawrence Kimmel were Mrs. Smith and her husband, the

plaintiff. The wife was by far the most active person in the business. She describes the conversation which it is claimed constituted the agreement thus: "*Question.* What was said there about the property? *Answer.* They said they were going to buy it in, going to sign an agreement, and as soon as they had their money back I should take it back again. They said 'We don't want to cheat you out of your property, we want to save it.' They were to sign an agreement at Heinsling's office the same evening, the same day. *Q.* Who said they were going to buy it in for you? *A.* Both, and Philip said, 'Now, Mrs. Smith we will buy it in for you and we are going to sign it over to your children and you can't bail anybody nor your old man either.' \* \* \* *Q.* How long were you to have to buy this property back? *A.* I didn't make no arrangement at all how long or how I would pay. I just told him, 'I leave it in your hands;' he could take it out in rent till he had his money out, what belongs to him, and if he has it double; he shouldn't be a loser, he should gain on it, and if he gets it double out I was satisfied too, so he just would give me my property back when he has his money all out." This almost unintelligible jargon discloses the most profound uncertainty as to the essential features of any agreement. How long was the plaintiff privileged to redeem? What was Kimmel, the purchaser, to pay? Was his own debt to be included in the redemption? How was he to be paid; in rents only or in an absolute payment, or payments directly by the Smiths? A long cross-examination developed that other moneys were to be paid besides the bid at the sheriff's sale, certain debts owing by Smith, some of record and others not of record, but it is absolutely impossible to determine from the testimony what these debts were. Some were denied in whole, and some in part; not one was stated with any certainty. Whether Lawrence Kimmel's own claim was to be paid was left in complete uncertainty, and hence his right to require its payment cannot be known. Being asked about this debt she said: "Yes, sir; we did owe him a store bill, but he had no judgment or anything at all in; I gave her a big iron kettle, and a kraut-cutter, and a whole lot of things that way; she didn't say anything after that, that I owed her anything or not. How they make the bill that big I don't know, they never asked me to pay, they didn't say a word about it." This is but a sample of much other testimony of a similar sort. How any jury could determine what amount should be paid, or tendered, or how the purchaser at the sheriff's sale could know what amount he had a right to claim before his obligation to reconvey arose, it is impossible to understand.

Peter Smith's testimony was still more uncertain than his wife's. When asked to tell what took place, he said: "When my property was sold by the sheriff it was not my deed, it was my son-in-law's; Lawrence Kimmel came to my house and said, 'I will buy it in for you; I don't like to see you lose your home; I will take it so long and rent it till it pays the whole thing.' \* \* \* *Question.* Did you ever talk with Kimmel before you went to Heinsling's? *Answer.* No, sir, never; that's all I talked to Kimmel; he came to me and says: 'I will buy it in and take it in rent;' that's all I know. \* \* \* I owed him a little store bill; my woman settled it; I don't want to cheat him out of a cent. *Q.* How much were you to pay him back a month? *A.* I never made a bargain that way. He said he would take it in rent. *Q.* How much rent? *A.* I don't know, I never asked him. *Q.* How much did you expect the house to rent for? *A.* That Dutch woman gave him \$2 a month." As to whether there was to be a writing he was asked: "*Question.* When you came over that morning to go to Hollidaysburg did you hear anything about a writing? *Answer.* No, sir, no writing; I never put my finger to no paper or pen. *Q.* There wasn't to be any writing about it? *A.* No sir. I thought he was a good Christian; that's all what I know. \* \* \* *Q.* Did you sign a paper? *A.* I signed no paper. *Q.* You never saw one prepared? *A.* No, sir. *Q.* You don't know what was to go in it? *A.* That

is all I know. Q. You don't know what was to go in the paper that Heinsling was to draw up? A. He says he would go over there to Heinsling and make an agreement. Q. What was to go in that agreement? A. I don't know, I gave him my deed and insurance paper, he said he wanted to sign that paper, he bought it in for me; that is all I know."

This witness is the plaintiff in the case. He seeks to recover land purchased and paid for by the defendant at a public sheriff's sale, in an action brought almost five years after the sale and just before the statute of limitations was about to close upon it. The foundation of his action is a verbal agreement with the purchaser for the conveyance of the property to him. Such an agreement being insufficient to confer title, it is alleged there was to be a written agreement. When inquired of upon that subject he first says there was to be no writing. Afterwards he says that a writing was to be signed, but he does not know what was to go in it. Upon such testimony as the foregoing he asks a court and jury to give him the land purchased by the defendant after part of it has been sold to another, and costly improvements erected thereon. The tender made when a conveyance was demanded was totally insufficient to compensate for the improvements, and it is impossible to tell from the testimony whether it was sufficient to repay the defendant the amount to which he was entitled under any phase of the evidence. The testimony of Mr. Heinsling in no manner relieves the case of these insuperable difficulties. He says he advised that a writing must be prepared and that the parties were to come to his office the evening of the sale, and that the defendant never came. What the specific contents of the agreement were to be he does not say. He is sure the judgments were to be paid, but thinks other debts were not, but what the actual agreement of the parties was he does not state and probably does not know, as they had already met before he saw them and come to whatever understanding they did have. He fails entirely to explain why he did not notify the sheriff not to deliver the deed because the written agreement was not signed, and why he did not apply to the court to set aside the sale on the ground of fraud, if there was any fraud, and why he did not, at least, call upon the defendant to execute a written agreement if one was to be signed. Apart from the entirely inadequate evidence as to what the verbal agreement was, we fail to discover any evidence of fraud or trickery on the part of the defendant in obtaining the sheriff's deed. Neither Heinsling nor any other witness testifies to any distinct agreement by Kimmel that he would enter into a written agreement and abstain from taking the sheriff's deed until he had done so. In point of fact, the deed remained with the sheriff a considerable time after it was acknowledged, and it was not acknowledged until four months after the sale, and there is not a particle of evidence that it was obtained secretly or surreptitiously. Not the slightest effort was made to prevent the defendant from getting it, nor at any time after the day of sale was any demand made upon him to execute a written agreement or to abstain from taking the deed. In view of these entirely undisputed facts it is impossible to understand how there could have been any real engagement to enter into a written agreement at all. The evidence of the plaintiff, his wife, and Heinsling, the only persons who testify on this subject, is entirely unsatisfactory and insufficient to support the allegation of fraud, and, without considering the positive denial of defendant and his son, we cannot regard it as either clear, explicit, or unequivocal. In our opinion it would be doing a grave injustice to permit a purchaser at sheriff's sale to be deprived of his land upon such testimony as is contained in this case, and we think the jury should have been instructed to render a verdict for the defendant. Judgment reversed.

PASSENGER CONDUCTORS' LIFE INS. CO. OF THE UNITED STATES v.  
BIRNBAUM.<sup>1</sup>

(*Supreme Court of Pennsylvania.* October 3, 1887.)

1. INSURANCE—MUTUAL BENEFIT ASSOCIATIONS—ASSESSMENTS—LEGALITY OF.

Upon the receipt by the secretary and treasurer of a mutual benefit association of notice of the death of a member, he submitted the same to the board of directors at its next meeting. The proofs of death not having arrived, the board directed the chairman to examine them when they should arrive, and, if found to be correct, the secretary to issue notice of an assessment. The proofs afterwards came, were examined by the chairman, and an assessment made accordingly. The by-laws of the association required all assessments to be made by the board of directors, and provided that the chairman should "approve all proofs of death for which an assessment is to be ordered." In an action against the association by the widow of a member who had not paid this assessment, *held*, that the assessment was valid; the member was not in good standing; and plaintiff was therefore not entitled to recover.

2. PLEADING—VARIANCE—OBJECTION MUST BE RAISED AT TRIAL.

Where there has been a trial on the merits, the judgment will not be disturbed because the *allegata* and *probata* do not agree. The objection should have been made on the trial, and the trial court could have allowed an amendment. When not so made, the supreme court, on writ of error, will allow it, and consider the narrative amended.

Error to common pleas No. 3, Philadelphia county.

*Assumpsit* by Sarah F. Birnbaum against the Passenger Conductors' Life Insurance Company of the United States, to recover the benefits due by reason of the death of her husband, Charles N. Birnbaum. Charles N. Birnbaum was a member of the association defendant. At a meeting of the board of directors, held December 5, 1882, notice was received of the death of three members,—Skinner, Gay, and Gillespie. The proofs of their deaths had not been presented. The board directed the chairman to examine them when they arrived, and, if correct, the secretary was directed to issue notices of an assessment. The proofs afterwards came, were examined, and found correct, and the assessment on Skinner's death, No. 117, was issued in January, 1883. Assessments Nos. 118 and 119, on Gay's and Gillespie's death, were issued in February, 1883. Birnbaum had notice of these assessments, but did not pay any of them. He died May 12, 1883. The number of members at that day was about 807.

Article 2 of the constitution of the defendant association provides as follows: "The object of this company is to collect money from its members for the relief of the widows, heirs, or legal representatives of deceased members."

By section 4, art. 1, by-laws, it is made the duty of the directors "to order an assessment of two (2) dollars per member for the benefit of the person or persons entitled to receive such assessments upon the death of any member; \* \* \*" and "to choose one of their number as chairman, who shall preside at meetings of the board in the absence of the president. Said chairman shall indorse all checks drawn by the secretary and treasurer, and approve all proofs of death for which an assessment is to be ordered. Three members of the board shall constitute a quorum for the transaction of all business."

Article 5, by-laws, provides "that, in case of intestacy of a member, the money to be paid shall belong to and be paid to his widow."

Article 7, by-laws, enacts: "Section 1. When the death of a member of this company occurs, notice must be sent to the president and secretary; also a certificate from the attending physician, sworn to before a notary public, justice of the peace, or a clerk of a court of record, which must state the cause, time, and place of death; also a notice of who, as representative of the

<sup>1</sup> Former opinion in this case, reported in 10 Atl. Rep. 138, withdrawn, and the opinion here printed substituted.

decedent, is entitled to receive the benefits, giving the full name of such person, whether executor, widow, or administrator. No assessment to be ordered by the board of directors until the provisions of this section are complied with. Sec. 2. Upon the receipt of the proof of the death of a member as hereinbefore provided, the secretary shall submit said proof to the board of directors, and with their approval shall make the assessment, copies of which shall be sent to each corresponding member for the members on his road or division, and to each member not belonging to a road or division having such corresponding member."

By section 3, art. 3, by-laws, "each member shall, upon receipt of notice of an assessment, forward to the secretary and treasurer, or pay over to corresponding member, the sum of two (2) dollars for the benefit of the person or persons entitled to receive the same on account of the death of a member; such money to be forwarded or paid over in time to be received by the secretary and treasurer within ninety (90) days of the date said assessment has been made."

And by section 3, art. 6, it is provided that, "at the expiration of ninety (90) days from the date of assessments, the secretary and treasurer shall pay over such amounts as may have been collected on such death assessments to the party or parties entitled to receive the same, and said party or parties shall receipt for the amount so received, and release the company from any further liability."

By article 6 it is provided that "all assessments must be received by the treasurer within ninety (90) days after notice thereof shall have been sent by the treasurer to the corresponding member of each road or division, and to each member not belonging to a road or division having such corresponding member. The corresponding member is the agent of the individual members of his road or division, and this company shall not be liable for the omission of a corresponding member to notify the individual members of his road or division of any assessment, or for his omission to remit amounts collected by him for such assessments; and no assessment shall be considered as having been paid until actually received by the treasurer, whose receipt shall be the only evidence of such payment. In case the assessment due by any member shall not have been paid by him, and received by the treasurer, within ninety days after notice of its assessment shall have been sent by the treasurer to the corresponding member of the road or division to which such member may belong, (or in case such member does not belong to a road or division having a corresponding member, then within ninety days after notice shall have been sent by the treasurer to such member,) then such person shall immediately cease to be a member of this company, and shall immediately forfeit all the rights, privileges, and benefits thereof."

The court instructed the jury that assessment No. 117 was not made according to the by-laws, and was therefore illegal, and that the members were not bound by it, and directed them to render a verdict for plaintiff. Verdict accordingly for plaintiff for \$1,802.09, and judgment thereon; whereupon defendant took this writ.

*Norris S. Barratt and John Samuel, for plaintiff in error.*

The narr averred a promise to pay absolutely a certain sum. The proof was a promise to assess each member two dollars, and to pay over what was collected. This is a variance. The narr was not demurrable, and the variance is not covered by the verdict. 1 Chit. Pl. 308; *Stump v. Hutchinson*, 11 Pa. St. 533; *Curtis v. Insurance Co.*, 48 Conn. 98. This is not an insurance company, but "a mere machine to collect assessments." *Supply Co. v. Thompson*, 17 Wkly. Notes Cas. 332, 3 Atl. Rep. 439; *In re Insurance Co.*, 9 Ins. Law J. 145; (U. S. Cir. Ct. N. D. Illinois;) *Com. v. Aid Ass'n*, 94 Pa.

St. 488; *State v. Protective Ass'n*, 26 Ohio, 19. The assessment (No. 117) was legally levied.

*W. R. McAdam, Jr., and Henry Budd*, for defendant in error.

Assessment No. 117 was made without authority. *Roswell v. Aid U* 15 Reporter, 5. After a trial on the merits, a verdict will not be disturbed for such a variance as this. *Brown v. Gilmore*, 92 Pa. St. 40; *Com. v. M* 4 Phila. 95.

PAXSON, J. We think the court below erred in instructing the jury that assessment No. 117, upon the death of Skinner, was illegal. The only money upon this point was that of Walter Lackey, the secretary and treasurer of the defendant company, called by the plaintiff. He said: "At the meeting of December 5, 1882, there was present, of the directors, Southwick, Goss and Kenney. I submitted to the board at that meeting the notice I had received of the death of Richard L. Skinner. The proofs of this death not having arrived, the board directed the chairman of the board of directors to examine them when they should arrive, and, if found to be correct, I was instructed to issue notice of an assessment. The proofs afterwards came, examined by the chairman of the board of directors, who found them correct and who approved them, and assessment No. 117 was made accordingly. No other meeting of the board of directors was held until March, 1883. \* There was no other vote of the board of directors ordering assessment. \* As the proofs of Mr. Skinner's death, not being made at the December meeting, could not have been acted upon by the board until March, in order that his representatives should not be delayed in getting their money, it was directed that when the proofs should arrive, and if found correct by the chairman of the board of directors, and approved by him, I was directed to issue notice of the assessments. This was the ordinary custom of the board, and the proofs of death had not come to hand with notice of death, and was for the convenience of members, so that money to which they were entitled could be sooner collected and paid over."

It is conceded that if Birnbaum was in default his widow has no claim. That he did not pay assessment No. 117 is not disputed. It is said, however, that it was illegally assessed. That it was done in entire good faith hardly be questioned. That it was done in such manner as to save delay and give the deceased member's family their money as early as practicable, is equally clear. The mode of making the assessments was the usual mode of the association of which Birnbaum was a member, and was admittedly a just and proper assessment,—one which the company was bound in good faith to make.

The principal objection to the assessment is that it was not made by the board, but by the chairman of the board. We do not so understand the law. The assessment was ordered by the board, subject to the approval of the proofs of loss by its chairman. Section 4 of the by-laws expressly provides that the chairman shall "approve all proofs of death for which an assessment is to be ordered." The fact of the death of Skinner was before the board in December, but the proofs required by the rules had not come in. When received in proper form, the duty of ordering an assessment followed of course. We do not think what the board did in the matter was so irregular as to be void, and to justify Birnbaum in refusing to pay his dues.

There would have been more force in the point that the *allegata* and *probata* did not agree, if such an objection had been made upon the trial of this case. While it is conceded that the narr does not set out the case properly, the case has been tried upon the merits, and we would not disturb the judgment on that ground. The court below could have allowed an amendment if the point had been taken on the trial. We will allow it and consider the narr amended.

Upon the whole, we are of opinion that the judgment must be reversed. We could have said this before, if the plaintiff in error's paper book had contained any evidence that an exception had been taken below. The opinion heretofore filed is now withdrawn, the judgment entered thereon vacated, and the judgment below reversed.

PENNSYLVANIA S. V. R. Co. v. KELLER.

(*Supreme Court of Pennsylvania.* October 3, 1887.)

1. EMINENT DOMAIN—ASSESSMENT OF DAMAGES FOR PROPERTY TAKEN—EVIDENCE OF—TITLE.

In an action to assess damages for property taken by a railroad company in the right of eminent domain, where the title is in dispute, evidence that part of the premises in question did not belong to plaintiff, and that his claim is excessive, is admissible.

2. SAME.

Whatever facts tend to enlighten the jury on the subject, and thus enable them to reach a correct conclusion as to the value of the property taken, are admissible.

Error to court of common pleas, Berks county.

Appeal by the Pennsylvania Schuylkill Valley Railroad Company from the report of viewers awarding to Jefferson M. Keller damages for property taken from him by said company. It was agreed that the cause be put at issue under the form of an action of *assumpsit*, and that the same be tried under the general issue of *non assumpsit* without pleading, the plaintiff taking the affirmative of the issue.

On the trial, before SASSAMAN, J., it appeared that in 1872 plaintiff acquired a piece of property on which was erected an ice-house, which he subsequently enlarged, situate on the northern side of a large pond, at the mouth of Wyomissing creek. The original deed from Isaac Shaneman to Huber and Weis, from whom Keller claimed title by mesne conveyances, contained this clause: "Benjamin F. Huber and Jacob Weis, their heirs and assigns, shall have also the right and privilege to use the water of the creek on Isaac Shaneman's land, namely, to get ice in winter-time, and to make ice-cream in summer-time; and Isaac Shaneman shall have the right to use of the ice obtained on the said creek or pond free of charge, namely, for his own family use." In 1882, Keller purchased from the Schwartz estate a small parcel of land on the other side of the pond, which extended partly into the pond, and then cleansed and enlarged the pond, changing the course of the current therein.

In November, 1883, defendant located its railroad upon plaintiff's property, taking the ice-house and a portion of land purchased from the Schwartz estate, and constructed a high bank through the pond, practically destroying plaintiff's ice-plant.

Plaintiff offered evidence to show the value of the pond for obtaining ice, its favorable location, the natural adaptability of the property, the purity of the ice obtained therefrom, and the proximity of the plant to consumers. Objected to. Objection overruled. Evidence admitted. (Twenty-sixth to thirty-sixth assignments of error.)

Defendant proposed to ask its witnesses, and to cross-examine those of the plaintiff, as to the state and condition of the Union canal, into which the water from the pond in question flowed, as affecting the market value of plaintiff's property at the time of defendant's appropriation of it. Objected to. Objection sustained. Exceptions. (Fifth to twelfth and twentieth assignments of error.)

Defendant offered to show that it was the owner of a tract of land running through the pond, being the same land that plaintiff claimed was part of the grant to him from the Schwartz estate. Objected to. Objection sustained. Exception. (Fourteenth to nineteenth assignments of error.)

Defendant offered to prove, and asked the court to charge, that the grant of

Shaneman to Huber and Weis gave to the grantees, their heirs and assigns, the right to gather ice on the creek or pond in question for the purpose of manufacturing ice-cream only, and not for the general purposes of merchandise and sale. The court refused the offer, and charged as follows: "So far as the grant in the deed of Shaneman, outside of granting the fee, the court have no hesitation in saying to you that it is general in its extent. The grant runs in two parts. The first is 'namely, to get ice in winter-time.' That is a grant of itself. Then there is an addition to that, 'and to make ice-cream in summer-time.' The court, of course, understand nothing about the business of making ice-cream, and do not know to what extent, or whether such a creek or stream would enter into the making of ice-cream, and can, therefore, say nothing about it beyond that, in the mechanical process of making it, ice enters as an element. All we can say is that, so far as the grant is concerned, it is in general terms: 'To get ice in winter.' That means just exactly what those words would usually and ordinarily mean. It means to get ice in winter,—just what the words are. Then there is an addition to it. The word 'and' is a particle of addition, and it may be used to connect two things together; as, for instance, we say 'one and one are two,' or, 'two and two are four.' That is, it adds one to the other and then, it makes the sum of addition. Or it may be between two sentences. Thus we speak of the cold in winter, and of the heat in summer. There, two sentences are added to each other. And so the grant says, 'and to make ice-cream in summer.' There is an addition to what it was. If the grant were only 'to get ice in winter-time,' that would be the end of it, and the grantee would have no use of this place at all in summer. He could get ice in winter, and that would be all. But when it goes further and says, 'and to make ice-cream in summer-time,' it gives him a right to go there and use it in summer-time, just in the ordinary meaning of those terms. If those words meant anything else, or were intended to have meant anything else, we could not look into it now, because the parties are, both grantee and grantor, held to their grant." (First to fourth assignments of error.)

Verdict and judgment for plaintiff, \$157,500.87½; whereupon defendant took this writ:

*Isaac Hiester and Cyrus G. Derr, for plaintiff in error.*

The value of the whole property unaffected by the road, and as affected by it, is the true standard. The jury are to value the injury to the property without reference to the person of the owner or the actual state of his business. *Navigation Co. v. Thoburn*, 7 Serg. & R. 422; *Railroad Co. v. Burson*, 61 Pa. St. 369; *Railroad Co. v. Hottensline*, 47 Pa. St. 30; *Navigation Co. v. Farr*, 4 Watts & S. 372; *Searle v. Railroad Co.*, 38 Pa. St. 64. A railroad company must be permitted, in a proceeding of this sort, to dispute his title to the property for which damages are claimed. *Church v. Railway Co.*, 45 Pa. St. 339; *Railroad Co. v. Obert*, 109 Pa. St. 193, 1 Atl. Rep. 398.

*H. C. G. Reber and George F. Baer, for defendant in error.*

The company was estopped by its proceedings, and by the form of the issue, from disputing the claimant's title. *Church v. Railway*, 45 Pa. St. 340; *McCurdy v. Railroad Co.*, 8 Wkly. Notes Cas. 144; *Railway Co. v. Bryant*, 57 Ill. 473; *Railroad Co. v. Camp*, 45 Ga. 180; *Railroad Co. v. Owen*, 8 Kan. 409; *Railroad Co. v. Laurie*, 63 Ill. 264; *Rippe v. Railroad Co.*, 23 Minn. 18; *Knauff v. Railroad Co.*, 22 Minn. 173. Assuming, however, that the question of title could be raised, plaintiff in error made no offer which tended to disprove Keller's title. *Railroad Co. v. Rose*, 74 Pa. St. 368; *Railroad Co. v. Gearhart*, \*81 Pa. St. 263; *Railroad Co. v. Rose*, 74 Pa. St. 368; *Railroad Co. v. Hill*, 56 Pa. St. 464; *Railroad Co. v. Patterson*, 107 Pa. St. 461; *King v. Railway Co.*, 17 Amer. & Eng. B. Cas. 95; *County v. Bridge Co.*, 16 Wkly. Notes Cas. 270.

STERRETT, J. The grant from Shaneman to Huber and Weis was correctly construed by the court below, and hence there is no error in the rulings complained of in the first four specifications.

Evidence tending to show the polluted condition of the water in the canal, as affecting the market value of the property in question at the time it was appropriated by the railroad company, should have been received, and submitted to the jury. The evidence proposed may have been entitled to very little weight, but still it was proper for their consideration. The fifth to twelfth specifications, inclusive, together with the twentieth, are therefore sustained.

As the basis of his claim for damages, it was, of course, incumbent on plaintiff below to show title to the property claimed by him, and appropriated by the railroad company, and its fair market value at the time it was taken. On the other hand, the company had a right to rebut, by proving, if it could, that part of the premises in question did not belong to plaintiff, and that his claim was excessive. There is nothing in the form of the issue or the pleadings to preclude defense on either of these grounds. The offers of evidence bearing on these points, and referred to in the fourteenth to nineteenth specifications, inclusive, should have been received, and submitted to the jury, with proper instructions as to its effect.

The remaining specifications are not sustained. The property appropriated by the railroad company was an ice-plant, operated as such by plaintiff below. Its value depended on its location, facilities for conducting the business, proximity to market, etc. Facts tending to enlighten the jury on these subjects, and thus enable them to reach a correct conclusion as to its value, were therefore admissible. The principles of law applicable to claims such as this have been so often stated that it is unnecessary to repeat them.

Judgment reversed, and a *venire facias de novo* awarded.

### McWILLIAMS' APPEAL.

(Supreme Court of Pennsylvania. October 3, 1887.)

#### 1. WILL—DIRECTION FOR SALE OF LAND—CONVERSION—LIEN OF DECEDENTS' DEBTS.

A provision in a will that land be sold after seven years from the date of the death of the testator is a conversion of the realty from the time of the death of the testator, and hence the provision of the Pennsylvania act of February 24, 1834, as to the lien of decedents' debts, does not apply.

#### 2. EXECUTORS AND ADMINISTRATORS—PRESENTATION OF CLAIMS—LIMITATION—PAYMENT OF INTEREST.

Payments of interest by executors, and promises to pay claims, will not toll the statute of limitations; but where it appears that the reason for the non-presentation of a claim within the six years was to enable the executors to carry out the intention of the testator, and where the executors were personally benefited by an agreement not to present the same, the statute of limitations will not be applied.

Appeal of Robert Curry McWilliams and John Woods McWilliams, legatees under the will of John McWilliams, deceased, from decree of orphans' court, Montour county, confirming the report of the auditor appointed to distribute the balance in the hands of the executor of John McWilliams, deceased.

The auditor, James Scarlet, Esq., found the following facts: John McWilliams died August 7, 1876, leaving a widow and four children. His will provided, *inter alia*, as follows:

"Item 3. I give and bequeath unto my beloved wife, Margaret McWilliams, all my real estate for the term of seven years, the rents and proceeds to be applied to the payments of my debts, and is to be used in no other way except so much as may be necessary for her to live on; and I do hereby appoint my son, Robert C. McWilliams, to collect the rents of all the farms, and pay the same over to my creditors, at which time my beloved wife, Margaret McWilliams,

will relinquish the claim, and take full possession of the brick house and yearly rental of said farm, as long as she remains my widow."

"Item 5. I do order and direct that my executor shall and will within years after my decease (that is, after the expiration of the seven years) have all my estate praised and sold, and after all my debts is paid the balance to be equally divided between my daughter, Mary E. Kimble, and my sons, James C. McWilliams and Robert C. McWilliams and John Woods McWilliams soon as it can be consistently done."

It appears that on April 1, 1868, testator made a promissory note to the order of Robert and Samuel Curry for \$3,180, payable in one year, and on April 1, 1874, he executed a similar note to the same parties for \$2,078.44, payable one day from date. The interest on these notes was regularly paid by the maker during his life-time, and after his death, on April 2, 1877, Robert C. Williams, executor, and his two brothers, John Woods McWilliams and James C. McWilliams, joined in a judgment note to the claimants, Robert and Samuel Curry, for the amount of three years' interest on the two notes here presented for allowance, and a considerable sum of money besides, then borrowed by the executor from the claimants to pay debts of the estate due to other persons; that the said transaction of loan and interest adjustment had been proposed by the widow, and requested by her and the parties signing the note, to the benefit of the estate to pay the debts of the estate; that it was required for the due execution of the will, and intended by the parties to the transaction to operate to that end; that it was in aid of the executor and the widow in carrying out the trusts of the will; that it was a recognition by the parties of the existence of those trusts, and a virtual assent by the claimants to their execution; that subsequently, and until April, 1882, interest was annually paid by the executor upon the claimants' notes, and indorsed by him thereon except one year, when payments were made through his brother James C. McWilliams, and indorsed by the latter upon the notes, and except also the last annual payment in 1882 upon one of the notes, for which a late receipt was taken by the executor; that the executor repeatedly promised the claimants, throughout the years he was paying interest on the notes, to pay said notes from moneys to come into his hands under the provisions of the will; that all these payments of interest were stated in the first account made for and on account of the estate, aggregating a large sum of money, were allowed and confirmed by the court, without exception or objection by any one interested in the estate; that by direct proof as to the widow, John Woods McWilliams, and James C. McWilliams, some of these payments of interest were made with their knowledge and consent by the executor; that within a short time after the death of the testator, there was an understanding and agreement between the Curry claimants and the executor, at the instance of the said executor, by which the claimants agreed to postpone payment of their notes, except the annual interest thereon, until the other debts of the estate could be paid by the executor under and pursuant to the provisions of the will, which agreement the complainants have fully complied with.

The executor filed his first and partial account on September 15, 1884, and the same was confirmed absolutely December 20, 1884. Credits were claimed by the executor for all of those payments made to the appellees on account of their notes; and were allowed and confirmed by the court, without exception or objection by any one. The payments were made by the executor, with the approval and concurrence of the widow and all parties in interest. The testator, at the time of his death, was the owner of four valuable farms, and payments made by the executor have been from moneys derived from said farms.

Proceedings in partition were had, and Robert C. McWilliams presented a petition asking that one of the tracts be awarded to him at the appraisement.

to-wit, \$20,224. James C. McWilliams also presented a petition asking that another of the tracts be awarded to him at the valuation, to-wit, \$10,580. The court awarded these tracts to the respective petitioners, directing, in each case, "that 60 per cent. thereof be paid in cash to the executor, for the payment of debts," etc. Before receiving the 60 per cent., the executor was directed to enter into bond, payable to the commonwealth, with surety, to be approved by the court, in \$24,200, on the award of the one tract; and \$12,700, on the award of the other. The executor, accordingly, gave these bonds. The second and partial account of R. C. McWilliams, executor, was filed November 20, 1885, after a citation issued at the instance of Robert Curry, showing a balance of \$11,715.58, which balance was made up entirely of the 60 per cent. ordered by the court to be set aside for the payment of debts as aforesaid. On December 26, 1885, this account was confirmed absolutely, and the auditor was appointed to make distribution. The two notes held by Robert and Samuel Curry was presented before him for allowance, and were objected to for the following reasons: "Because, it being proved that John McWilliams died August 7, 1876, and this being the proceeds of real estate, the claim was barred by the statute before it was converted into money. Neither the payments made on account by the executor, nor a promise to pay the debt, would prevent the running of the statute, and that it was barred generally by the statute of limitations." Two notes signed by decedent were presented by William Simington, administrator of Harriet A. Simington, on behalf of Rebecca A. Simington. These notes were objected to, because barred by the statute of limitations on their face. Both contained indorsements of receipts of interest from R. C. McWilliams, executor, from 1877, to March 21, 1884. The auditor allowed these claims and ordered distribution accordingly. Exceptions to his report having been overruled by the court, in an opinion by EWELL, P. J., the heirs took this appeal.

*S. B. Boyle*, for appellants.

A general charge of real estate for the payment of debts does not create a testamentary lien. *Trinity Church v. Watson*, 50 Pa. St. 518; *Buffington v. Railroad Co.*, 74 Pa. St. 162. The claims were due and payable at the time of testator's death, and were barred at the time they were presented for payment. Act February 24, 1834, § 24; *Purd. Dig.* 525, pl. 97; Act March 27, 1713, § 1, *Purd. Dig.* 1065, pl. 18; *Fritz v. Thomas*, 1 Whart. 66; *Reynolds v. Hamilton*, 7 Watts, 420; *Steel v. Steel*, 12 Pa. St. 64; *Hoch's Appeal*, 21 Pa. St. 280; *Ritter's Appeal*, 23 Pa. St. 95; *York's Appeal*, 17 Wkly. Notes Cas. 33, 1 Atl. Rep. 162.

*W. J. Baldy, C. R. Buckalew, and Isaac X. Grier*, for appellees.

The finding of facts by an auditor will not be set aside unless for plain error. *Bedell's Appeal*, 87 Pa. St. 510; *McConnell's Appeal*, 97 Pa. St. 31. The payments made by the executor upon the notes from time to time, with or without the express assent of the widow and legatees, and his repeated promises to pay the notes from land proceeds, were not the ordinary payments and promises of an executor to a creditor, which will not, under decisions of this court, affect the running of the statute of limitations against a stale demand. Those payments and promises are, in themselves, evidence of a seating of the claim upon the trust created by the will, and, when the assent of the creditors to take their pay from the sources of payment provided by the will and during the time therein fixed is shown, there can no question remain between the parties under the statute of limitations. And this ground can be securely held without resorting to the other grounds of argument already mentioned.

STERRETT, J. Appellants' contention is that the Curry and Simington claims, to which part of the fund was awarded, were not entitled to particular. v.11A.no.4—25

pate in the distribution, (1) because they had ceased to be liens on the land of which John McWilliams, the testator, died seized, and from which the fund was realized; and (2) because they were barred by the statute of limitations, more than six years from the maturity of the claims and death of the testator having elapsed before they were presented.

As to the first, it is sufficient to say, as did the court below, that the fifth item of the will, in which testator directed all his estate to be "praised and sold" by his executors, etc., operated as a conversion of the land into personalty, and hence the limitation act of 1834 does not apply.

The second position is well taken, unless the provisions of the will, and what was done in pursuance thereof, exempt the claims in controversy from the rule established in *York's Appeal*, 17 Wkly. Notes Cas. 83, 1 Atl. Rep. 162. The learned auditor and court below came to the conclusion that they did, and in that, we think, there was no error.

The testator died seized of valuable real estate, consisting of several farms, but he was largely indebted. To provide for the liquidation of that indebtedness appears to have been the main object of the testamentary provisions referred to. In the third item of his will he devised all his real estate to his wife for seven years, but in the same connection he provided that the rents, issues, and profits thereof, except so much as might be necessary for her support, should be collected by his son, one of appellants, whom he appointed executor, and applied exclusively to payment of his debts. This provision evidently contemplated an extension of time covering the period of seven years—at least by some of his creditors. It is true, they were not bound to wait and accept payment in that manner; but, if they accepted the terms, and assented to an extension of credit, which the auditor finds they did, neither heirs nor legatees who were parties to the arrangement can now be permitted to set up that indulgence as a statutory bar to such claims. The auditor finds as a fact that shortly after the death of the testator there was an understanding between the Curry claimants and the executor, to which the other appellant assented, that these creditors should postpone the payment of their notes, except the annual interest thereon, until the other debts of the estate could be paid by the executor under and pursuant to the provisions of the bill, and that this agreement, assented to by appellants and for the benefit of the estate in which they were interested, was carried out in good faith. To this arrangement the executor, who is one of these appellants, was a party, acting under the provisions of his father's will. In view of these and other facts found by the auditor, the defense to the claims in question, set up by appellants is unconscionable, and should not be permitted to prevail. They both enjoyed the benefit of the agreement to which one of them was actually a party, and to which the other was virtually a party, by assenting thereto and assisting to carry it out, and hence they are estopped from interposing the bar of the statute to the claims in question.

There is another sufficient answer to the position assumed by appellants. When the real estate was appraised under the provisions of the will after the expiration of the seven years, R. Curry McWilliams, the executor and one of the appellants, and his brother, J. C. McWilliams, each petitioned the orphans' court to award to them respectively portions of the real estate at the appraisal. That was accordingly done, with notice to all the heirs and legatees, and without objection from any of them; and, as part of the decree, and for the very purpose of carrying out the provisions of the will as to payment of testator's debts, the court ordered 60 per cent. of the valuation money to be paid to the executor for that purpose, and provided that, before receiving the 60 per cent., the executor should give bond with approved security conditioned for the faithful application of the money. In March, 1885, the bond was given, and security approved. That decree remains in full force and unappealed from. The money in court is part of the fund thus set apart for the

payment of testator's debt, including the claims now in question. As the auditor finds and concludes, "here is a solemn adjudication, seating these very debts upon the fund at the instance of all the parties in interest, who are now here disputing these claims, and interposing the statute of limitations." This conclusion is warranted by the evidence, and is a complete answer to appellant's contention. It is unnecessary to refer to the authorities cited and relied on by the learned counsel for appellants. They are inapplicable to the controlling facts of this case.

Decree affirmed, at costs of appellants, and appeal dismissed.

### LEISTER'S APPEAL. SWOOPE'S APPEAL. GOULD'S APPEAL. O'NEILL'S APPEAL.

(*Supreme Court of Pennsylvania.* October 3, 1887.)

#### 1. INTOXICATING LIQUORS—LICENSES—REFUSAL TO GRANT—APPEAL FROM DECREE.

Upon appeal from a decree of the quarter sessions refusing to grant a liquor license, the supreme court will not review the facts of the case.

#### 2. SAME—OPINIONS OF JUSTICES—WHEN MAY BE FILED.

When the associate justices (unlearned in the law) of a court of quarter sessions filed a brief opinion refusing certain applications for liquor licenses, which opinion had been drawn for them by the president judge of the court, who himself filed a lengthy dissenting opinion, the said associate justices had the right, after a *certiorari* had been taken from their decree, to file a supplemental opinion, as of the date of their first opinion, setting forth the facts on which they had acted.

#### 3. SAME—DISCRETION OF COURT IN GRANTING OR REFUSING LICENSES—PETITIONS.

It is a proper exercise of the discretionary power of a court of quarter sessions, in the granting of liquor licenses, to refuse such license in a case where but 14 people signed a petition for the license, and over 200 people signed a remonstrance against it, and the applicant had been refused a license the year before for violation of the liquor laws; also in a case where the court knew that the applicant had violated the liquor laws the preceding year.

Four writs of *certiorari sur appeal*, taken by Henry Leister, J. C. Swoope, E. F. Gould, and James O'Neill, from decrees of quarter sessions, Huntingdon county, refusing appellants a license to sell liquors.

The petitioners in these cases were proprietors of four hotels in Huntingdon county, to-wit: The Leister House, and Hotel Brunswick, in Huntingdon; the Exchange Hotel, in Dudley; and the Mountain House, in Broad Top City,—and applied to the court for a license to sell liquor. In each case the petition was accompanied by the usual bond, and was indorsed by 12 or 14 persons. The regularity of the applications, including the petitions, certificates, and bonds, was not denied, nor was it alleged that notice thereof was not properly published. Separate remonstrances were filed against the granting of licenses to Leister and Swoope, on the ground "that the licensing of said houses is not necessary for the accommodation of the public, and the entertainment of strangers and travelers." There was no allegation against the necessity of the houses. No remonstrances were filed in the cases of Gould and O'Neill. Under the rules of the court, these applications, with eight others, came up for hearing on April 11, 1887. On April 14th seven of the twelve were peremptorily refused by an undivided court; but as to the remaining five, in which appellants were included, the court was divided. As to the latter, MCCARTHY and FOREMAN, JJ., (unlearned in the law,) united in refusing their applications. The opinion filed by them in Leister's Case was as follows:

"This application is to keep a hotel in the borough of Huntingdon. The fact that the house is necessary for the accommodation of the traveling community, and the entertainment of strangers, is established. It is the leading hotel in the borough, and largely patronized by the public. It has all the accommodations required. The applicant has complied with the requirements of the law. While such is the case, we, the associate judges, do not think

that it is necessary to license a hotel to sell intoxicating liquors, and therefore refuse this application."

Similar opinions were filed in the other cases. FURST, P. J., filed a dissenting opinion in each case. From these decrees, on April 16, 1887, the petitioners took these writs. Subsequently, on April 21, 1887, the associate justices filed the following opinion in the cases:

"As there was a misunderstanding with his honor, Judge FURST, in the opinions written out by him and signed by us, that said opinions did not fully set forth our reasons for refusing the licenses therein named, it is now agreed that we add or supplement these additional reasons, which shall be attached to said opinions by the clerk of the court, and filed as a part of the record, and to have equal standing in date as if filed on the fourteenth of April with the opinions referred to above.

"In the matter of the applications for license by Henry Leister, J. C. Swoope, H. C. Wallace, James O'Neill, and E. F. Gould.

"Upon the application of Henry Leister, we refused said license because he had but 14 petitioners for said license, while there were 207 signers to the special remonstrance against the granting of a license to the said Henry Leister; and, further, because Henry Leister was refused a license by the court a year ago because of willful violation of the liquor laws. Upon the application of J. C. Swoope, we refused a license because he had but 14 petitioners for license, while 223 signed a special remonstrance against granting license to said J. C. Swoope. Further, said J. C. Swoope was refused a license a year ago by the court for violations of the liquor laws. Upon the application of James O'Neill, we refused a license because it was known to the court that said O'Neill had violated the liquor laws last year, and therefore was not a proper person to be intrusted with a license. Upon the application of E. F. Gould, we refused a license for the reason that it was known to the court that he had violated the liquor laws, and that he was not a proper person to be intrusted with a license.

"Using a sound discretion, and after considering each application separately, we refused license to the persons before named for the reasons stated, and for the further reason that said license, in each case, we do not consider necessary for the accommodation of the traveling public."

P. M. Lytle, R. Bruce Petrikin, and M. M. McNeill, for appellants. McK. Williamson, for appellees in Leister's and Swoope's Appeals. Samuel T. Brown, for appellees in Gould's and O'Neill's Appeals.

PER CURIAM. The records in the cases before us are without fault, and as the facts cannot be brought before us on appeal, we must affirm the *certioraris*, and dismiss the appeals. We may observe, however, that, if we are to regard the second opinion of the associates as containing a statement of the facts of the several cases, their power to refuse the licenses was undoubted, and was properly exercised. It is true, their first opinion, as drawn for them by the president judge, puts them in the awkward position of a clear violation of the prescriptions of the act of assembly, but this, on further consideration, they had a right to correct, and set forth the facts on which they acted.

The judgments on the *certioraris* are affirmed, and the appeals dismissed at the costs of the appellants.

#### TAYLOR v. BREISCH and others.

(Supreme Court of Pennsylvania. October 3, 1887.)

#### USURY—AS A DEFENSE TO DISTINCT OBLIGATION.

A defense of usury against one obligation cannot be set up against an action upon an entirely distinct and independent obligation, even if it be between the same parties; much less can it be done where the parties are not the same.

Error to court of common pleas, Schuylkill county.

Debt, by Benjamin T. Taylor against Jacob Breisch and others, lately trading as Jacob Breisch & Co. In 1871 the Mechanics' Safe Deposit Bank of Pottsville was the owner of numerous pieces of commercial paper, upon which Jacob Breisch and Jacob Breisch & Co. were parties. One of these was a note for \$3,500. Some of this paper, including the \$3,500 note, had been running for a considerable period, and continued to run thereafter. Usurious interest was charged and received in all these renewals. Benjamin T. Taylor, a resident of Pottsville, in November, 1871, bought with his own funds the original of the \$4,000 note in suit, which, with the other note afterwards purchased, was renewed from time to time at usurious interest. Breisch made an assignment to the bank company of certain collaterals as security for the notes thus held by the bank, and afterwards made another assignment to Taylor as security of his remaining interest in such collaterals. The bank received considerable sums upon these collaterals, which it appropriated to the payment of the notes so held, and still claims a large balance to be due it upon such paper, of course retaining the usurious interest charged and received by it. The court below permitted the deduction of all the usury paid to the bank, and all the proceeds of the collaterals received by it from the claim of the bank, so as to leave a surplus applicable to the notes in suit in this case, belonging to Mr. Taylor. Verdict for defendants and judgment thereon. Whereupon plaintiff took this writ.

*Charles W. Wells and Guy E. Farquhar*, for plaintiff in error.

The payment and receipt of usury is legal in Pennsylvania. *Trust Co. v. Roseberry*, 81 Pa. St. 318; *Appeal of Second Nat. Bank*, 85 Pa. St. 528. Usury paid by defendants on other notes would be no defense to the suit on this note. *Maher's Appeal*, 91 Pa. St. 516; *Bright v. Banking Co.*, 3 Penny. 478; *Appeal of Second Nat. Bank*, 85 Pa. St. 528; *Lennig's Appeal*, 93 Pa. St. 301; *Wheelock v. Wook*, Id. 298.

*B. B. McCool, James Ryon, and John W. Ryon*, for defendants in error.

The court below correctly allowed the usury to be deducted from the \$3,500 note, in ascertaining the amount due, in order to appropriate the proceeds of the collaterals sufficient to pay it.

GREEN, J. The assignments of error in this case raise but the one question, whether the direction to deduct the usury paid on the \$3,500 note was correct. It is not proposed by the defendants that the usury upon that note shall be deducted from the notes in suit, and therefore the question is not precisely the same as that presented in the cases cited in the argument. But the \$3,500 note does not belong to the plaintiff; at least, there is no legal identity of the plaintiff with the ostensible owners of that note. How, then, can the rights of such owners be determined in the present action, to which they are not parties? How can we know that they may not have some reply to the defense of usury against their note? They are not in court; they cannot be heard, and of course their rights cannot be determined. The defendants cannot be prejudiced, because their right to defend on the ground of usury is always available to them whenever any action shall be brought on the \$3,500 note. But, for the purposes of the present case, we must be bound to regard that note as a distinct and independent transaction from the notes in suit, and therefore not open to a judicial determination of an allegation of usury against its owners on the trial of this action. All our recent decisions are to the point that a defense of usury against one obligation cannot be set up against an action upon an entirely distinct and independent obligation, even if it be between the same parties; much less can it be done where the parties are not the same. *Bright v. Banking Co.*, 3 Penny. 478; *Maher's*

*Appeal*, 91 Pa. St. 516; *Appeal of Second Nat. Bank*, 85 Pa. St. 528; *Lenig's Appeal*, 93 Pa. St. 301.

The assignments of error are sustained. Judgment reversed, and new venire awarded.

# BURGESS AND INHABITANTS OF THE BOROUGH OF YORK v. WELSH.

(*Supreme Court of Pennsylvania*. October 3, 1887.)

## DOWER—NOT DIVERTED BY EX PARTE EMINENT DOMAIN PROCEEDINGS—ACTION FOR RECOVERY.

A borough having, by right of eminent domain, taken for a street a lot on which, as appeared by the records of the orphans' court, a widow's dower interest was charged, and having, after an appeal from the viewers' assessment, settled with the owner, the widow being no party to these proceedings, and the borough having no knowledge of the widow's interest, *held*, that her interest was an estate in the land fully protected by the fact that her title appeared upon the records; that she could not be in any way prejudiced by proceedings which, as to her, were *ex parte*; that by occupying the entire lot for a street the borough had left nothing which was subject to distraint; the land could not be sold, nor could a private estate in it be granted, the borough holding it, practically, in fee simple; that the borough is an "assign" of the acceptor of the land in partition, and that, the remedy by distress being taken away, an action of debt would properly lie.

Error to court of common pleas, York county.

Debt by Magdalena Welsh against the burgess and inhabitants of the borough of York.

The plaintiff is the widow of George Welsh, deceased. George Welsh at the time of his death was the owner of a half lot of ground in the borough of York, which is now occupied as a public street laid out by authority of the defendant. After the death of said George Welsh proceedings in partition were had, which resulted in this half lot of ground, number six, in said proceedings, being accepted by his son, Zaccheus H. Welsh, at the valuation of \$3,000, put upon it by the inquest; one-third of said valuation money, less the costs of the proceedings, were by the decree of the orphans' court charged upon the premises during the life of the widow in the usual manner, the interest thereof, \$59.60, to be paid to her annually during her life, on the thirtieth of March in each year, and after her death the principal to be paid to the heirs. Subsequently, said Zaccheus H. Welsh conveyed the premises to Augustus E. Fahs by deed dated March 25, 1878, subject to the payment of said dower interest to said widow during her life, and after her death the principal to the heirs. On the first day of April, 1880, the town council of said borough enacted an ordinance laying out South Pine street over this half lot of ground owned by said Augustus E. Fahs. The borough authorities filed a petition in the court of quarter sessions asking for the appointment of viewers to assess the damages, etc. The viewers awarded to said Augustus E. Fahs \$4,092.86. From this award said Fahs appealed. The borough authorities did not know of the dower fund charged upon this half lot of ground, the deed to Fahs not being recorded. The borough authorities and Fahs finally settled on "\$5,000, and costs of suit in said appeal case, for the ground taken by the opening of said South Pine street," etc., reserving the buildings, and releasing to defendant the premises "for the use of a public street so long as the same shall be used for said purpose, and so long only; to have and to hold the said piece of ground for the use of a street as long as the same shall be used for said purpose." This action of debt was brought against the defendant to enforce the payment of said annual dower interest payable to widow under the decree of the orphans' court. It was contended by the defendant that it paid to Augustus E. Fahs the full value of the entire lot, including the dower charged upon it, and that the borough is not liable to Mrs. Welsh for the arrears of interest; that she must look to Fahs, who got the money, for her annual payments, or if not to him, to Zaccheus H.

Welsh, who took the ground in the partition subject to this payment; that the borough of York is not an "assign" of Zaccheus H. Welsh, who took the land at the valuation in the proceedings in partition within the meaning of the act of March 29, 1832, § 41, and is not, as such, liable to pay the annual interest on this dower charged, to Mrs. Welsh.

A number of points embodying these views were submitted and disaffirmed. Verdict for plaintiff, \$119.26, and judgment thereon, whereupon defendants took this writ.

*John W. Bittinger, J. W. Heller, Charles A. Hawkins, and V. K. Keesey*, for plaintiffs in error.

The plaintiff's remedy is against Fahs. *Pidcock v. Bye*, 3 Rawle, 183. The judgment for the widow must be *de terris*. *Diefenderfer v. Eschleman*, 18 Wkly. Notes Cas. 315, 6 Atl. Rep. 568. Fahs is trustee for the party entitled. *Workman v. Mifflin*, 30 Pa. St. 371; *Bean v. Kulp*, 7 Phila. 650; *Moore v. Barrett*, 6 Phila. 204.

*Frank Geise, E. D. Zeigler, and J. R. Strawbridge*, for defendant in error.

The recovery of the principal sum after the widow's death is by an action against the tenant in fee, and the judgment would be *de terris*. But this suit is for the recovery of the widow's annual interest, and debt is the proper remedy. Act March 29, 1832, § 41, (P. L. 202;) *Van Syckle v. Pennsylvania Co.*, 3 Leg. & Ins. Rep. 107; *Henderson v. Boyer*, 44 Pa. St. 220; *Pidcock v. Bye*, 3 Rawle, 183. The widow was not compelled to look to her recognition. Her remedies are cumulative. *Medlar v. Aulenbach*, 2 Pa. 355. The decree of the court to Zaccheus H. Welsh was made subject to the dower fund, and interest thereon, and the proceedings in the orphans' court by which Zaccheus H. Welsh became possessed of the premises did not change the widow's estate in the land. She continued to have a freehold estate in the land mentioned in the declaration filed in this case. *Schall's Appeal*, 40 Pa. St. 170; *Zeigler's Appeal*, 35 Pa. St. 173; *Gourley v. Kinley*, 66 Pa. St. 270; *Bachman v. Christman*, 23 Pa. St. 162.

GREEN, J. It was undoubtedly the fault of the defendant that the estate of Mrs. Welsh in the land in question was not discovered, and provided for in the proceedings to assess the damages. Her title was fully spread upon the record of the orphans' court in the proceedings in partition, and there was not the slightest reason for overlooking it, and disregarding her interests in the assessment of damages. The culpability in this respect was increased by the consideration that the damages were finally adjusted by a private agreement, and the execution of a release from the owner to the borough. The widow was in no default whatever, she was not made a party nor in any manner notified of the taking of the land by the borough. Of course she had no day in court, and no opportunity to assert her rights or protect her interests. In such circumstances she could not possibly be divested of her estate in the land, or of the least fragment of her interests, by proceedings which, as to her, were purely *ex parte*. This being so, there is no question in the case but one of remedy. The borough has taken the whole of the land, and occupied it for the purpose of a public highway. The right of distress cannot be exercised since there is nothing to distrain. The land cannot be sold, since it has been devoted to public use by the lawful exercise of the right of eminent domain, and no private estate in it can be granted. The borough has accepted a conveyance of the owner's title by deed of release, which in fact is the equivalent to a fee, since it is only determinable by the abandonment of the street as a public highway, a contingency which may, and probably will never happen. Whether, therefore, the position of the borough, with reference to the widow, is that of a voluntary grantee of the owner, or the acquirer of

his estate by force of the proceedings to take the land and assess the damages, is a matter of no consequence in determining her rights. As to what they are, there can be no controversy. She is plainly entitled to her interest upon the dower fund, and by the words of the statute (Act March 29, 1832, par. 41) she has a right to have it from the original acceptor or his assigns holding the same. The defendant is clearly an *assign* of the acceptor, and as such, liable to pay this dower interest. That interest may be recovered "by distress or otherwise, as rents in this commonwealth are recoverable," and as debt will lie to recover rent, and the defendant has deprived the plaintiff of the remedy by distress, we see no possible reason why the present action cannot be maintained. Judgment affirmed.

### SYLVIVS v. KOSEK.

(*Supreme Court of Pennsylvania. October 3, 1887.*)

#### 1. EQUITY—REFORMATION OF WRITTEN CONTRACT—FRAUD—EVIDENCE.

The evidence requisite to reform a written instrument on the ground of fraud, accident, or mistake, must be clear, precise, and indubitable. If the evidence when admitted is not such as would move a chancellor to reform the contract, the case should not be submitted to the jury without binding instructions as to its insufficiency.

#### 2. SAME—REPRESENTATIONS BY AGENTS—AUTHORITY.

In an action on a contract, defendant testified that at the time of signing it was read to him at his request by the party who had been commissioned by plaintiff to bring it to him; and that said party had read it as if it included a stipulation contained in the original agreement as to the matter, which stipulation was in reality not in the written contract. *Held*, that the burden of proof was on defendant to show that the party reading the contract had authority from plaintiff to represent that such a stipulation was inserted therein, and that, in the absence of such proof, plaintiff was not bound by any such representations, as said party, in reading the contract, must be taken to have been the agent of defendant.

#### 3. SAME—TWO WITNESSES TO CONTRADICT ANSWER.

The answer of plaintiff to such a defense is conclusive unless contradicted by two witnesses, or one witness and corroborating circumstances equivalent to a second witness. Since parties have been made competent witnesses, the reason for enforcing this rule is stronger than ever.

Error to court of common pleas, Luzerne county.

*Assumpsit* by George D. Sylvius against John Kosek, to recover the price for certain work done and materials furnished upon a written contract.

The defendant is a merchant and dealer in real estate. Wishing to put up some houses, he went to the lumber-yard of Ryman & Sons, where a neighbor of his, one Roushey worked, to get the name of a reliable contractor. Sylvius, the plaintiff, was suggested as such a man, and it was arranged that Sylvius, who was a stranger to defendant, should go that night with Roushey to Kosek's house. He did so, and in the presence and hearing of Roushey and others an agreement was arrived at, which Sylvius was to write out in duplicate and send up the next day, either by Roushey or some one else. Sylvius accordingly wrote out the contract, in duplicate, and left them at the office of Ryman & Sons. They were taken up to the defendant, Kosek, the next day, by Roushey, who, in response to a request from Kosek, read the contract to him. Kosek signed them both, keeping one, and sending the other back to Sylvius. The latter then went on building the houses under the terms of the contract, and finally completed them, and Kosek took possession. Kosek kept his duplicate of the contract for a month without looking at it. The defense set up was that the contract as written did not include the "sealing" of the houses, which Kosek alleged he understood to be a part of the verbal agreement; that Roushey read the contract as if it contained the provision for sealing, and that Kosek signed under the belief that such was the case. Kosek testified, "I could read writing if it is wrote plain, but this writing I could not read it;

of course if I looked at it long enough I might read some words out of it." Stylius swore that the agreement never included the "sealing" of the houses, and that the written contract was exactly what had been agreed to verbally. Roushey testified that he did not read the contract to Kosek at all, and neither read it himself, and that nothing was said at the time the verbal agreement was made about "sealing" the houses. The defendant claimed a deduction of some \$1,050 from the contract price, which sum he stated it had cost him to have these houses wainscoted or sealed. Verdict for plaintiff and judgment thereon, deducting the amount claimed by defendant, whereupon plaintiff took this writ; the material assignments of error being set forth in the opinion.

*Wm. Penn Ryman and E. P. & J. V. Darling*, for plaintiff in error.

The evidence was insufficient to reform the written contract. *Brawdy v. Brawdy*, 7 Pa. St. 159; *Murray v. Railroad Co.*, 103 Pa. St. 37; *Bentley v. Mackay*, 31 Law J. Ch. 709; *Building Ass'n v. Hetzel*, 103 Pa. St. 507; *Railway Co. v. Swark*, 105 Pa. St. 555; *Thorn v. Warfflein*, 100 Pa. St. 519; *Phillips v. Melly*, 106 Pa. St. 536; *Audenreid's Appeal*, 89 Pa. St. 120; *Martin v. Berens*, 67 Pa. St. 459; *Adams*, Eq. 363*n*, and cases cited.

*John T. Lenahan*, for defendant in error.

Roushey was plaintiff's agent, and he cannot now insist on the acceptance of such acts of Roushey as are beneficial to him, and reject those which prove disadvantageous to him. *Insurance Co. v. Woodworth*, 83 Pa. St. 223; *Jones v. Building Ass'n*, 94 Pa. St. 215; *Musser v. Hyde*, 2 Watts & S. 314; *Jackson v. Hayner*, 12 Johns. 469.

STERRETT, J. In response to the *prima facie* case presented by plaintiff's evidence, including the written contract on which the action is grounded, defendant undertook to prove that an important provision of their verbal agreement in relation to building the houses was fraudulently omitted from the written contract prepared in duplicate by plaintiff, and submitted to him for his signature. He testified in substance that plaintiff, having verbally agreed to build the houses for a fixed sum, including wainscoting in lieu of plastering, undertook to prepare and send him for execution, duplicate copies of their agreement, embodying that and all other provisions thereof; that instead of doing so he wrote, and sent by the hand of Roushey, duplicates from which the provision in question was omitted; that inasmuch as he was not sufficiently familiar with English to read the contract, he asked Roushey to read it, and he read it as though it contained the provision in regard to wainscoting, and thereupon he executed the contract in duplicate, believing it embodied all the provisions of their verbal agreement. In view of the foregoing testimony and the uncontradicted evidence as to Roushey's authority in the premises, plaintiff, in his third point, requested the court to charge as follows: "In order to bind the plaintiff by the alleged representations made by Roushey at the time of the execution of the written contract, it must be shown affirmatively that Roushey had authority from plaintiff to make such representations, and that the burden of proof is on defendant who seeks to take advantage of those representations. The simple testimony that Roushey was authorized to take the contract to Kosek to be signed, is not sufficient evidence to establish that authority. There being no other evidence in this case tending to establish or prove such authority, the jury must find as matter of fact that none existed, and plaintiff is not bound by representations alleged to have been made by Roushey." The court declined to affirm this point as a whole, saying: "We cannot say, \* \* \* in the language of the point, that there is no other evidence in the case than that alluded to. In its length and breadth we cannot affirm this point; it is, therefore, disaffirmed." In plaintiff's fourth

point the court was further requested to charge: "It being the uncontradicted evidence that Roushey's authority was to deliver the contract to Kosek, that, if read at all, such reading was at the request, and by direction of Kosek, this constitutes and makes Roushey the agent of Kosek, and nothing that has been said or done by Roushey, so acting, can in any way bind the plaintiff. This point was also refused. Each of these points was fully warranted by the evidence before us; and as correct legal propositions, based upon the undisputed facts of the case, they should have been severally affirmed. Roushey was intrusted with the papers merely for the purpose of delivering them to the defendant. The evidence proves this, and nothing more. If he read the contract at his request, he did so as the agent of the latter, and not of the plaintiff. If Kosek chose to make him his own agent for that purpose, and the contract was incorrectly read, it was neither the fault nor the act of the plaintiff. The ninth and tenth assignments of error are sustained.

It is conceded by the learned counsel for defendant that the defense is the nature of a bill brought to reform the written contract on the ground of fraud. The rules of evidence applicable to such cases are too well established to admit of any doubt. The evidence requisite to reform a written instrument on the ground of fraud, accident, or mistake, must be clear, precise, and indubitable. *Murray v. Railroad Co.*, 103 Pa. St. 37. If the evidence when admitted is not such as would move a chancellor to reform the contract or deed, the case should not be submitted to the jury without binding instructions as to its insufficiency. *Phillips v. Melly*, 106 Pa. St. 536.

Again, the answer of a plaintiff to such a defense as is set up in this case is conclusive, unless contradicted by two witnesses, or one witness and corroborating circumstances equivalent to a second witness; and, now that the parties are competent witnesses, and each may oppose his oath to that of the other, when written contracts or obligations are sought to be impeached, defenses purely equitable, the reason is stronger than ever for enforcing the rules of equity applicable to such cases. *Phillips v. Melly*, *supra*; *Bush v. Ass'n v. Hetzell*, 103 Pa. St. 507. Tested by these and other rules of evidence applicable to such defenses as the one under consideration, we think the evidence was insufficient to justify the submission of the alleged fraud to the jury.

It is unnecessary to notice specially the remaining specifications of error. What has been said disposes of the controlling questions in the case. The judgment is reversed, and a *venire facias de novo* awarded.

### SMITH'S APPEAL.

(*Supreme Court of Pennsylvania.* October 3, 1887.)

#### ASSIGNMENT FOR BENEFIT OF CREDITORS—PERSONAL PROPERTY IN ANOTHER STATE—DOMICILIUM.

An assignment by a citizen of one state of personal property situate in another state, when properly recorded, takes effect from its date, and passes the title for all purposes. The law of the domicile regulates the transfer of personal property.<sup>1</sup>

#### Appeal from court of common pleas, Bradford county.

Petition by H. Austin Clark, assignee, for the benefit of creditors of J. West, for a rule to show cause why an order should not be made allowing him to make distribution of said assigned estate, in accordance with the

<sup>1</sup>A voluntary general assignment for the benefit of creditors, if valid where made, is valid to transfer personal property wherever situated, *J. M. Atherton Co. v. I. W. Fed. Rep.* 894; *Butler v. Wendell*, (Mich.) 23 N. W. Rep. 460; *In re Page-Ser Lumber Co.*, (Minn.) 16 N. W. Rep. 700; *Campbell v. Coal & Iron Co.*, (Colo.) 1 N. W. Rep. 248; *Welder v. Maddox*, (Tex.) 1 S. W. Rep. 168; except as it conflicts with the rights of resident creditors, *Schuler v. Israel*, 27 Fed. Rep. 851.

of the state of New York. The facts are stated in the opinion. The court having entered a decree in accordance with the prayer of the petitioner, Frederick E. Smith took this appeal.

*Rodney A. Mercur*, for appellant.

By the act of May 3, 1855, courts of common pleas may dismiss or appoint trustees under such assignments, as in other cases. They may be dismissed by act of June 14, 1836. §§ 11, 12, (P. L. 632;) *Weiskettle's Appeal*, 103 Pa. St. 522. The assignment is, therefore, to all intents and purposes, one made under the laws of Pennsylvania. By act April 17, 1843, § 1, (P. L. 273,) the preferences in the assignment are void. *Smith's Appeal*, 104 Pa. St. 381, is clearly distinguishable from the present case.

*Edward Overton* and *Jo & John F. Sanderson*, for appellee.

The propriety of the decree is fully sustained by *Smith's Appeal*, 104 Pa. St. 381.

PAXSON, J. This was an appeal from the decree of the court below distributing the assigned estate of Jehiel J. West. Both the assignor and the assignee were domiciled in the state of New York; the assignment was made, delivered, and recorded in Tioga county, in that state. A portion of the assignor's personal property was located in Bradford county, Pennsylvania; the assignment was recorded in said county, an appraisal made, an inventory filed, and a bond given and approved by the court. The deed of assignment contained preferences in favor of certain creditors, which preferences are valid by the law of New York, but are illegal here. The appellant, who is a Pennsylvania creditor and unpreferred, endeavors to avoid the effect of the preferences in the assignment by holding the fund here, and distributing it according to the law of Pennsylvania. This he cannot do. It is settled by abundant authority that an assignment by a citizen of one state of personal property located in another state passes the title fully for all purposes. The law of the domicile regulates the transfer of personal property. It is sufficient to refer to the late case of *Smith's Appeal*, 104 Pa. St. 381. The recording of the assignment in this state was a compliance with the act of May 3, 1855. The effect of this was to give the assignment a force which it did not have at common law, and take effect from its date, saving all rights accrued to "bona fide purchasers, mortgagees, or creditors, having a lien thereon before the recording in the same county, and not having had previous actual notice thereof." The appellant does not come within this saving clause. He has no lien in the fund; he is merely an unsecured creditor; and while it may seem hard that assets in Pennsylvania shall be transferred to the state of New York for distribution, and then swallowed up by preferred creditors, it is a risk which he took when he gave credit to a citizen of New York. He knew that his debtor could do just what he has done, and having such knowledge he has no reason to complain.

It must not be overlooked that this was a voluntary assignment; it was not one made *in invitum*, or by coercion of law; neither are we distributing the estate of a decedent domiciled in another state; and the rule in such cases has no application here.

The decree is affirmed, and the appeal is dismissed at the costs of the appellant.

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CHRIST v. FIRESTONE.

(*Supreme Court of Pennsylvania*. October 3, 1887.)

PARTNERSHIP—AUTHORITY OF PARTNER TO ASSIGN PATENT-RIGHT.

One partner has authority to assign and dispose of a patent-right belonging to the firm of which he is a member, and of this authority he cannot be deprived by any action on the part of his co-partners.

Error to court of common pleas, Warren county.

This was a judgment confessed for \$551.25 on note under seal, which was opened, and defendant let into a defense.

Upon the trial before BROWN, P. J., the following facts appeared:

"On the twelfth of May, 1884, the defendant purchased from M. C. Firestone and A. Hewitt, the patent-right in a patent washing-machine in the state of Virginia, and in the county of Armstrong, state of Pennsylvania, and received two deeds for the exclusive right thereto, the one for the state of Virginia, signed M. C. Firestone and A. Hewitt. M. C. Firestone and A. Hewitt were the assignees of the patentees. The sale to Christ of the patent-right in the territory mentioned was made by Firestone, the deeds thereto were drawn by him, and he signed his name and the name of Hewitt to the deed, in the absence of the latter, who, at the time of the transaction, was in the state of Ohio, while this transaction took place at Geneva, Crawford county, Pennsylvania. The consideration for these deeds for the said patent-right was notes aggregating \$1,900. One note, the one in controversy, for \$525, was made payable to M. C. Firestone. Another note for the same amount was made payable to A. Hewitt. Two other notes, one for \$150 and one for \$100, were given, but it does not appear from the evidence to what they were made payable. The \$525 note was made payable to Hewitt because Firestone claimed one-half belonged to Hewitt. On the seventh, twenty-first, and twenty-third of June, and eighth of July, 1884, A. Hewitt wrote to Mr. Christ letters notifying him that Firestone had no authority to sell his, Hewitt's, one-half, and that the deed did not convey his interest in the patent-right in the state of Virginia.

"It was shown upon the trial, by reading from the deposition of M. C. Firestone, taken by the plaintiff upon a commission, that Mr. Firestone had no written authority from Mr. Hewitt to sell the latter's interest in the patent-right and sign a deed therefor, and that the only authority claimed by the defendant upon the trial was the partnership relation existing between him and Hewitt. This alleged partnership relation was not evidenced by any writing. On March 6, 1886, judgment was entered upon this note for the face thereof with ten per cent. commission. On the fifth of April, following, a petition was presented praying the court to open the judgment and let the defendant into a defense. After taking testimony, upon hearing, the court opened the judgment and put the cause at issue. Upon the trial the defendant offered in evidence the notices from A. Hewitt, which were excluded. The defendant also claimed that, under the laws of congress, interests in patent-rights could be conveyed by writing, and that Firestone having no written authority from Hewitt, the deed only conveyed his undivided one-half. Mr. Christ did not get what he bargained for, and he had a right to rescind the contract. The court overruled these points, and directed a verdict for the plaintiff. The plaintiff gave no evidence upon the trial."

Verdict and judgment for plaintiff; whereupon defendant took this writ of *D. I. Ball* and *C. C. Thompson*, for plaintiff in error.

If defendant got but half what he bargained for he can rescind the contract. *Ley v. Huber*, 3 Watts, 367; *Moore v. Shelly*, 2 Watts, 256. The Revised Statutes of the United States, § 4898, require an assignment of an interest in a patent to be in writing. The interest of the assignees is in joint tenancy, and one cannot convey the interest of his co-owner. 3 Nat. Dig. 458, § 96; *Vose v. Singer*, 4 Allen, 226; *De Witt v. Manufacturing Co.*, 5 Hun, 301; *Parkhurst v. Kinsman*, 6 N. J. Eq. 600; *Dunham v. Railroad Co.*, 9 Chi. Leg. N. 50; *Pitts v. Hall*, 3 Blatchf. 201; *Davy v. Swan*, 9 Amer. Law Reg. (N. S.) 645.

*W. D. Hinckley* and *C. H. Noyes*, for defendant in error.

A patent-right is personal property. *Shaw Relief Valve Co. v. Christ*, *New Bedford*, 19 Fed. Rep. 753; *Bradley v. Dull*, Id. 913; *Donough*

*Hubbard*, 27 Fed. Rep. 742. One partner can sell the personal property of the firm. Pars. Partn. c. 7, § 2; Story, Partn. c. 7.

**PER CURIAM.** The testimony produced in the court below establishes the fact that as to the patent-right in controversy Firestone and Hewitt were partners; hence the assignment of Firestone to the defendant passed to him the title of both. The act of congress invalidates unrecorded assignments only as to subsequent purchasers and mortgagees for valuable consideration without notice. Neither Hewitt's notice, nor his letter disclaiming Firestone's authority to dispose of the patent-right, was of importance in the trial of this case. They being partners, the one could not, in this summary manner, abrogate the power of the other; therefore, the offers of evidence covered by the fourth and fifth assignments of error were properly refused. Judgment affirmed.

WILCOX, to Use, etc., v. ROWLEY and another.

(*Supreme Court of Pennsylvania.* October 3, 1887.)

**ESTOPPEL—PAROL EVIDENCE—PROVINCE OF JURY.**

Where a party sets up an estoppel, and in support thereof offers evidence which is wholly verbal, and which, if believed by the jury, would amount to an estoppel, it is error in the court to withdraw such evidence from their consideration.

Error to court of common pleas, Warren county.

Judgment entered on a judgment note in favor of Belle Wilcox against E. D. Rowley and Nason Rowley. The judgment was assigned by plaintiff to Charles Parker, who assigned it to Daniel Rhodes, who assigned it to C. W. Clark. On February 14, 1887, the court opened the judgment, and let defendants into a defense, they alleging failure of consideration. The further facts are stated in the opinion. The court having directed the jury to render a verdict for defendants, which was accordingly done, and judgment entered thereon, plaintiff took this writ.

*Allen & Higgins* and *R. Brown*, for plaintiffs in error.

The court erred in directing the jury to render a verdict for defendants in the face of the testimony of Daniel Rhodes. *McMullen v. Wenner*, 16 Serg. & R. 18; *Edgar v. Kline*, 6 Pa. St. 327; *Elliot v. Callan*, 1 Pen. & W. 24; *Chapman v. Chapman*, 59 Pa. St. 214; *Griffiths v. Sears*, 112 Pa. St. 523; *Williams' Appeal*, 83 Pa. St. 391; *Ashton's Appeal*, 73 Pa. St. 153.

*Dinsmoor & Cable*, for defendants in error.

An estoppel cannot take place unless one person has been misled by the statement of the other. One cannot be misled where the records would furnish notice, as in the case of a mortgage. *Evans v. Jones*, 1 Yeates, 172, *Com. v. Moltz*, 10 Pa. St. 527; *Crest v. Jack*, 3 Watts, 238; *Dungan v. Insurance Co.*, 52 Pa. St. 257.

**STERRETT, J.** The judgment against defendants having been opened for the purpose of permitting them to show failure of consideration of the note on which it was entered, evidence was introduced tending to show that it was given for the purchase money of land on which there was then an outstanding mortgage executed by a prior owner of the land; that in an action of *scire facias*, afterwards brought on the mortgage, with notice to the terretenant, judgment was obtained, and the land sold thereon to a stranger. To meet the defense thus interposed, the equitable plaintiff introduced evidence for the purpose of showing that defendants were estopped from setting up failure of consideration as against him and his assignor, Daniel Rhodes. On that subject Rhodes testified as follows: "Before I took a transfer of the

judgment I saw Nason Rowley, and had a talk with him about the judgment. Had the talk before I bought it. I told him that I talked of taking the judgment that Mr. Parker and I talked of trading. I should have said judgment. I thought before I took it I would go and see what they had to say about it and see if it was all right, and see the property. I had not been at his house before. We talked some about it. He told me what he and his son had said that the note was all right; that it was good. I took the judgment on the strength of the statement made by Nason Rowley. If he had not made this statement, that it was good, I should not have taken it. \* \* \* Rowley showed me what property they had, and in that conversation I saw to me the judgment was good. In this conversation with Mr. Rowley he said there was nothing. \* \* \* He said there was nothing against the judgment. The place was clear. We were talking about the judgment; he said there was nothing against them, the place was clear."

In view of this and other evidence, the equitable plaintiff, in his first motion, requested the court to charge "that if, prior to the purchase of the judgment by Rhodes from Parker, Rhodes went to Nason Rowley to inquire about the judgment, and whether there was anything against it, and if there was, whether he would purchase it, and intended to sell it to Clark, and, in answer to his inquiry, Rowley informed him that it was good, and there was nothing against it, and on the faith of that representation, Rhodes purchased, and gave a valuable consideration for it, Rowley is now estopped from showing that no incumbrance existed against the land for which the judgment was given, and from showing any defense to the payment of the judgment."

This point was substantially refused by the court, saying: "Whether the judgment is correct or not in the abstract, we say to you that there is no evidence that the defendant from setting up the failure of the consideration of the judgment, and also charging the jury that, upon the undisputed evidence in the case, their verdict should be in favor of the defendants. In thus withdrawing the case from the jury, and directing a verdict for defendants, the learned judge erred. The evidence on which plaintiff's first point is predicated is wholly verbal, and therefore proper for the consideration of the jury. The court were satisfied as to the truth of the facts recited in the point, the legal conclusion sought to be drawn therefrom by plaintiff would necessarily follow, and if Nason Rowley was thereby estopped as to Rhodes, he was also estopped as to his assignee, the equitable plaintiff."

It is unnecessary to consider the remaining specifications of error. The judgment reversed, and a *venire facias de novo* awarded.

### RUDY'S APPEAL.

(Supreme Court of Pennsylvania. October 3, 1887.)

#### WILL—CONSTRUCTION—DUTY OF TRUSTEE—MEANS OF CARRYING OUT.

Testatrix, in her will, provided as follows: "And the other half or share of my real and personal estate, I give, devise and bequeath to the said A. in trust for the use of my said daughter B., who is now a minor, capable to act for herself, and put the same at interest, or use the same in any lawful manner, at five per cent. interest as he may see fit, and keep, maintain the said B. during her life, or until she becomes, in the judgment of the said trustee, capable to act for herself, then and in that case, the trustee may pay to her the said interest and principal; and provided further that in case the said B. should marry any man, or have any lawful children born of her, immediately upon the birth of such child or children, the said trustee shall pay all such trust money remaining in his hands at that time to my said daughter B., her heirs and assigns, and not otherwise, and in case of such lawful children born of my said daughter B., then, upon her death, the balance of said trust money I give to my son, A., his heirs and assigns." "The trustee shall keep, support, and maintain out of said trust fund, my said daughter B. until marriage and a lawful child born to her, or her death, as hereinbefore directed." *Held*, that in carrying out the provisions of the trust it was necessary that the trustee should have the custody and control not only of the corpus but also of the interest or income arising from the trust property; that to require him

the latter to the committee of B. would deprive him of the only means he had of performing the active duties of the trust as contemplated by testatrix, and that in the absence of evidence of mismanagement of the trust property or of the refusal of the trustee to apply the income in the manner directed by the will, the committee had no just reason to complain.

#### Appeal from orphans' court, Lancaster county.

Petition by Jacob Rathfon, committee of Fianna E. Rudy, a lunatic, for a rule on Henry Rudy to show cause why he, as trustee under the will of Susanna Rudy, deceased, should not pay the interest on the trust fund of \$1,671.68 to the petitioner.

The facts are stated in the following opinion of the orphans' court: "Henry Rudy, the trustee under the will of Susanna Erb, deceased, in his answer filed in this proceeding, admits that he holds in his hands or custody, the trust fund of \$1,671.68, and has had such custody since August 18, 1883, at which date his trust account was finally confirmed by the court. The trust was created by the will of Susanna Erb, and by which was bequeathed to said Henry Rudy, who was also appointed executor of said will 'in trust for the use of my (her) said daughter Fianna, *who is not capable to act for herself*, and to put the same to interest, or use the same himself, at *five* per cent. interest, as he may see fit,' etc. The said will further directs that 'the said trustee shall keep, and support, and maintain out of said trust fund, my said daughter Fianna, until marriage and a lawful child born to her, or her death, as hereinbefore directed.' On September 5, 1881, said *cestui que trust*, Fianna, was found a lunatic by an inquisition duly appointed, and as required by the act of thirteenth of June, 1836, the court committed the custody and care of her person to a committee. On March 1, 1886, the petitioner, Jacob Rathfon, for the rule now being considered, was appointed her committee, and he now asks for the *interest* of said trust fund, for the use and support of her, the said Fianna Rudy, a lunatic. This the committee is entitled to, although the legacy to Fianna, under the will of Susanna Erb, is contingent. *Seibert's Appeal*, 19 Pa. St. 49. The said trust fund, the *corpus* amounting to \$1,671.68, it seems by the answer, is in the hands of Henry Rudy, the executor; he uses the same himself, and is therefore bound for 5 per cent. interest for it as provided in the will. He will, therefore, be required to pay the said interest on said *corpus* at said rate of interest, into the hands of Jacob Rathfon, the committee; the same to be computed from August 18, 1883, to the eighteenth of August, 1886, and annually thereafter, or until further order of the court. And now, August 14, 1886, it is ordered and decreed, that Henry Rudy, the respondent, and as executor and trustee under the will of Susanna Erb, deceased, pay to Jacob Rathfon, committee of Fianna Rudy, a lunatic, on the eighteenth day of August, 1886, three years' interest, at the rate of 5 per cent. per annum, on the trust *corpus* in his hands, to-wit, on \$1,671.68, and also shall pay the interest on said sum at same rate of interest annually thereafter to said committee, and that this order shall remain in full force and effect until otherwise decreed by the court." Whereupon this appeal was taken.

#### B. F. Davis, for appellant.

In order to comply with the directions of his trust, it is necessary that the trustee should have control over the expenditure of the interest of the trust fund. The trustee is not charged with neglect or bad faith. He cannot therefore be deprived of his trusteeship. *Royce's Ex'r's v. Meisel*, 19 Pa. St. 242; *Wilson's Estate*, 2 Pa. St. 325; *Canaday v. Hopkins*, 7 Bush, 108; *Kellberg's Estate*, 86 Pa. St. 129.

#### S. P. Eby, for appellee.

Where a legatee is a child of the testator, and a minor incapable of supporting herself, and no special provision is made for the maintenance of the lega-

tee, interest will be allowed on the legacy, although not payable until a future time. And this whether the legacy be particular or residuary, vested or contingent. *Maguffin v. Patton*, 4 Rawle, 113; *Seibert's Appeal*, 19 Pa. St. 49; *Clark's Ex'rs v. Wallace*, 48 Pa. St. 80.

STERRETT, J. There is nothing in the record to sustain the decree complained of. The testamentary provision made by Mrs. Erb for the benefit of her daughter is an active, continuing trust, unaffected by the proceedings in lunacy. The clauses of her will creating the trust are as follows: "And the other half or share I give and bequeath to the said Henry Rudy in trust for the use of my said daughter Fianna, who is not capable to act for herself, and put the same to interest, or use the same himself at five per cent. interest as he may see fit, and keep, maintain the said Fianna during her life, or until she becomes, in the judgment of the said trustee, capable to act for herself, then and in that case, the trustee may pay to her the said interest and of the principal; and provided further that in case the said Fianna should marry and have lawful children born of her, immediately upon the birth of such child or children, the said trustee shall pay all such trust money remaining in his hands at the time unto my said daughter Fianna, her heirs and assigns, and not otherwise; and in default of such lawful children born of my said daughter Fianna, then, upon her death, the balance of said trust money I give to my son, Henry Rudy, his heirs and assigns." "The said trustee shall keep, support, and maintain out of said trust fund, my said daughter Fianna, until marriage and a lawful child born to her, or her death, as hereinbefore directed."

In carrying out the provisions of the trust it is obviously necessary that the trustee should have the custody and control not only of the *corpus* but also of the interest or income arising from the trust property. To require appellant to pay the latter to the committee of the lunatic would deprive him of the only means he has of performing the active duties of the trust as contemplated by testatrix. It is not even alleged that he is mismanaging the trust property or refusing to apply the income in the manner directed by his mother's will. In the absence of any evidence of either, the committee has no just reason to complain.

Decree reversed, and petition dismissed at costs of appellee.

#### DELOSIER and others v. PENNSYLVANIA CANAL CO.

(*Supreme Court of Pennsylvania.* October 3, 1887.)

EMINENT DOMAIN—EXERCISE OF, BY STATE—ESTATE ACQUIRED.

In Pennsylvania land seized by and appropriated for the use of the state vests in the commonwealth in fee.

Error to court of common pleas, Blair county.

The facts are fully stated in the following charge of DEAN, P. J.:

"This is an action of ejectment brought by the Pennsylvania Canal Company against Levi Delosier and others for a tract of land in Blair township, containing about one hundred and twenty-nine acres. In 1839 the commonwealth commenced the construction of the eastern reservoir, an improvement designed to store water for the use of the Pennsylvania canal. The bed of the reservoir was located on the south-west branch of the Juniata river, about a mile and a half south of the main line of the canal, with which it was connected by a feeder. The whole area of the reservoir is about 539 acres. 300 acres of this, the portion immediately at and adjoining the breast, was purchased by the commonwealth from Judge Joseph McCune. The remaining portion immediately adjoining the McCune tract belonged, at the time of the construction of the reservoir, to Dr. Shoenberger, John L. Ingram, Patrick McCloskey, and perhaps to other owners. That which belonged to Dr. Shoen-

berger, to the extent of 129 acres, is the portion in dispute. The defendants, on the evidence here, have whatever title or right to the possession remained in Shoenberger, or those claiming under him, after the abandonment of the reservoir, and the plaintiff has whatever right or title the commonwealth had or acquired from Shoenberger at the time of the construction of the reservoir.

"It is admitted on both sides that the reservoir was abandoned and the water drawn off in 1881 or 1882. The issue turns, it seems to us, on a question of law which is entirely for the court. At the time of the original laying out of the reservoir, as shown by the map of Morris, chief engineer, filed in the auditor general's office in 1839, the land intended by the commonwealth to be embraced within the area of the reservoir included this land in dispute. Thomas T. Wierman, in charge of the construction of the work, ran the line of the land intended to be embraced within the boundaries in 1846 or 1847. This line, he testifies, was run so as to include all land which might be covered by water at the height of four feet above the overflow or waste-way at the breast of the dam, and included so much of Shoenberger's land as is now in dispute. This, as nearly as he remembers, was in 1846 or 1847 that he ran that line, after or about the time the work was completed. At the time of the construction of the reservoir much of the Shoenberger tract was covered with timber. This, under the direction of the commonwealth's officers, was cleared off, and, although Shoenberger took the timber, it was claimed by the commonwealth, and as it formed part of the compensation to be paid to the contractors for clearing they were allowed \$700 for it.

"According to the testimony of Wierman, surveys and maps of the whole 539 acres were made by him, including the Shoenberger portion, and transmitted to the canal commissioners. Search has been made for these maps, but they have not been found and are not produced here. Wierman testifies to the running of the lines and the making of the maps, and he remembers distinctly of transmitting them by stage in a tin case to the commonwealth officers of Harrisburg.

"On March 6, 1847, Shoenberger made application to the canal commissioners for compensation for the damages caused by the taking of these 129 acres, and \$2,450 were awarded him in full, and that amount was paid to him. Whatever the commonwealth did by way of taking land for the purpose of this reservoir was done under and by authority of the legislation of 1836 and subsequent statutes for the construction of public works, or internal improvements, between the west and the east. The reservoir was not a distinct improvement; it was part of the canal, just as much as any other portion of the canal, not the actual boat channel, was part of the canal. The legislation authorizing the construction of the canal, authorized the construction of sufficient reservoirs to make the canal navigable in dry seasons. It is not material that the construction of canal and reservoir were not simultaneous. The reservoir might be constructed years after the completion of the main channel under the authority of the general legislation authorizing the construction of the internal improvements.

"On our present impression of the law we instruct you that if the commonwealth in fact appropriated this land for the purpose of the reservoir, then it took an absolute estate in the land in perpetuity, and that estate is vested in this plaintiff. The question, then, is, did the commonwealth appropriate this land? It was not necessary it should have a deed. It was not necessary it should actually make permanent monuments on the ground to show the extent of its claim. The map of Morris, the subsequent surveys of Wierman and Garrigues verifying that map of Morris, and the testimony of Wierman showing that he ran the lines and made maps himself at the time, show conclusively that it was intended by the commonwealth to appropriate this land up to the line four feet above the water level at the waste-way of the reservoir. This testimony is not disputed, and we say to you that that was sufficient

appropriation of the land to give title to the commonwealth to the extent which it could acquire title under the legislation then existing.

"On the part of the defendants it is argued that an estate in perpetuity was not taken; that the commonwealth was the owner only of that portion of the land which formed the bed of the canal proper; and that the statute expressly stipulated that nothing but an easement could be acquired to any land for any other purpose, and, as the reservoir formed no part of the bed of the canal, on its abandonment the land reverted to the former owners, and therefore there can be no recovery in this case; or that, at most, the plaintiffs can recover for more land than was embraced within the water-line from the sluice, being about 80 acres. We desire to give a further examination to this question, and we therefore reserve our answer to this point made by the counsel for the defendants."

The court directed the clerk to take the verdict of the jury for the plaintiffs for the land described in the writ, and subsequently, in an opinion filed, entered judgment on the verdict; whereupon defendants took this writ.

*Samuel S. Blair*, for plaintiffs in error.

Though the statute gave a fee to the bed of the canal, yet it is a determinable fee, to cease on the abandonment of the canal. *Haldeman v. Railroad Co.*, 50 Pa. St. 425; *Coal Co. v. Price*, 81 Pa. St. 156; *Com. v. Snyder*, 2 Pa. St. 418; *Vanhorn's Lessee v. Dorrance*, 2 Dall. 304. The land was not properly bounded and defined.

*Daniel J. Neff*, for defendant in error.

A fee was acquired in this land by the appropriation. *Haldeman v. Railroad Co.*, 50 Pa. St. 425; *Craig v. Mayor, etc., of Allegheny*, 53 Pa. St. 316; *Canal Co. v. Young*, 1 Whart. 425; *Buckholder v. Sigler*, 7 Watts & S. 316; *Robinson v. Railroad Co.*, 72 Pa. St. 316.

**PER CURIAM.** The boundaries of the land seized for the use of the commonwealth were sufficiently defined; and that the fee thereto vested in the commonwealth is a matter now so well settled by previous decisions that discussion concerning it is unnecessary. The judgment is affirmed.

### Appeal of WAGNER FREE INSTITUTE OF SCIENCE.

(*Supreme Court of Pennsylvania.* October 3, 1887.)

#### TAXATION—EXEMPTION—"GIFTS, BEQUESTS, OR ENDOWMENTS."

A supplement to the act of incorporation of the Wagner Free Institute of Science provided "that the cabinet collection and lot of ground on which it is erected, and all property belonging to the said institution, with any gifts, bequests, or endowments, shall be exempt from taxation." The corporation was also authorized to accept a donation of certain real estate conveyed to it, and "to hold the premises and property therein mentioned, including all endowments at any time to be made to the said corporation," subject to the conditions therein mentioned. Subsequently other real estate was conveyed to the corporation as a gift, the rents from which were used for the purposes under the original charter. *Held*, that such real estate was not a gift, bequest, or endowment which was exempt from taxation within the terms of the act.

Appeal from common pleas No. 2, Philadelphia county.

Case stated, wherein the Wagner Free Institute of Science was plaintiff, and the city of Philadelphia, John Hunter, William Loughlin, George Fairman, Simon Gratz, John P. J. Sensitive, and Charles A. Widmer, defendants, as follows:

The plaintiff was incorporated by an act of the legislature of Pennsylvania, approved March 9, 1855, for the object, as set forth in section 2 of said act, of giving gratuitous instruction in the natural sciences, such as geology,

eralogy, metallurgy, mining, botany, chemical agriculture, with their application to the arts, and other kindred sciences, to all persons conforming to the rules of the institution. The said act of incorporation was amended by a subsequent act of the legislature approved the thirtieth day March, 1864, whereby, *inter alia*, it was enacted that "the trustees shall \* \* \* be capable, in law, of purchasing, holding, taking, and conveying any estate, real, personal, or mixed, for the use of said corporation, of whatsoever kind, nature, or quality, by gifts, grants, bargains, sale, assurance, will, devise, trust, or bequest, including all endowments from any person or persons capable of making the same; \* \* \* that the cabinet collections and lot of ground on which it is erected, belonging to the said institution, with any gifts, bequests, or endowments, so long as the same shall be used for free lectures, shall be exempt from taxation."

The defendant John Hunter is the receiver of taxes; defendants William Loughlin, George W. Fairman, and Simon Gratz compose the board of revision of taxes; defendant John P. Sensenderfer is deputy-collector of delinquent taxes in the Eighth ward; and defendant Charles A. Widmer is deputy-collector in the Twenty-ninth ward of the city of Philadelphia.

On Monday, May 15, 1865, a course of free lectures was begun in the institute building, which embraced chemistry, anatomy, geology, natural philosophy, physiology, mineralogy, and mining. Since that time two courses of free lectures have been delivered each year, embracing most or all of the branches of natural science above named.

William Wagner, and Louisa, his wife, by deed dated the fourteenth day of March, 1866, granted and conveyed to the Wagner Free Institute of Science, as an endowment for the said corporation, certain brick messuages and lots on South Eleventh and Juvenal streets, in said city, and subsequently conveyed to the said corporation plaintiff a lot on the south side of Montgomery street, east side of Seventeenth street, and west side of Willington street, which lot William Wagner afterwards subdivided, and erected on the same, at his own expense, 24 dwelling-houses, as an endowment for the corporation plaintiff.

The whole of the net income of the said real estate has been and is appropriated to the support of the institute for the purposes contained in the acts of incorporation. The real estate above described was assessed for taxes, to be paid the city of Philadelphia, in the year 1884. From this assessment the corporation plaintiff appealed to the said defendants William Loughlin, George W. Fairman, and Simon Gratz, composing the board of revision of taxes, claiming that the said property was exempt from payment of taxes, by reason of the provisions of the acts of incorporation above quoted; but the said board, on January 14, 1884, declined to grant the exemption asked for. After the said decision of the above-named defendants, composing the board of revision, the defendant John Hunter, receiver of taxes of the city of Philadelphia, authorized and directed the defendants John P. Sensenderfer and Charles A. Widmer to collect from the plaintiff the taxes assessed against the properties named in the case stated for the year 1884; and the defendants John P. Sensenderfer and Charles A. Widmer are proceeding to collect the said taxes so alleged to be due, as delinquent taxes, by distraint upon the personal property of the tenants renting and occupying, under the said plaintiff, the said several properties referred to.

If the court shall be of the opinion that, under the provisions of the acts of assembly incorporating the Wagner Free Institute of Science, and the amendment thereto, first above quoted, the above-described real estate is exempt from the payment of city taxes, then judgment is to be entered for the plaintiff, that no tax is due to the city of Philadelphia upon the real estate mentioned in the case stated, and an injunction to be issued restraining the defendants from taking any proceeding to collect, or filing a lien for, said taxes; but if the court shall be of a contrary opinion, then judgment is to be entered,

for the defendants. Either party is to have the right to take a certificate or appeal from the judgment of the court.

The court, in an opinion by MITCHELL, J., entered judgment for defendants; whereupon plaintiff took this appeal.

*W. W. Montgomery and George W. Biddle*, for appellants.

The act of 1874 does not repeal the charter of 1864. A general act does not repeal a particular one by implication. *Max*, Int. St. 157; *Brown v. Commissioners*, 21 Pa. St. 37; *Harrisburg v. Sheck*, 14 Wkly. Notes Cas. 280; *O'Hara v. Johnson*, 42 Leg. Int. 198. The act of 1874 was only intended to exempt, not to impose, taxation where none then existed. *Gas Co. v. Chester Co.*, 97 Pa. St. 476.

*Chas. B. McMichael and Charles F. Warwick*, City Sol., for appellees.

This property is not exempt. See opinion of MITCHELL, J., in court below. *German Soc. v. Philadelphia*, 3 Wkly. Notes Cas. 483; *Township of Londonderry v. Berger*, 2 Pears. 230. The commonwealth cannot bargain away the means by which only it can exist. *Hospital v. Philadelphia Co.*, 24 Pa. St. 229; *Zimmerman v. Turnpike Co.*, 81\* Pa. St. 96. The legislature intended only to exempt gifts, bequests, and endowments of personal property.

GREEN, J.: The property for which exemption from taxation is claimed by the appellant consists of two contiguous lots of ground on Eleventh street, Philadelphia, each 16 feet front and 100 feet deep, and each with two dwelling-houses erected thereon; and also a lot of 177 feet 10 inches front, and 186 feet depth, on Seventeenth street, Philadelphia. On the last-mentioned lot are 24 dwelling-houses. These properties are rented, and yield an income which is applied to the support of the appellant. As these properties are ordinary houses and lots, they are undoubtedly subject to taxation, unless they are clearly exempted by some constitutional law plainly expressing such exemption. It is alleged there is such a law, and we are referred to the eleventh section of an act approved March 30, 1864, entitled "A supplement to an act to incorporate the Wagner Free Institute of Science," approved the ninth day of March, 1855. The portion of the section in question, which it is claimed exempts this property from taxation, is in these words: "That the cabinet collection and lot of ground on which it is erected belonging to the said institution, with any gifts, bequests, or endowments, so long as the same shall be used for free lectures, shall be exempt from taxation." The cabinet collection and lot of ground on which it is erected are no part of the premises as to which the present question arises. The fifth section of the original charter of 1855 exempted the cabinet collection and lot of ground on which it is erected, but nothing more; and it is now claimed that the exemption demanded is conferred by the words "gifts, bequests, or endowments" contained in the eleventh section of the supplemental act of 1864. All of the property in question in the present case was conveyed by several deeds by William Wagner and wife in 1864 and 1873 to the appellant, and hence was not owned by the appellant at the time of the passage of the original charter or the supplement.

The first and most obvious question which arises is, does this property come within the description "gifts, bequests, or endowments," contained in the act of 1864? It certainly is not a "bequest," as the title was derived by deed, and not by will, nor can we regard it as a "gift," within the manifest meaning of the act. Gifts, in their ordinary legal sense, are donations of chattels, and the same meaning attaches to them in the common popular sense also. A gratuitous conveyance of the title to a piece of real estate is in a very large sense a gift, but it is not so designated in the popular, or in the legal, thought or expression; and we would not feel at liberty to depart from the ordinary

meaning of the word in construing a statute exempting property from taxation. Nor is the word "endowment" any more apt to describe such property as this. "Endowment" is defined by Worcester as "property or pecuniary means bestowed as a permanent fund; as the endowments of a college or hospital or a library." It is certainly understood, in common acceptation, as a fund yielding income for the support of an institution. In its collocation in the act in question we think it very clear that the legislative intent was to indicate "gifts, bequests, or endowments" belonging to the appellant, in connection with the cabinet collection and lot of ground of which it is erected, and for the maintenance of free lectures therein.

In the sixth section of the same act the word "endowments" is certainly used in such a connection. The corporation is there authorized to accept a deed, "and to hold the premises and property therein mentioned, including all endowments at any time to be made to the said corporation," etc. And in the fifth section all three of the words "endowment, gifts, or bequest" are manifestly used in this sense. The words of this section are: "Should these buildings described in this section not be erected in the life-time of the party of the first part by him, and under his direction, the board of trustees, as in their opinion the funds which shall from time to time be at their disposal will warrant such an expenditure, or by endowment, gift, or bequest made for the above purpose, shall proceed to erect the laboratory," etc. Here "funds" which may be derived by endowment, gift, or bequest are authorized to be used for the construction of buildings. We cannot doubt that this was the sense in which the legislature used these words, and, that being so, we do not feel that we can enlarge this legislative meaning beyond its proper scope. We are therefore of opinion that the real estate in question is not exempt from taxation, and this view renders unnecessary the discussion of the other questions considered in the paper books and arguments of counsel.

Decree affirmed, and appeal dismissed, at the cost of the appellant.

### *In re Opening of MAGNOLIA AVE.*

(*Supreme Court of Pennsylvania.* October 3, 1887.)

#### 1. MUNICIPAL CORPORATIONS—OPENING STREETS.

The Pennsylvania act of May 14, 1874, does not apply to cases in which streets in Philadelphia have been already located.

#### 2. SAME—LOCATED STREET—JURY CANNOT ASSESS DAMAGES.

A street marked out or laid down upon a confirmed plan is to be regarded as established or located; and a jury appointed to report upon the necessity of opening such established or located street can only report upon that question, and are without power to assess damages.

*Certiorari* to quarter sessions, Philadelphia county, (common pleas No. 1.)

A petition having been filed for the opening of Magnolia avenue from Centre street to Chelton avenue, in the Twenty-Second ward, Philadelphia, viewers were appointed. At a meeting held on December 5, 1885, the jury were about to affix their signatures to a report, when they were prevented from so doing by the city solicitor, who had procured a rule "to show cause why they refused to perform their full duty as viewers, as required by law, as laid down and regulated by the opinion of this court in *Re Pearl St.*, 41 Leg. Int. 408;" to which rule the viewers made return in court, as follows: "That the viewers had no thought to disobey the law or the court, because they were appointed only to view and to determine whether or not the street be needed for public use; and, having viewed and found that the street is needed, they met to sign their report, when they were restrained from signing by the notice from the city solicitor of this rule. They aver that they are ready and willing 'to perform their full duty as viewers' in this behalf. And

they therefore respectfully submit themselves to your honors, asking to be instructed as to their duties, to the end that they might exercise their best judgment with impartiality, under their oaths."

After argument, the rule was withdrawn, and the viewers then reported as follows:

"The viewers, from the evidence produced, find that Magnolia avenue is a street duly located upon the public plan, (called "Plan No. 17,") and was confirmed as a public highway, September 15, 1879, as of the width of fifty feet, and of such width extends from above Centre street to and beyond Chelton avenue. From Centre street to the railroad, Magnolia avenue has been partially graded, so that the railroad embankment is about 10 feet high, and thus crosses the lines of said avenue, completely obstructing its use as a public highway, and preventing safe and convenient passage; while between the railroad and Chelton avenue the breast and waters of Kelly's dam occupy the full width of Magnolia avenue for a distance of about two hundred and twenty-five feet eastwardly from said embankment; yet very many people are daily compelled to use Magnolia avenue for the purpose of passing from Centre street to Chelton avenue, to the Church of St. Vincent de Paul, and to the markets and other places of resort, because there is no crossing other than this between Hancock street, a long distance below, and Chew street, a greater distance above, said Magnolia avenue. There also appears to have been a dedication of the property within the lines of Magnolia avenue, by George Jaggar and others, on March 26, 1853, which dedication is recognized in the deed under which Joseph Scatchard's Sons claim, Jaggar having granted and conveyed to Scatchard, in 1865, by deed in which Wilson street (the former name of Magnolia avenue) is named as a landmark. Moreover, the firm of Joseph Scatchard's Sons have themselves admitted the dedication in erecting buildings to conform to the lines of the street, and also conceded the right of way by making and maintaining a bridge for people to cross the waters at the breast of Kelly's dam to the pathways over the railroad embankment. This right of way has existed for more than twenty-one years, during which period it has been in constant daily use by large numbers of people. George Scatchard (one of the firm) testified that people had been crossing by their mill and over the railroad since they bought their land, in 1865, while it was otherwise shown that the way had been in general use long before that date.

"The proofs produced before the viewers fully sustain the petition, and are entirely unanswered. A number of witnesses were examined, among them John H. Dye, registrar of the survey department, who produced the deeds of dedication, and H. A. Stallman, the surveyor and regulator of the district, both of whom testified that the grade of Magnolia avenue, as established, provided that the street should, when opened, pass beneath the railroad; and Mr. Dye said that Magnolia avenue was formerly called 'Wilson Street,' and undoubtedly is the street mentioned in the deeds of dedication.

"Therefore having viewed, and also carefully considered, the petition and proof submitted to them, the viewers in this matter have concluded after due deliberation, and do find, that Magnolia avenue, from Centre street to Chelton avenue, is now needed for public use, and should be presently opened effectively for that purpose."

To this report numerous exceptions were filed by George Scatchard and others, and by the city of Philadelphia, which were all dismissed by the court; ALLISON, P. J., filing the following opinion:

"There are a number of exceptions to the report of the jury, the most material of which presents again for reconsideration by this court the question whether the jury were justified in refusing to comply with the demand of the representatives of the city that, after reporting in favor of the opening of the street, they should proceed to assess damages resulting from such opening, under the supposed requirements of the act of the fourteenth of May,

1874, (P. L. 164.) It is claimed, on behalf of the petitioners, that the street was placed on the plan of the borough of Germantown as far back as the year 1850, and was confirmed by the court of quarter sessions in 1863, and recognized as a confirmed street of the city of Philadelphia by the board of surveyors in 1879, when they established the grades of the street according to the lines by which it appeared on the plan. Before the jury there appears to have been an effort made to establish a dedication of the land within the lines of the street which it is now proposed shall be taken and appropriated to public use. The testimony of Mr. Dye, registrar of the survey department, as reported to us in the argument, is that a Mr. Jaggar and others, who owned the land in 1853, dedicated the same to the public as a highway, and that it has since been known as a dedicated street. The jury or viewers state, in their report, that they were appointed to view and determine whether or not Magnolia avenue, from Centre street to Chelton avenue, in the Twenty-Second ward, is now needed to be opened for public use.

"The present proceeding seems to ignore the question of dedication, for if the land within the lines of the street has in fact been dedicated to the public and was so recognized by the city, Magnolia avenue, between the designated points, is not only an established highway, but the public have the right at any time to enter upon and use it for the purposes of travel. In such case there are no damages to be paid; for after dedication of a street by one who is the owner of the land, especially when such dedication has been recognized by actual use and accepted by the public authorities, the question would seem rather to be, shall the city at this time be required to put the street in a condition that will render travel over it safe and convenient? If the street is a dedicated and accepted street, the right of the public to enter upon and enjoy its use would seem to be beyond question. But it does not seem to us that this question properly arises now, under the petition to open Magnolia avenue as a located street. The fact to be ascertained first is, does the public convenience require that it shall be thrown open to common use at this time? Putting aside, therefore, the question of dedication, which may possibly come up hereafter, we take up the case on the main point raised by the exceptions: Were the jury right in reporting alone on the question whether Magnolia avenue shall now be opened for public use, or were they bound to go further, and endeavor to obtain releases of claims for damages from the owners of the land to be taken, and, if such releases could not be obtained, then to assess damages?

"This question was first presented for consideration and decision in *Re Fifty-Second St.*, opinion reported in 11 Phila. 437, about two years only after the passage of the act of 1874, under which act this contention arises. After a most careful examination of the act of 1874, the construction placed on it was that it was wholly inapplicable to the case of a street already located and established by due process of law; that, when a street was marked out or laid down on a confirmed plan, it was to be regarded as established or located; that it was the power to locate a road or bridge that authorized the jury to perform the subsequent duty of assessing damages, and that, when they were appointed to report on the necessity for opening an established or located road or street, they could only report on that question, and were without power to assess damages; that when a highway was laid down or marked out on a confirmed plan, and thus located on the land, there was no further act of location to be performed; that which was already done could not be done over again. We thought then, and think now, after the most careful examination of the whole subject, that in the case of a road already located the jury have nothing to do except to follow the direction of the law applicable to such a case, and report on the necessity of opening. That is what the jury have done in this case, and we think they have conformed strictly to their duty, and that they would have departed from it if they had gone further, and reported an assess-

ment of damages. That a jury have specific duties to perform, when appointed as a jury of view merely upon the question of opening a located street or road, ought now to be regarded as a settled question.

"The decision in *Re Opening of Twenty-Eighth St.*, 102 Pa. St. 140, was made upon an application on behalf of the city to set aside the appointment of a jury appointed to report on the necessity of opening Twenty-Eighth street, which was stated in the petition to be 'according to the old city plan;' that is, as the same had been located or laid down on said plan. The city had strenuously denied the right to appoint a jury to advise the court upon the question of opening a plotted or confirmed street. Judge THAYER, in discharging the rule, vindicated his judgment, in an opinion showing a most thorough and comprehensive examination and understanding of the subject which he discussed. The decision of No. 4, sustaining the appointment of the jury, was confirmed, on appeal, by the supreme court.

"In the case just referred to, the question now under consideration was not raised, but it was not made a contention on the part of the city that if the jury of view could be appointed, their duty was to do other than to report on the necessity of opening the street. In the statement of the facts of the case we are informed that the jury of view filed a report, wherein they found and determined that the opening of Twenty-Eighth street is a public necessity.' Only this, and nothing more. This report was not questioned on the ground that the jury did not go on and obtain releases of claims or assessed damages. The thought does not seem to have been entertained by any one that the jury had not performed their entire duty when they reported on the expediency of opening the street. The court confirmed this report, which certainly does not carry with it the implication that they thought the jury had not done all that, under the law, they were authorized to do.

"The question what a jury can or cannot do, in a case like the one now before the court, was expressly raised and decided in *Re Opening of Jackson St.*, 83 Pa. St. 328. There has been a persistent effort to get rid of the effect of this decision by entirely disregarding it, or by placing on the decision a different interpretation from that which was evidently intended by the court. Jackson street was a street on the confirmed plan of the city. A jury of view reported that there was a public necessity for the laying out and opening of the street; using the term 'laying out' as synonymous with 'laying open to common or public use.' It could not mean plotting or laying out a street by lines or boundaries, because that had already been done on the plan of the city. After so reporting, they proceeded as stated in a second or supplemental report, in accordance with the act of 1874, as they understood it, in discharge of the duties required by said act, to endeavor to procure releases from all claims for damages which might arise by the opening of the street; and, failing to secure such releases, they took up the question of an assessment of damages, and reported that no damages would be sustained by any of the parties over whose ground the street was located. This, it will be seen, was a direct attempt to apply the act of 1874 to an already plotted or located street. To this action on the part of the jury an exception was filed, which alleged that the provisions of the act of May 14, 1874, are not applicable to this case, and were improperly followed by the petitioners and the jury. In the opinion of the supreme court, reversing the court below, which had dismissed the exception, and confirmed the report, discussing the precise question now before us, it holds the following language: 'What, then, has been the effect of the act of 1874 on the general highway system in the city of Philadelphia? It has manifestly established a uniform method throughout the commonwealth for adjusting damages at the time when and by the viewers by whom a road or bridge shall be located. But it has done nothing more. It made no provision for streets already located, and streets laid on the city

plan have been treated as so located throughout the statutes. \* \* \* It was for an original view only that the act was intended to provide. Damages were not to be adjusted or assessed, unless the viewers should decide in favor of locating the street or bridge. And this location, as was said by the judge who decided the case of Fifty-Second street, was the primary duty imposed by the law of 1874.'

"Could anything be more plain than this clear and unambiguous language of the supreme court in deciding the precise question now under consideration, which decision stands up to this time unshaken by any subsequent decision of the court of last resort? In the opinion of court No. 2 in *Re Opening of Pearl St.*, the authority of *In re Jackson St.* is sought to be set aside by the statement that the decision of the supreme court in *Re Twenty-Eighth St.* overrules *In re Jackson St.*, which is therefore no longer to be regarded as a controlling authority upon this question. An examination of *In re Twenty-Eighth St.* will show that no such point was before the court below, nor was it raised in the supreme court. The contention on the part of the city was that the court of quarter sessions had no power to appoint a jury to report on the necessity for opening Twenty-Eighth street, on the ground that the jurisdiction of the municipal legislature was exclusive, under the act of the twenty-first of April, 1855, a point that had been expressly ruled the other way by the affirmation by the supreme court of *Large v. City*, 9 Phila. 382, and also in *Re Jackson St.* The question of the power of a jury, appointed to report on the necessity for opening a street previously located, to assess damages for such opening, in no way, directly or collaterally, came up in that case. And yet it is claimed that it overruled the decision in *Re Jackson St.*, which decided that the act of 1874 did not apply to located streets. Nor was the denial of power in a jury of view appointed to open a street, to go on and assess damages, at all complicated by the question of the retroactive operation of the act of 1874, in the consideration of either *In re Fifty-Second St.* or *In re Jackson St.*, as the court in deciding *In re Pearl St.* seemed to think; the point was raised by counsel representing the city in both cases. In the former case, in the last paragraph of the opinion, after denying the power of the jury to assess damages because the act of 1874 was inapplicable, the remark is added: 'For this reason the questions discussed on the argument of the exceptions do not arise, and are therefore dismissed from further consideration.' In *Re Jackson St.*, the concluding language of the supreme court is: 'As the proceeding was wholly unauthorized, it is unnecessary to enter into the question of the retroactive operation of the law, or into an examination of the alleged defects of the record.' The opinion in *Re Pearl St.* seems to rest very largely on the expediency of applying what are called sound business principles to the action of a jury inquiring as to the expediency or necessity for opening a street. This, it seems to us, is a question for the legislature, and not for the courts, unless the application of such a rule of action is found in the law as it now exists. The primary duty to locate a street, which must of necessity be an original or new street, is put aside as an unimportant consideration, with the remark: 'If, as in the case of a plotted street, the location is already fixed, they are relieved from the consideration of that part of a jury's general duty, they are free to proceed at once to the rest.' And this is said, notwithstanding the ruling in *Re Jackson St.*, that the act of 1874 made no provision for streets already located, and that it was intended for the case of an original view only; that is, where no street had been previously located or established. We are wholly unable to agree with the reasoning or the conclusion of the court in *Re Pearl St.*; and as *In re Pearl St.* conflicts with the previous decision of the quarter sessions, and with that of the supreme court also, as we read it, we cannot accept the decision in that case as an authority which should influence, much less control, our judgment. We therefore dismiss the exception under which this question has been presented.

"We have carefully considered the remaining exceptions, no one of which do we think is well taken. All of the exceptions are therefore dismissed, and the report of the jury is confirmed."

Whereupon this writ was taken.

*George Junkin and W. H. Addicks*, for plaintiffs in error.

It was error in the jury not to consider and assess damages. *In re Pearl St.*, 15 Wkly. Notes Cas. 205; *In re Arrott St.*, 18 Wkly. Notes Cas. 121; *In re Cogan House Tp. Road*, 7 Wkly. Notes Cas. 257; *In re Road in Palmer Tp.*, 11 Wkly. Notes Cas. 429.

*Theo. Cuyler Patterson*, for defendants in error.

There was no error in confirming the report of the viewers who refused to assess damages. *In re Jackson St.*, 83 Pa. St. 328.

GREEN, J. We certainly did decide in the case *In re Jackson St.*, 83 Pa. St. 328, that the act of 1874 does not apply to cases in which streets in Philadelphia have been already located. That was the one leading, and indeed only, question in the case. It was fairly stated, and fully and elaborately considered, by our late Brother WOODWARD, who gave ample and satisfactory reasons for his conclusion. That decision has never been, either directly or indirectly, overruled, or indeed questioned, by this court in any case to which we have been referred, or of which we have knowledge. The question involved was not before this court either in the case of *In re Twenty-Eighth St.*, 102 Pa. St. 140, or *In re Pearl St.*, 111 Pa. St. 565, 5 Atl. Rep. 490. We did not assume the consideration of the decision of the question in those cases, and hence have given no cause for an inference that we intended even to qualify, much less to overrule, the *Case of Jackson St.* Nor have we any disposition to do so. We are satisfied it was correctly decided. The learned judge of the court below has written so clear, forcible, and exhaustive an opinion upon the merits of the contention in the present case that we find it impossible to add anything to it. We affirm the order of confirmation for the reasons stated in that opinion. We have examined and considered the several assignments of error other than those which raise the question of jurisdiction, and find them to be without merit. The order of confirmation is affirmed.

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*In re Widening of New St.*

(*Supreme Court of Pennsylvania*. October 3, 1887.)

*Certiorari* to quarter sessions, Philadelphia county.

Petition for the appointment of viewers to report upon the necessity of widening New street, a plotted public highway, on the public plans, to the full width of 40 feet. The jury reported the necessity for the widening of the street, but declined to ask for releases or assess damages. Exceptions to the report were dismissed; whereupon this writ was taken.

*W. H. Addicks and Chas. F. Warwick*, for City of Philadelphia. *Theo. Cuyler Patterson*, for petitioners.

GREEN, J. For the reasons stated in the opinion in the case *In re Magnolia Ave.*, ante, 405, just filed, the order of confirmation in this case is affirmed.

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HERSTER and others v. HERSTER and others.

(*Supreme Court of Pennsylvania*. October 3, 1887.)

1. WILL—ISSUE DEVISAVIT VEL NON—UNDUE INFLUENCE—EVIDENCE.

In an application for an issue *devisavit vel non*, if the testimony is such that after a fair and impartial trial, resulting in a verdict against the proponents of the alleged will, the trial judge, after a careful review of all the testimony, would feel constrained to set aside the verdict as contrary to the manifest weight of the evidence,

it cannot be said that a dispute has arisen. On the other hand, if the state of the evidence is such that the judge would not feel constrained to set aside the verdict, the dispute should be considered substantial and an issue to determine it should be directed.

2. SAME.

Undue influence may be exercised secretly as well as openly, especially where a confidential relation exists between the principal devisee and testator and they dwell together in the same house. In such case it is not easy to make out an allegation of undue influence by proof which is direct or positive, nor is it necessary to do so. The effects of its exertion may be very visible; but as these may also be consistent with a perfectly free will, much caution must be exercised by the jury in considering such an aspect of the case. Rash conclusions must not be drawn simply because of a large disproportion of the estate being given to one to the exclusion of others, and the evidence of the exertion of undue influence must be of a satisfactory and convincing character, whether it be direct or circumstantial.<sup>1</sup>

Error to court of common pleas, Northampton county.

Issue *deviseavit vel non*, in which William Henry Herster and Irwin Reich and Eliza, his wife, in right of said Eliza, were plaintiffs, and Andrew J. Herster, devisee, and Andrew J. Herster and James W. Lynn, executors, were defendants, to determine whether the will and codicils of Andrew Herster were made and executed by reason of undue influence, fraud, or misrepresentation.

On the trial, before SCHUYLER, P. J., the following facts appeared:

"Andrew Herster, the testator, died May 27, 1882, seized of realty and possessed of personalty valued at about \$200,000. He left four sons and two daughters, among whom were the parties plaintiff in this issue. The testator, by a will dated June 13, 1874, devised and bequeathed the greater part of his property to his son, Andrew J. Herster, who was the residuary legatee and devisee. He also made various devises and bequests to his other children. By two separate codicils, dated August 29, 1878, and May 7, 1880, the testator revoked sundry of the last-mentioned bequests and devises, so that the whole bulk of the estate passed to said Andrew J. Herster. Only small legacies were bequeathed to testator's other children, except William Henry Herster, to whom one piece of real estate was also devised. The testator was nearly 84 years old at the time of his death, and had for 20 years lived with his said son, Andrew J. Herster. Evidence was introduced by plaintiffs showing that he had from time to time suffered of late years from apoplexy or congestion of the brain, and that he had been under treatment for such an attack a short time prior to the date of the original will. They also introduced evidence of declarations made by the testator from time to time, to the effect that his children, other than said Andrew J., were attempting to poison him, and in other ways to do him injury. The theory of the plaintiffs was that suggestions to this effect were being constantly made to him by Andrew J. Herster and his wife. The defendants denied explicitly all allegations of undue influence and of statements on their part prejudicial to testator's other children. It was shown that testator went alone to the office of the scrivener who prepared the will and codicils, and in each case executed them apparently of his own will and accord.

"The plaintiffs offered to prove, among other things, by Jacob Herster, a witness, that immediately before his death, testator expressed a great desire, and anxiety to have possession of his will and the two codicils, and that he requested the witness to remain with him during the day for the purpose of enabling him, in case the will and codicils were not returned to him, to procure them from the custody of James W. Lynn; that he declared to the wit-

<sup>1</sup>As to what is competent evidence of undue influence, and what amounts to undue influence, see *Bledsoe v. Bledsoe*, (Ky.) 1 S. W. Rep. 10, and note; *Thompson v. Hawks*, 14 Fed. Rep. 905, and note; *Saunders's Appeal*, (Conn.) 6 Atl. Rep. 193, and note; *Rockwell's Appeal*, Id. 198; *Pemberton v. Pemberton*, (N. J.) 7 Atl. Rep. 642; *Blume v. Hartman*, (Pa.) 8 Atl. Rep. 219; *Schildnecht v. Rompf's Ex'x*, (Ky.) 4 S. W. Rep. 236; *McCulloch v. Campbell*, (Ark.) 5 S. W. Rep. 590.

ness repeatedly during the day that he had requested James W. Lynn, his attorney, who had prepared the will and codicils to return them, and that he had sent his son, Andrew Jackson Herster, to the office of Mr. Lynn with instructions to bring the will and codicils to him; that on different occasions he had so sent him, and that he would return and inform him that Mr. Lynn would bring them out himself, and when Mr. Lynn called he failed to bring them and made some excuse with reference to his not bringing them, and that he had forgotten them or some other reason for his failure to do so; that he declared to the witness that he must see these papers before he died; that he requested the witness to remain until late that evening in order to see when the papers would be returned; that having waited, at the testator's request, until ten o'clock on that Saturday evening he stated to the witness that they should return on Monday morning following, and that if the papers were not brought to him he would make arrangements to send for or procure them from the custody of Mr. Lynn, and again told the witness that if they were not brought by Monday morning he should be sure to get them from the custody of James W. Lynn; and that he then declared that he must see the papers before he died and must have them; that on the Sunday following he had a stroke of apoplexy which rendered him unconscious for some time, and that on the following Monday morning, while upon his death-bed, the testator being restored somewhat to consciousness, called his son Jacob to his bedside, took his hand, and declared repeatedly to him: "My God, it is all wrong, all wrong!—*Mein Gott, es ist lezt, es ist lezt!*"—and shortly after died; this evidence is offered in connection with the other circumstances already given in evidence for the purpose (1) of illustrating and showing the state of the feeling of the testator towards his son Jacob and the remainder of the family; (2) to show undue influence, and that the testator was in a condition easily to be influenced; (3) for the purpose of showing the testator's state of mind as to his weakness and impressibility; (4) for the purpose of showing that when removed from the presence of Andrew Jackson Herster, or of the wife of Andrew Jackson Herster, that there was a state of mind indicating a feeling of dissatisfaction with what had been done with reference to his will and two codicils; this evidence to be followed also by proof that repeatedly, from a beginning with five or six years prior to the decedent's death and at different times up to the time of his death, the testator complained of the failure of Mr. Lynn and Andrew Jackson Herster to bring or to give him the custody and possession of the will and codicils, and in connection with proof that on these different occasions the testator repeatedly declared his anxiety to have the custody and control of the will and codicils, and that the testator was dissatisfied with the state and condition of the disposition of his property in his will and codicils; offered also in connection with the proof already in the case of similar declarations by the testator made a number of years previous to his death. Objected to. Objection sustained. Exception. (Eighth, ninth, and tenth assignments of error.)

The defendants having called the said Andrew J. Herster for examination, he testified that certain money which he had had in hand, amounting to \$25,000, had not come from his father. On cross-examination the plaintiffs proposed to ask the witness where this amount came from; this to be followed by proof that he had no other means or resources from which to receive so large an amount as this, except through his father. Objected to. Objection sustained. Exception. (Sixth assignment of error.)

The court charged, *inter alia*, as follows:

"Is, then, the evidence relied upon by the plaintiffs to establish undue influence sufficient for that purpose? It must be borne in mind that undue influence will not be presumed. True, it is not necessary to produce direct evidence of the fact, but where it is sought to be established by inference from other facts in the cause, the inference must be a necessary one. Where

evidence lends equally to sustain either of two inconsistent propositions, neither of them can be said to be established by proof. Moreover, 'the influence to render a will void must be intentionally exercised specifically to procure the testament in question.' I fail to discover in the present case even the slightest evidence of the character just indicated. \* \* \*

"The statements, therefore, not being connected with the act of making the will and codicils, are not evidence to impeach them. Thus far, therefore, we have discovered no evidence whatever of undue influence, and yet there is no other evidence on the subject. The declarations of the testator that Jackson and his wife had told him stories about his other children calculated to prejudice the testator against them are not evidence on the question of undue influence at all; for there is no evidence that the declarations are true. \* \* \*

"Finding, therefore, no evidence whatever of undue influence in procuring the will and codicils in controversy, or either of them, it becomes my duty to direct you to return a verdict in favor of the defendant. \* \* \*

"It is quite likely that they (the statements) were made, if made at all, from feelings of jealousy or for the purpose of paving the way for the large benefactions Jackson received from his father in his life-time." (First, second, third, fourth, and eighteenth assignments of error.)

Verdict and judgment for defendants; whereupon plaintiffs took this writ.

*Frank Reeder, B. F. F. Ackenthall, W. S. Kirkpatrick, and Edward J. Fow & Son*, for plaintiffs in error.

The questions of undue influence and mental incapacity are inseparable. *Wilson's Appeal*, 99 Pa. St. 551. Where a testator is circumvented by fraud, he is under undue influence. *Boyd v. Boyd*, 66 Pa. St. 293; 1 Williams, Ex'rs, 41; *Lord Donegal's Case*, 2 Ves. Sr. 407; *Hacker v. Newborn*, Style, 427; *Mountain v. Bennett*, 1 Cox, 355; *Rambler v. Tryon*, 7 Serg. & R. 93; Bisp. Eq. §§ 230, 231, 234, 235. Evidence tending in the least possible way to show fraud is admissible. *Delafield v. Parrish*, 25 N. Y. 95; *Tyler v. Gardener*, 35 N. Y. 559; *Roberts v. Trawick*, 17 Ala. 57. Testator's declarations are admissible. *Reel v. Reel*, 1 Hawks, 268; *Howell v. Barden*, 3 Dev. 442; *Bates v. Bates*, 27 Iowa, 113; *Stephenson v. Stephenson*, 62 Iowa, 163, 17 N. W. Rep. 456; *McTaggart v. Thompson*, 14 Pa. St. 153; *Norris v. Sheppard*, 20 Pa. St. 478; *Dennis v. Weeks*, 51 Ga. 24; *Lewis v. Mason*, 109 Mass. 169; *Shaller v. Bumstead*, 99 Mass. 112; *Turner v. Cheesman*, 15 N. J. Eq. 243.

*Wm. Mutchler and Henry W. Scott*, for defendants in error.

Undue influence is the same as fraud, and the measure of proof must rise to the standard required to move a chancellor to decree the cancellation of a deed. Williams, Ex'rs, 70-72; *Thompson v. Kyner*, 65 Pa. St. 375; *Smith v. Bank*, 99 Mass. 611. Testator's declarations are not evidence sufficient to submit to the jury on the question of undue influence. *Hoshauer v. Hoshauer*, 26 Pa. St. 404; *Moritz v. Brough*, 16 Serg. & R. 403; *Clark v. Morrison*, 25 Pa. St. 453; *McTaggart v. Thompson*, 14 Pa. St. 153; *Norris v. Sheppard*, 20 Pa. St. 475; *Clingen v. Mitchell*, 31 Pa. St. 25; *Thompson v. Kyner*, 65 Pa. St. 368; *Tawney v. Long*, 76 Pa. St. 106. The evidence of undue influence sufficient to submit to a jury, must be of a restraint over the testamentary acts. If not, the court must give binding instructions against the contestants. *Eckert v. Flouery*, 43 Pa. St. 52; *Cauuffman v. Long*, 82 Pa. St. 72; *Wilson v. Mitchell*, 101 Pa. St. 495; *Wainwright's Appeal*, 89 Pa. St. 220.

GREEN, J. In this case an issue was granted to determine a question of undue influence exerted upon the mind of a testator in the execution of a testamentary writing. The issue was granted by the orphans' court after a full hearing upon the matters of fact alleged against the will, and a contest upon the sufficiency of the facts in evidence to justify the granting of an issue. It must be assumed that in granting the issue the learned court was of opinion that there was evidence enough to carry the case to a jury, and to require a

verdict to determine upon the disputed matter of fact in question. The issue thus granted was tried in the common pleas, the learned judge tried the cause, who was not the same judge who granted the issue, with opinion that there was not sufficient evidence to warrant a verdict against the will, and he withdrew the case from the jury by a binding instruction to return a verdict in favor of the will.

The question of undue influence exerted upon the execution of a will is a question of pure fact. Its disposition properly rests with the jury alone. Even if the trial judge should feel that were he sitting as a juror he could regard the evidence as sufficient to induce him to find a verdict against the will, that is not enough to justify him in taking the case entirely from the jury. He must be prepared to go further than that before he can deprive the jury of its proper control of the dispute. This court has indicated in a number of decisions a rule by which to determine the granting of an issue, and it is equally applicable in determining whether a cause of this kind ought to be withdrawn from the jury. It is thus expressed in a recent case: "If the testimony is such that after a fair and impartial trial resulting in a verdict against the proponents of the alleged will, the trial judge, after a careful view of all the testimony, would feel constrained to set aside the verdict contrary to the manifest weight of the evidence, it cannot be said that the dispute within the meaning of the act has arisen. On the other hand, if the state of the evidence is such that the judge would not feel constrained to set aside the verdict, the dispute should be considered substantial, and an order to determine it should be directed. This simple and only safe test is supported alike by reason and authority." *Knauss' Appeal*, 18 Wkly. Rep. Cas. 532, 6 Atl. Rep. 394. Having this principle in mind we have given to the testimony on this record a most patient and careful examination, study, and after doing so we do not feel able to say that had we been sitting as trial judges and a verdict been rendered against the will and codicil in question, we should have felt constrained to set aside the verdict. That being so it is necessary to reverse the judgment of the court below in order that the cause may be heard and decided by a jury on its merits. It would not be proper to discuss the testimony in detail as we could not do so without giving a possible bias to the jury, and they ought to be entirely free to consider and determine the facts upon their own judgment.

It is perhaps well to say that undue influence may be exercised secretly as well as openly, and this is especially possible where a confidential relationship exists between the principal devisee and the testator, and they dwell together in the same house. In such cases it is not easy to make out an allegation of undue influence by proof which is direct or positive, nor is it necessary to do so. The effects of its exertion may be very visible, but as these may be consistent with a perfectly free will, much caution must be exercised by the jury in considering such an aspect of the case. Rash conclusions must not be drawn simply because of a large disproportion of the estate being given to one to the exclusion of others, and the evidence of the exertion of undue influence must be of a satisfactory and convincing character whether it be direct or circumstantial. With these reflections we dismiss this part of the case, and sustain the first, second, third, fourth, and eighteenth assignments of error. We sustain the sixth assignment because the question asked has some tendency to show the relations between the testator and his son, the principal devisee, and might possibly tend to illustrate the power of the son over the father. We sustain the eighth, ninth, and tenth assignments of error because we cannot say that the answers to the proposed questions would not indicate the exertion of undue influence, or of improper control of the testator by the agency of the testator both as to the making of the will and its custody, indeed as to his assent to its contents. As to the remaining assignments of error we think they are without merit, and they are not sustained. Judgment reversed, and new venire awarded.

## BURGESS AND TOWN COUNCIL OF THE BOROUGH OF WARREN v. GEER.

(Supreme Court of Pennsylvania. October 3, 1887.)

## 1. MUNICIPAL CORPORATIONS—BOROUGHS—ORDINANCES—BOOK AGENTS' LICENSES.

Where an act of assembly incorporating a borough gives to the council of such borough express authority to enact such by-laws, and make such rules, regulations, and ordinances as shall be determined by a majority to be necessary to promote the peace, good order, benefit, and advantage of said borough, particularly providing for the regulation of the markets, streets, alleys, highways, etc., therein, said council has power to pass an ordinance requiring book canvassers to take out a license, and imposing a penalty for failure to do so.

## 2. SAME.

The provisions of the general borough act of April 3, 1851, § 3, (P. L. 320,) vests in boroughs power to make all needful regulations respecting markets and market-days, the hawking and peddling of market produce and other articles in the boroughs, etc. *Held*, that the court could not say, on demurrer to a declaration, that such provisions were not broad enough to authorize the passage of an ordinance as to book canvassers, as above.

## 3. SAME—CONSTITUTIONALITY.

A borough ordinance requiring persons canvassing from house to house, for the purpose of selling or soliciting orders for books, to take out a license for that purpose, and to pay certain fees therefor, thus putting such persons on the same footing as others holding a mercantile license within the borough, is not unreasonable, as opposed to common right, and is not in conflict with the constitution of the United States or of Pennsylvania.

Error to common pleas, Warren county.

Appeal from the judgment of a justice of the peace, in a proceeding by the burgess and the town council of the borough of Warren against L. F. Geer, to recover a penalty for the alleged violation of a municipal ordinance. To plaintiff's declaration defendant demurred, and the court entered judgment for defendant on the demurrer; whereupon plaintiff took this writ. The facts are sufficiently stated in the opinion.

*D. I. Ball* and *C. C. Thompson*, for plaintiff in error.

The usual power of boroughs to make license regulations is recognized by the act of May 17, 1853, (P. L. 31,) restricting their authority in that regard. Such a power exists at common law. 1 Bl. Comm. 476; 1 Dill. Mun. Corp. § 12; *People v. Bennett*, 18 Amer. Rep. 111; *Justice v. Logansport*, 101 Ind. 326; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park Village*, Id. 659; *Clark v. South Bend*, 44 Amer. Rep. 14; *Northern Liberties v. Gas Co.*, 12 Pa. St. 321; *Williamsport v. Com.*, 84 Pa. St. 494. The charter of the borough gives this power. The general borough act of 1851 also confers it. *O'Maley v. Freeport*, 96 Pa. St. 24; *Northern Liberties v. Gas Co.*, 12 Pa. St. 320; *Wartman v. Philadelphia*, 33 Pa. St. 202. A reasonable fee may be charged for a license. *Railway Co. v. Philadelphia*, 58 Pa. St. 119; *Johnson v. Philadelphia*, 60 Pa. St. 445; *People v. Marx*, 9 Amer. & Eng. Corp. Cas. 506, 507, and cases there cited. Courts will not interfere with the exercise of the discretion of the municipal legislature by declaring the ordinance void except in a plain case. *Fisher v. Harrisburg*, 2 Grant, Cas. 291; *O'Maley v. Freeport*, *supra*.

*O. C. Allen* and *Geo. H. Higgins*, for defendant in error.

Whenever a by-law seeks to alter a well-settled and fundamental principle of the common law, or to establish a rule interfering with the rights of individuals or the public, the power to do so must come from plain and direct legislative enactment. *Taylor v. Griswold*, 14 N. J. Law, 222; *Beaty v. Knowler*, 4 Pet. 168; 1 Dill. Mun. Corp. §§ 293, 295; *Dunham v. Rochester*, 5 Cow. 462; *Com. v. Stodder*, 2 Cush. 562. "The general welfare clause," clearly does not give the borough authority to pass this ordinance. 1 Dill. Mun. Corp. § 250; *State v. Ferguson*, 83 N. H. 424. Any fair, reasonable

doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. 1 Dill. Mun. Corp. § 55; *Spaulding v. Lowell*, 23 Pick. 71; *Bangs v. Snow*, 1 Mass. 181; *Stetson v. Kempton*, 13 Mass. 272; *Williard v. Newburyport*, 12 Pick. 227; *Merriam v. Moody*, 25 Iowa, 163; *Minturn v. Larue*, 23 How. 435; *Mays v. Cincinnati*, 1 Ohio St. 268; *Caldwell v. Alton*, 33 Ill. 416.

GREEN, J. There is certainly nothing in the ordinance in question in this case which conflicts either with the constitution of the United States or of the state of Pennsylvania. It is an ordinance which requires every person canvassing from house to house in the borough of Warren, for the purpose of selling or soliciting orders for books or pictures or certain other enumerated articles, to take out a license from the burgess for that purpose, and pay certain fees therefor. By another provision of the ordinance it is declared that it shall not apply to persons holding mercantile licenses within the borough, nor to persons resident in the county selling their own farm produce. The effect of the ordinance would seem to be to subject persons who would otherwise pay no license for the privilege of doing business within the borough, to the duty of paying something for the privilege when they undertake to exercise it without incurring the expense of a mercantile license. There is surely nothing unreasonable in such a requirement. It is difficult to understand why one portion of the community which engages in the transaction of business in a municipality should pay a license fee for the privilege of doing so, and another portion should have practically the same privilege without paying for it, simply because the business is done in a different manner. The argument that it is contrary to common right to require a license fee to be paid in the latter case, and therefore such a requirement is void, proves too much, since the same argument is applicable to the law requiring any license fees to be paid in any case. The only question, therefore, is whether the borough of Warren possesses, either by express grant or necessary implication, the right to enact the ordinance in question. It may well be questioned whether it does not possess the necessary authority under the common-law power incident to all boroughs as public municipal corporations; but, however that may be, we are of opinion that, both under the incorporating act of 1832, (P. L. 261,) and under the general borough law of 1851, the power clearly exists. Section 6 of the act of 1832 gives the council of this borough express power "to enact such by-laws, and make such rules, regulations, and ordinances as shall be determined by a majority of them necessary to promote the peace, good order, benefit, and advantages of said borough; particularly providing for the regulation of the markets, streets, alleys, highways," etc., therein. This power is very broad, indeed, and practically includes whatever conduces to the benefit and advantage of the borough, and would seem to restrict the limitations upon its exercise to those which require ordinances to be reasonable, and not in conflict with the state or federal constitutions. In addition to this, however, the general borough law of 1851 (Purd. Dig. p. 202, pl. 58) gives to all boroughs "the power to make all needful regulations respecting markets and market-days, the hawking and peddling of market produce, and other articles in the borough," etc. The peddling of "other articles," besides market produce, includes everything which may be disposed of by the method called "hawking and peddling;" and we cannot say that this does not include canvassing from house to house, and soliciting orders for books. We certainly cannot make such a presumption upon a mere demurrer which alleges only the insufficiency in law of the declaration.

We think the demurrer should have been overruled, and the defendant required to answer over.

Judgment reversed, and *procedendo* awarded.

## INHABITANTS OF WELLS v. COUNTY COM'RS OF YORK CO.

*(Supreme Judicial Court of Maine. November 29, 1887.)*

## 1. HIGHWAYS—LOCATION BY COUNTY COMMISSIONERS—PRIOR TOWN WAY.

County commissioners have authority to locate a highway over and upon a previously existing town way whenever either terminus of such location connects with a highway, although the whole of such location is within the limits of the same town.

## 2. SAME—REPORT OF COMMITTEE—EXCEPTIONS—FINDINGS OF FACT—REVIEW.

When objections involving matters of fact are made at *nisi prius* to the acceptance of the report of a committee of appeal on the location of a highway, are overruled, the report accepted, and exceptions are taken to the ruling, the report of the evidence is not properly before the law court, and the finding of facts by the presiding justice cannot be revised.

## 3. SAME—JURISDICTION OF COUNTY COMMISSIONERS.

The Maine special act of 1885, c. 497, which provides that "a highway may be laid out, constructed, and maintained in the manner provided in Rev. St. c. 18, across the tide-waters of the Ogunquit river," confers jurisdiction on the county commissioners to make the location.

On exceptions by appellants, the inhabitants of Wells, from supreme judicial court, York county.

The opinion states the material facts.

*N. & H. B. Cleaves* and *Geo. C. Yeaton*, for appellants. *R. P. Tapley*, for appellees.

**VIRGIN, J.** Some time prior to 1885, a town road or way was made from the county road, near C. H. Littlefield's store, to Ogunquit river. The legislature of that year enacted a special act which provided: "A highway may be laid out, constructed, and maintained in the manner provided in Rev. St. c. 18, across the tide-waters of Ogunquit river, in the town of Wells; but not below the southerly line of the road leading from the county road, near C. H. Littlefield's store, to said river." Sp Laws 1885, c. 497. After this special act took effect, certain inhabitants of York and of Wells duly petitioned the county commissioners to locate a "highway" from the county road, near Littlefield's store, extending easterly to and over Ogunquit river, to high water on the ocean beach. Accordingly, after due preliminary proceedings had, the commissioners, at their October term, 1885, reported in favor of, and located, the highway as prayed for. From this location, the inhabitants of Wells duly appealed. A committee was appointed, who, after a hearing, made their report, wherein they "affirmed the judgment of the commissioners, except so much of the location of said highway across Ogunquit river, as lies below the southerly line of the town road leading from the county road, near C. H. Littlefield's store, to said river, which we reverse," specifying the portion intended to be reversed, extending from high-water mark 194 feet towards the channel of the river. To the acceptance of the committee's report, the appellants, at the September term, 1886, filed three written objections, and introduced evidence which they contended supported their allegations. The presiding justice overruled the objections, and ordered the report to be accepted; to which rulings the appellants alleged exceptions, which are now before us for decision.

1. The first objection is, in substance, that the location affirmed by the committee covers the identical territory of the town road, and does not otherwise connect with any county road. The answer is that the commissioners had authority to locate a highway over and upon a previously existing town road, when either terminus of such location connects with a county road or highway, although the whole of such location is within the limits of one and the same town. *Harkness v. County Com'rs*, 26 Me. 353; *Windham v. County Com'rs*, Id. 406, 410; *King v. Lewiston*, 70 Me. 406; *Acton v. County Com'rs*, 77 Me. 128.

2. That a part of the highway located by the commissioners and affirmed by the committee is below the southerly line of the town road mentioned in the special act. The answer is that the presiding justice did not so find the facts. The case comes up on a bill of exceptions, and not on report. The report of the evidence is not legitimately before us, and we cannot revise the finding of facts at *nisi prius*.

3. That the commissioners had no original jurisdiction to locate a highway from the county road, near Littlefield's store, to Ogunquit river, and across the tide-waters thereof, nor do the provisions of the special act of 1885 confer such jurisdiction; and that the committee had no authority to affirm such unauthorized location. *Answer* As already seen, the commissioners had authority to locate a highway to the river, inasmuch as one terminus was at a county road or other highway. Of course, the commissioners could not locate across tide-waters without the authority of the legislature, and this authority the special act of 1885 confers. To be sure, it does not contain the words "county commissioners," and hence does not, in direct, express terms, authorize that board *eo nomine* to make the location, as the special statute of 1846, c. 365, authorized the "county commissioners" of Waldo county to locate a highway across Fish river, or as the special statute of 1870, c. 282, authorized the "county commissioners" of Kennebec county to build a bridge across the Kennebec river. Nevertheless, the special statute of 1885 did authorize "a highway" to be located across the Ogunquit "in the manner provided by Rev. St. c. 18." And "highway may include a county bridge, county road, or county way." Rev. St. c. 1, § 6, cl. 6. It never means a town way in the statute. *Cleaves v. Jordan*, 34 Me. 9, 13. As it authorized a "highway" to be located, and that, too, "in the manner provided by Rev. St. c. 18," and as highways can only be located by county commissioners, under Rev. St. c. 18, § 1, we perceive no difference, in the authority conferred, between an act authorizing county commissioners *in totidem verbis* to locate a highway, and an act authorizing a "highway" to be located "in the manner provided in Rev. St. c. 18."

It is also further urged, under the third objection, that the commissioners did not, in their report, "judge the way to be of common convenience and necessity," as required by Rev. St. c. 18, § 4, and that the omission is fatal to their jurisdiction. *Answer*. If this question was raised at *nisi prius*, and is open now, we are of opinion that it is not maintainable, for, when properly construed, the report expressly recites "that the commissioners do hereby adjudge and determine that common convenience and necessity do require \* \* \* said location,"—said location being the object of "require," as well as of "made." Exceptions overruled.

PETERS, C. J., WALTON, LIBBEY, FOSTER, and HASKELL, JJ., concurred.

### PERLEY v. CHASE and another.

(Supreme Judicial Court of Maine. November 30, 1887.)

#### MORTGAGE—RIGHTS OF MORTGAGOR AFTER FORECLOSURE—EMBLEMENTS.

A mortgagor of land, who simply continues in possession after his right of redemption under foreclosure proceedings has expired, has no right to cut and sell the hay therefrom.

On exceptions by defendants from superior court, Cumberland county.

*Assumpsit* for a certain quantity of hay, cut upon premises formerly owned by the plaintiff, but which had been foreclosed under a mortgage. The verdict was for the plaintiff, and the defendants alleged exceptions to the ruling of the court. The opinion states the material facts.

*Frank & Larrabee*, for plaintiff. *Geo. M. Seiders*, for defendants.

VIRGIN, J. *Assumpsit* for the stipulated price of a certain quantity of hay, which the plaintiff sold and delivered to the defendants in the spring of 1886. The hay was cut and harvested by the plaintiff in the haying season of 1885, on land once held by him as mortgagor, and which he continued to occupy until after the sale and delivery of the hay, although his right to redeem the premises on which it grew had been forever foreclosed in March, previous to the cutting. After the delivery to the defendants, they were forbidden by the holder of the foreclosed mortgage to pay any person other than himself, he claiming title thereto.

One of the disputed questions of fact at the trial was whether the plaintiff, when he commenced to cut the hay, at some place other than the farm on which it grew, agreed with the holder of the mortgage to cut it for him at a stipulated price. The judge instructed the jury, in substance, that, when the mortgagee simply allows the mortgagor to continue in possession after the right of redemption has expired, then the mortgagor, while thus in possession, in the absence of any agreement to the contrary, and of any taking possession by the mortgagee, has the right to gather the annual crops, and dispose of them as he sees fit. \* \* \* But if, before the hay was cut, the plaintiff agreed that it should belong to the holder of the mortgage, or if he agreed to cut it for him, or if the holder of the mortgage claimed it, and the plaintiff acceded to the claim, and cut it in pursuance thereof, then it became the property of the holder of the mortgage. The jury found for the plaintiff, and the defendants challenge the soundness of the ruling.

Eliminate the fact of foreclosure from the instruction, and the defendants could not be aggrieved, for the authorities generally concur in holding that, so long as the mortgagor is allowed to remain in possession without an entry by the mortgagee, although there has been a breach of the condition of the mortgage, the mortgagor is entitled to receive the rents and profits to his own use, and is not liable to account therefor to the mortgagee. *Noyes v. Rich*, 52 Me. 115; *Teal v. Walker*, 111 U. S. 249, 250, 4 Sup. Ct. Rep. 420. But this proposition, unlike the instruction complained of, is predicated of a subsisting mortgage, and of the consequent relation of mortgagor and mortgagee before foreclosure. For, when the foreclosure becomes perfected, the mortgage, if the premises are of sufficient value, thereby becomes paid, (*Hurd v. Coleman*, 42 Me. 182; *Morse v. Merritt*, 110 Mass. 458,) ceases to exist, and the title of the mortgagor becomes extinguished, leaving the title in the mortgagee absolute and indefeasible. "Until foreclosure, or possession taken by the mortgagee," says Jones, Mortg. § 697, "the mortgagor is entitled to emblements;" implying that, after the happening of either foreclosure or possession by the mortgagee, the emblements belong to the latter. 1 Washb. Real Prop. 120, § 21, and cases there cited. As before seen, when the right of redemption has become "forever foreclosed," the relation formerly existing has become extinguished; and if, without any agreement, express or implied, the former mortgagor continues in possession after the determination of the particular estate by which he originally gained it, he thereby brings himself within the definition of a tenant at sufferance. 4 Kent, Comm. 116; 1 Thos. Co. Lit. 650; 2 Bl. Comm. 150; 1 Washb. Real Prop. 534, § 2; *Livingston v. Tanner*, 12 Barb. 484. And, if a tenant at sufferance, he is not entitled to emblements. *Bennett v. Turner*, 7 Mees. & W. 226; 1 Washb. Real Prop. 121, § 4. And, if he were, emblements do not include the grass, which is not an annual crop. 1 Washb. Real Prop. 119, § 4. But if we take the view which is the most favorable to the plaintiff,—that, inasmuch as the plaintiff was allowed to continue in possession for more than one year after the foreclosure had become absolute, and to cultivate and harvest the crops for the season of 1885, and that (as suggested by PARKE, B., in *Bennett v. Turner*, *supra*) "slight evidence would probably satisfy a jury that a tenancy by sufferance, in which the tenant is not entitled to the fruits of his own industry, as he has

no right to emblements, would not long be continued;" and that a tenancy at will might be inferred by a jury from the acts of the parties,—still, the plaintiff would not then be entitled to the hay, it being no part of the annual crops. Or, if we adopt the view of the court in *Allen v. Carpenter*, 15 Mich. 38, and hold that, where a purchaser under a foreclosure sale suffered the mortgagor to occupy the premises without interruption for three months, and in the mean time to go on and manage the premises and plant crops, he had a right to claim them as emblements, still he would gain no right to sell the hay off from the land.

In the absence of any express or implied agreement for holding over, the plaintiff has no reason to complain, for he pays no equivalent by way of rent. He has taken the crops which he raised, and no question is raised as to them. Exceptions sustained.

PETERS, C. J., WALTON, LIBBEY, FOSTER, and HASKELL, JJ., concurred.

### LITTLEHALE v. LITTLEFIELD.<sup>1</sup>

(*Supreme Judicial Court of Maine*. November 30, 1887.)

NEW TRIAL—REAL ACTION—ERROR IN SURVEYOR'S REPORT.

A new trial will not be granted on motion of the plaintiff for an alleged error in a surveyor's report in a real action, when the surveyor was a witness for the plaintiff at the trial, and testified to the same fact, and the proposed correction is inconsistent with the declaration in the plaintiff's writ.

On motion for new trial by the plaintiff, from supreme judicial court, Androscoggin county.

Real action. The verdict was in favor of the defendant, and the plaintiff filed a general motion for new trial, on the ground that the verdict was against the evidence, and also the following special motion:

"Motion for a new trial, on the following reasons: Frederic Danforth, the surveyor appointed by the court to make a survey and draw a plan of the land in question between the plaintiff and defendant and surrounding lands, made the following mistakes, to-wit: That the course of the line as claimed by the plaintiff is south  $50\frac{1}{2}$  degrees east, when in fact it is south 50 degrees and fifty minutes east; and Mr. Danforth, on the stand, stated that the distance from Plummer's fence to the center of a stone in the center of a forty-foot street was 21 feet and 5 inches, when in fact it is only 20 feet and  $4\frac{1}{2}$  inches; and Mr. Danforth, on the stand in court, gave the distance of all the posts east of stone and post-hole, and between the corner post in the south-east corner of plaintiff's land relative to the blue line, when in fact Mr. Danforth did not measure but three of the posts relative to the blue line.

[Signed]

"S. K. LITTLEHALE."

Plaintiff, *pro se*. *Savage & Oakes*, for defendant.

PER CURIAM. The question presented to the jury was, where is the true line between the adjoining lots of the parties? The original line was created in 1832, and the subsequent deeds bound the lots by the respective abutters. In 1871 the defendant erected a brick building. The owner of the adjoining lot made no claim that any part of the building was on any land other than its owner's. The plaintiff purchased in 1884, and thereupon claimed that a few inches of the defendant's building was over the line, and soon commenced this action. He had a fair trial, with able counsel to try it. He takes no exceptions to the rulings of the presiding justice. We have patiently listened to and appreciated his lengthy argument, and carefully re-examined the report of the evidence; and while we do not feel entirely sure that

<sup>1</sup>Reported by Leslie C. Cornish, Esq., of the Augusta bar.

the verdict is right, we are satisfied that it is supported by the evidence on the part of the defendant, and that the general motion must be overruled.

The special motion, pardoning its want of form and substance to the inexperience of the plaintiff, and considering it as if properly made, must also be overruled. The alleged error as to the course of the line claimed by the plaintiff, is inconsistent with the amended declaration to which the defendant pleaded, and on which the case was tried. Moreover, the witness, by whose testimony the alleged error is proved under the motion, was a witness for the plaintiff at the trial, and testified to the same fact. And the remaining facts set out in the motion seem to have been known to the plaintiff at the time of the trial. Motions overruled. Judgment on the verdict.

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BIRD v. SWAIN.<sup>1</sup>

(*Supreme Judicial Court of Maine. November 30, 1887.*)

**INFANCY—CONTRACT—RATIFICATION IN WRITING.**

An indorsement of these words upon a note: "The within note being paid, I hereby discharge the property thereby secured,"—is not such a ratification in writing, within the meaning of Rev. St. Me. c. 111, § 2, of an alleged warranty by the defendant, when a minor, of the soundness of a horse for which the note was given, as will support an action for breach of warranty, the plea of infancy being set up.

On exceptions by plaintiff from supreme judicial court, Oxford county.

*Assumpsit* for breach of warranty of a horse. Plea, infancy. The action was referred by rule of court, and to the ruling of the court, accepting the report of the referees, the plaintiff alleged exceptions.

*S. F. Gibson*, for plaintiff. *Bearce & Stearns*, for defendant.

VIRGIN, J. The plaintiff counted on an alleged verbal contract, whereby the defendant warranted a horse which he bargained and delivered to the plaintiff, on November 12, 1884, to be "all right, and good to work." The defendant pleaded infancy. By agreement the action was referred by rule of court. The referees reported, in substance, that, on the day named, the defendant, being then more than 20, but less than 21 years of age, bargained and delivered to the plaintiff a horse, receiving therefor a cow, a pair of steers, and the plaintiff's note for \$65 on six months, in which it was stipulated that the horse should remain the defendant's property until the note was fully paid. After maturity, the note was paid to the defendant, who then had attained his majority. The referees made an alternative report that, if the action is maintainable, they find a promise, and assess damages at \$25, otherwise no promise. The referees find no ratification in writing. The report of the referees was accepted, and judgment ordered for the defendant, whereupon the plaintiff alleged exceptions.

We are of opinion that the exceptions must be overruled. Rev. St. c. 111, § 2, provides that "no action shall be maintained on any contract made by a minor, unless he, or some person lawfully authorized, ratified it in writing after he arrived at the age of twenty-one years, except for necessities or real estate," etc. No fact found by the referees brings the case within the provisions of the statute. The early authorities cited by the plaintiff declare the common-law rule of ratification, and the cases were decided before the statute above mentioned was enacted in 1845. *Davis v. Dudley*, 70 Me. 236, related to real estate, which is an exception expressly mentioned in the statute. Even if the indorsement on the note—"the within note being paid, I hereby discharge the property thereby secured"—was signed by the defendant after

<sup>1</sup> Reported by Leslie C. Cornish, Esq., of the Augusta bar.

he became of age, it cannot be construed as a "ratification in writing" of alleged warranty of the horse. Exceptions overruled.

PETERS, C. J., WALTON, LIBBEY, FOSTER, and HASKELL, JJ., concur.

### GAMAGE v. HARRIS and others.<sup>1</sup>

(*Supreme Judicial Court of Maine. December 2, 1887.*)

EQUITY—REMEDY AT LAW—EQUITABLE RELIEF—DEFECT OF PROOF—DISMISSAL.

When a cause of action, cognizable at law, is entertained in equity, on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice.

Bill in equity to remove a cloud from the title of the orator to two several pieces of land. Heard on bill, answer, and proof.

*Savage & Oakes*, for plaintiff. *C. Record*, (*Frye, Cotton & White*, of counsel,) for defendants.

HASKELL, J. Bill to remove a cloud from the title of the orator to several parcels of land. The orator claims to have acquired the right to redeem both parcels from a mortgage by virtue of a sale of the equity to him on execution. Three of the respondents, sisters, claim title to one parcel by virtue of a levy upon it on execution in their favor, and to the other parcel by virtue of a sale to them, on execution, of the right to redeem the same from a mortgage. Both the levy and the sale were made to perfect a lien upon the land created by an attachment made earlier than the attachment in the orator's favor, under which he claims title. The orator, not being in possession of the land, seeks to avoid the respondents' levy for irregularity, and to annul their purchase of the equity, because there was none, and because the sale was irregular and invalid. Failing in these particulars, the orator seeks to annul both the sale and the levy annulled, because the judgment, whereon the execution issued upon which the sale and levy were made, was fraudulent, collusive, and void.

The bill invokes two specific grounds for relief,—one, the invalidity of certain judicial conveyances, the validity of which can as well be determined by an action at law as in equity; the other a fraudulent and collusive proceeding at law, under which the three respondent sisters claim title. The sole cause for relief is properly within the jurisdiction of a court of equity. The orator charges that three of the respondents, daughters of the other respondent, fraudulently and collusively procured a judgment and execution against their father, the other respondent, upon a fictitious and groundless claim, and that the title which they claim under the levy and sale on the execution is colorable only, and invalid. The orator called for an answer to the bill upon oath, to search the conscience of each daughter, and of their father, as well. They all answer fully and, no doubt, satisfactorily to the orator. He has no exception to any suggested insufficiency or evasiveness in the answers. The answers, so far as responsive, are evidence on the part of the defense, and must be taken to be true, unless overcome by evidence that outweighs them. They deny all fraud and collusion between the three respondents claiming title and their father, touching the judgment in question.

A careful consideration of the evidence fails to prove that the judgment in question is fraudulent or collusive. The orator and the three female respondents had suits pending at the same time, in the same court, against the same defendant, wherein the same land was attached, the attachment of

<sup>1</sup>Reported by Leslie C. Cornish, Esq., of the Augusta bar.

respondents having been first made, and it is improbable that the orator did not then know of the respondents' suit and attachment. If he then believed that the respondents' suit was upon a fictitious claim, or for a sum too large, he might have defended the same, as a subsequent attaching creditor. Rev. St. 1871, c. 82, § 39; 1883, c. 82, § 46. But this he omitted to do. He might then have compelled the respondents to prove their damages, and have prevented expensive litigation in a court of equity. He who asks equity must not only do equity, but come into court free from laches himself. The three female respondents, scarcely beyond their majority, believed that they had a claim against their father for wood cut by him upon land that they had inherited from their mother, and, fearing lest their father might become unable to pay them, consulted a counselor whom the court has no reason to distrust, and by his direction prosecuted their claim by suit, and recovered judgment and execution. The testimony of their counselor clearly proves good faith in the proceeding, and the orator has no reason to complain of the result. Had he been more diligent in collecting overdue notes, running at 8 per cent. interest, his attachment might have been the earlier one.

The orator, failing to prove the fraud charged in his bill, cannot further maintain the same for a cause giving a plain and adequate remedy at law. "The rule is that, when a cause of action, cognizable at law, is entertained in equity, on the ground of some equitable relief sought by the bill, which, it turns out, cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice. *Russell v. Clark*, 7 Cranch, 69; *Candle Co. v. Candle Co.*, 4 Kay & J. 727; *Baily v. Taylor*, 1 Russ. & M. 73; *French v. Howard*, 3 Bibb, 301; *Robinson v. Gilbreth*, 4 Bibb, 183; *Nourse v. Gregory*, 3 Litt. 378;" *Dowell v. Mitchell*, 105 U. S. 430. The orator, not being in possession of the land, cannot in equity test the validity of the levy and sale set up against him. A writ of entry will afford him a plain and adequate remedy. *Spofford v. Railroad Co.*, 66 Me. 51; *Briggs v. Johnson*, 71 Me. 237; *Robinson v. Verrill*, 73 Me. 176; *Russell v. Barstow*, 144 Mass. 130, 10 N. E. Rep. 746.

Bill dismissed, but without prejudice as to matters not decided in this opinion. Respondents to recover one bill of costs.

PETERS, C. J., WALTON, VIRGIN, and EMERY, JJ., concurred.

### STATE (AMERMAN, Prosecutor) v. BRIGGS and others.

(*Supreme Court of New Jersey. November 16, 1887.*)

#### 1. JUDGMENT—WHAT CONSTITUTES—WHEN A BAR—ACTION OF JUSTICES AND SURVEYORS IN DETERMINING HIGHWAY.

Justices of the peace and surveyors of highways made a determination in writing, relating to encroachments on a road by adjoining land-owners, which determination was partially acted upon, and boundary lines fixed by the land-owners. Afterwards an entirely different determination, as to the place and encroachments on the same road, was made by the same officers, without the first determination being set aside or reversed. *Held*, that the action of this body was a judicial one, and the first determination was a bar to the second, and rendered it invalid.

#### 2. HIGHWAYS—ENCROACHMENTS—AUTHORITY OF JUSTICES AND SURVEYORS.

A road was laid out and established as a public highway by the surveyors more than 50 years ago. The evidence showed that the course of this road had not been changed since it was first laid out. The justices of the peace and the surveyors of the highways, in determining encroachments upon this road, laid out a road which left the original course, and went upon plaintiff's land. *Held*, that the laying out of the new course was not within the authority of the officers to determine encroachments.

On certiorari.

*Gaston & Beryen*, for prosecutor. *H. F. Galpin*, for respondents.

KNAPP, J. This writ brings up the proceedings and written determination of justices of the peace and surveyors of the highways made December 1, 1886, in respect to encroachments on a public road laid out in the township of Bedminster, in the county of Somerset. The first reason assigned for setting aside the proceedings is that when said determination was made, there was in full force a determination relating to the same alleged encroachments on the same public road, previously made by a like tribunal, under which the overseer had partially acted, and boundary lines set by adjoining owners; the second determination being entirely different as to the place and extent of encroachments from the first. The other reasons allege that in fact the justices and surveyors departed from the line of the old road, and instead of removing encroachments, practically laid out a new road on other lands. The case shows the facts to exist upon which the first reason assigned is predicated, for, by a return made on the ——— day of June, 1886, by two surveyors of the highways and two justices regularly called for that purpose, it appears that the same road was examined for encroachments, and in their report such encroachments were determined. Under it some of the adjoining land-owners adjusted their fences to comply with that determination, and no proceedings have been instituted by any one to reverse it or set it aside. It is conceded that no new encroachments had followed the former adjudication when the one under review was made. The question presented is whether this statutory proceeding, once begun and carried to completion, and standing unreversed, is a bar to subsequent action of like character, touching the same encroachment.

It is a general principle that the decision of a tribunal of competent jurisdiction is binding and conclusive upon all other tribunals of concurrent power. If there be identity in the subject or thing litigated in the ground or cause of action, identity of persons or parties to the controversy of the quality or rights in which they litigate, a judgment or decision is, until unreversed, conclusive. Is there to be ascribed to this proceeding the nature and quality of judicial action? Those officers, who constitute the body when it is called into being, discharge their general duties under the sanction of official oaths. Persons to be affected by the action of this body, in a proceeding of this character, must be brought before it by notice. *Van Tilburgh v. Shann*, 24 N. J. Law, 740. They, as a board, are to examine into and decide on the fact of encroachment of the persons who are guilty of it, and its extent. Their decision, reduced to writing and signed by them, defining the limits of encroachment as they have determined it to be, is, until set aside or reversed, conclusive in determining the private right, so far as the provision in the law has binding force, and becomes an authoritative direction to the overseer of the highways acting for the public, to throw down and remove inclosures, to the extent which shall have been determined by them; and their determination of the public and private right is not declared in the act to be merely a temporary and provisional arrangement, but stands without any prescribed limit to its duration. There would seem to be no great room for doubt that the exercise of such power is marked by all the essential qualities of judicial action.

As the case now stands, there exist two determinations on the same subject-matter, each, apparently, of equal force with the other,—one fixing one line as defining the encroachment; the other, another and a different line. In this state of things, to which one of these is the adjoining land-owner to conform? Under which will the overseer for the time being assert his right to remove boundary fences? I perceive no ground for believing that the later reverses or overturns the earlier action. Can they both stand? If so, one overseer can adhere to and enforce one direction, and his successor in office may, with equal authority, choose to execute the other. Or may the same officer use one return to determine the rights of owners on one side of the high-

way, and the other to determine the rights of adjoining owners on the other side? Again, the question may be asked, with what frequency may these proceedings undergo repetition? How often may the adjoining land-owner be called upon to defend his right to maintain his inclosures? These two proceedings, in point of time, are separated by less than half a year. If they may be so frequent as that, why not oftener, at the whim and pleasure of the overseer of the highways? If one proceeding does not conclude further action, the possible number is illimitable. I think every consideration of justice and convenience, looked at in the light of public interest as well, requires that such proceedings, when once taken, shall, until set aside, be, as to existing facts, a bar to subsequent investigation before the same statutory tribunal. Under this view, the determination under review cannot be sustained.

If we look into facts in this case, there is difficulty in maintaining the proceedings of this body. The road attempted to be opened was laid out by the surveyors of the highways above fifty years ago. The map and return of the surveyors on file was the proper resort for guidance in establishing the public right. But, to serve in this, it was indispensable that a resurvey under it should have a correct beginning. The beginning and ending were unmarked by any fixed monument, and, as I understand the evidence, none such was found existing anywhere in the entire line of the survey. In determining the starting-point adopted by the justices and surveyors, their own engineer admits there was no certain or reliable guide, and he accepted one, not on his own judgment, for he could form none from the *data* given in the return, but that which the judges directed as seeming to them to be the best under the circumstances. From that the road lines were run towards the west, giving a width of two rods. At the beginning of the first course, the south line of the survey lapped the prosecutor's inclosure  $8\frac{1}{2}$  feet, and left about 10 feet of the road, as it was used by the public, outside of the north line as run; and throughout this first course, of about one-fourth of a mile, the lap on prosecutor's possession widened from  $8\frac{1}{2}$  feet at the beginning, to about 25 feet near the end of that course. North of the north line a strip of the used road was left, varying in width from 10 feet at the beginning, to over 25 feet near to the end. At the end of the third course the survey entirely left the old road, and passed on the land of the prosecutor. The fourth course was separated from the south line of the old road by a narrow gore of lands within the prosecutor's inclosure. This road had been used by the public for half a century, since it was laid by the surveyors. Many respectable and intelligent gentlemen from the neighborhood were sworn as witnesses in the case, who had known and used the road for many years, some from the time it was originally laid out; and, when interrogated on the subject, none had observed any material change in the road boundaries during the period of its use by the public; certainly none so marked as this survey, if correct, necessarily assumes. These indications of error are too pointed and forcible to permit the belief that justice has been done in this procedure. The case seems to present that condition of uncertainty touching the persons who have encroached upon the road which the statute requires to be resolved by equal widening on each side of the road as it has been used. The statute does not confer upon this body the right to take lands in the alteration or laying of roads. Lands for such purpose can only be taken by the public, upon compensation made to the owner.

For the reasons given, the proceedings should be set aside, with costs.

## FAIRCHILD v. FAIRCHILD.

(Court of Chancery of New Jersey. December 8, 1887.)

1. **DIVORCE—BILL FOR SEPARATION AND MAINTENANCE—DEFENSE—MARRIAGE PROCURED BY FRAUD—WANT OF AFFECTION.**  
 Defendant, in his answer to complainant's bill for separation and maintenance, set up that complainant represented to him that she was in a familyway by him, and that he, knowing that he had had connection with her, married her, and afterwards discovered that her representations were false, and that they had no affection for each other. *Held*, that this was no defense to a suit for maintenance.
2. **SAME—PLEADING—ANSWER CAPABLE OF TWO INTERPRETATIONS—EXCEPTION.**  
 Complainant, in her bill for separation and maintenance, alleged that defendant abandoned her without justifiable cause. The answer to this charge was not specific, and admitted of two interpretations. *Held*, that an exception to the answer was well taken.
3. **SAME—PLEADING—ANSWER—CHARGE OF FRAUD—FACTS NOT PROPERLY PLEADED.**  
 Defendant's answer to complainant's bill for separation and maintenance contained a clause as follows: "Believing, as he did, that he had been fraudulently entrapped into his said marriage with the complainant." There were no facts immediately following for the charge of fraud to rest upon. In a subsequent part of the answer the facts upon which the fraud could rest were set up, but an exception to them was sustained on other grounds. *Held*, that the clause charging fraud could not be aided by the facts subsequently stated.
4. **SAME—ANSWER NOT RESPONSIVE.**  
 Complainant, in her bill for a separation and maintenance, alleged that defendant had not, since their marriage, rendered her any support. Defendant alleged ill health, and an inability to support himself, and that he was unable to support complainant. *Held*, that this did not meet the allegation, and was not a proper answer. Defendant should have stated whether or not he had, since the marriage, rendered complainant any support.
5. **SAME—ANSWER—INCURRING PENALTIES OF PERJURY—LAW OF FOREIGN STATE.**  
 In her bill for separation and maintenance complainant alleged that defendant, to procure a divorce in another state, falsely swore that complainant had abandoned him, and that her residence was to him unknown. Defendant pleaded that he could not be compelled to answer this charge, as in so doing he might incur a penalty for the crime of perjury. *Held* that, in the absence of a showing that the crime of perjury was punishable in the state where it was alleged to have been committed, an exception that defendant had not answered the charge would be sustained.
6. **SAME—ANSWER—RESERVATION OF EXCEPTIONS—DENIAL OF COMBINATION—RULE OF COURT.**  
 A reservation of exceptions, and a general clause denying combination, in an answer to a bill in equity, being against rule of court, an exception to that part of the answer should be sustained.

Bill for divorce and maintenance. On exceptions to answer.

A. Walling, Jr., for complainant. R. Dayton and Thos. N. McCarter, for defendant.

**BIRD, V. C.** The bill in this case is for a judicial separation, and for maintenance; the allegation being that the defendant abandoned the complainant without justifiable cause. There is also an allegation in the bill that the defendant fraudulently procured a divorce from the complainant in the state of Kansas, together with a prayer that the said decree may be declared void, and set aside, and for an allowance for the maintenance and support of the complainant. The defendant has filed his answer, to which numerous exceptions have been raised.

The first exception is to the clauses which have been expressly provided against by rule of the court, namely, the reservation of exceptions, and the general clause denying combination. These being in violation of the well-established rule of the court, the exception thereto must prevail.

The second exception is to the effect that the defendant has not answered the allegation in the bill that he abandoned the complainant without justifiable cause. In answer to this allegation the defendant insists that he has

spread out in his answer such facts as show a complete abandonment, and such other facts as show that he was justified in abandoning her. In my judgment he does show an abandonment. But is that sufficient to answer the demands of good pleading? No one will insist that facts which constitute the basis of a defense need not be set out when it becomes essential that such facts should be presented to the court, in order that the court may understand whether the facts alleged amount to a defense or not. Yet it can scarcely be said to be good pleading, when the pleader presents facts which may be capable of two interpretations, and which may support more than one conclusion in law, without such pleader himself putting his own interpretation upon them, and declaring what inferences he desires to be drawn therefrom. The allegations in this answer admit of two interpretations. It may clearly be seen that the defendant could come into court and say that he did not abandon his wife, nor did he intend to; that he left her and went into the state of Kansas with her consent, and with her consent procured the divorce which is mentioned in the bill of complaint; and that such leaving and obtaining of such divorce amounted not to an abandonment in the contemplation of the statute. The directions of the statute are that the wife shall be entitled to her suit for maintenance if the husband abandons her without justifiable cause. If the complainant alleges, as has been done in this case, that the defendant abandons her without justifiable cause, it is his duty to answer that charge directly and specifically yes or no. If he abandons her, and has a justifiable cause, it is his duty to say: "Yes, it is true, I have abandoned the complainant, and I had a justifiable cause for so doing,"—setting forth the cause of causes for such abandonment. In seems to me that the issue can only thus be framed. The court is entitled to the mind or judgment of the defendant upon the exact charge upon which a decree must be rendered, whether it be in favor of the complainant or of the defendant. I think the second exception is well taken.

The third exception to the charge in the answer, that the defendant, "believing, as he did, that he had been fraudulently entrapped into his said marriage with the complainant," is scandalous and impertinent, is, I think, also well taken. *First*, it is a simple charge of fraud, without a single fact immediately following for the charge to rest on; *second*, it is, by direct reference, made part of the defense afterwards set up, showing, by proper allegations, what the pleader meant by the charge of fraud in this part of the answer; and since, I think, the latter must fall under the exception taken to it, as will appear, the former must also, even though it be connected with the facts contained in the latter.

The fourth exception is to that part of the answer which is directed to the charge in the bill that the defendant has not at any time rendered any support to the complainant since their marriage. The nearest approach to an answer to this charge is in these words: "And that, owing to his ill health, which has continued ever since the time of his said marriage, and before, this defendant has been unable to even support himself, and is, and always has been, ever since his marriage, entirely unable to support, or contribute to the support of, the said complainant." I think that is not a satisfactory answer. It may be intended for such; but it certainly does not follow that because that allegation is true he did not furnish her any support. The value of requiring material and direct charges to be answered directly and clearly, is so great that no court can disregard them, when its attention is thus particularly called to them. A party may have an excuse for doing or not doing a thing; but good pleading requires him to say whether he did or did not do what is charged. The pleader must choose the ground he intends to stand upon, and make plain declaration thereof.

The fifth exception is that the defendant has not answered the charge that he knew of the residence of the complainant when he instituted proceedings for

divorce in the state of Kansas, and that he falsely and wickedly swore that the residence of the complainant was unknown to him, and could not be ascertained by him, and that he falsely swore that this complainant had abandoned him. The answer to these exceptions is that the defendant cannot be compelled to answer any further than he has, because, in so doing, he might incur some penalty or forfeiture, the crime of perjury being involved. This is the well-established rule. A defendant, like a witness, when called upon to answer, can always avail himself of the privilege, if it appears to the court that an answer may, or may have a tendency to, convict him of a crime, or may form a link in a chain of evidence in that direction. 1 Daniell, Ch. 563, etc.; Story, Eq. Pl. § 521 *et seq.*, 575 *et seq.*, 591 *et seq.* But it does not appear that, by the laws of Kansas, where the divorce is alleged to have been obtained through perjury, such a crime is still punishable or not. In the absence of this material fact, I cannot say that the exceptions are not well taken. It may be proper to remark that it is very questionable, indeed, whether or not the defendant has availed himself of the proper method of raising such a defense to answering by way of discovery.

The sixth exception to the answer goes to that part in which the defendant sets up what may be said to be his reason or excuse, without so saying, for abandoning the complainant, and procuring his alleged divorce in the state of Kansas, and in which, it is to be inferred, consists the fraud that was previously adverted to in the answer; namely, that on the tenth day of August, A. D. 1885, the complainant came to the defendant on board the steamer Minnie Carroll, and told the defendant that she was in trouble, meaning that she was in a family way; and that, because of such charge on her part, he, believing it to be true, and knowing that he had had connection with her twice previously, consented to marry her, and did marry her immediately afterwards, which charges he soon discovered were false. In determining whether this exception is well taken or not, I must determine whether or not the matter thus set up in the answer constitutes a legal defense to the complainant's suit for maintenance. What, then, is this part of the defense? It is that the complainant and defendant met at the house of the complainant's father, which was her home, and that on two occasions the defendant had sexual intercourse with her there; and that, in a short time thereafter, they met again on board a steam-boat, when she told him that she was in trouble by him, and that, believing her statement, he married her; and that, although he married her, there was no previous promise of marriage, and no affection on his part towards the complainant, nor on her part towards him; and that her statement that she was with child by him was untrue.

In my judgment, all this is no defense to a suit for alimony. The first particular that arrests the attention is, not that Mrs. Fairchild was a lewd woman, not that she submitted to the lustful desires of Mr. Fairchild, but that she spoke falsely to him respecting the results. Had he been as thoughtful as he was greedy, he would have expected just such an appeal; and if he had not felt himself guilty of a great wrong, he would not have been so readily overcome by her tender appeal. When, after mutual consent to such transgression, the parties deliberately consent to the marriage contract, and to the solemn performance of the marriage ceremony, the fact that the wife has falsely declared herself to be with child by the husband, as an inducement for him to marry her, is no ground for annulling the marriage, or resisting a claim for maintenance. They are equally filthy and abominable in the eye of the law. The law will require each to fulfill their obligations. *Seilheimer v. Seilheimer*, 40 N. J. Eq. 413, 2 Atl. Rep. 376; *States v. States*, 37 N. J. Eq. 195.

The next allegation that strikes the mind is that there was no affection between the contracting parties. I cannot perceive that this case can be made part of an issue in any divorce proceedings, except as it may be introduced by the complaining party in case of cruelty, or desertion, or adultery, as tending

to show alienation and the like on the part of the alleged defaulting party. But I cannot perceive how any person, who has solemnly entered into a marriage contract, can avoid his just obligations by saying: "I had no affection for you when I married you." However desirable it may be that holy affection should control every thought and act of parties bound in wedlock, I do not understand that courts have ever undertaken to define the depth or wealth of that affection, or to prescribe the manifestation of it at all.

In my judgment, the exceptions are all well taken. The exceptant is entitled to costs.

### *In re* INVESTIGATING COMMISSION.

(*Supreme Court of Rhode Island. October 5, 1887.*)

#### 1. STATES AND STATE OFFICERS—GOVERNOR—POWER TO APPOINT COMMISSION TO INVESTIGATE MANAGEMENT OF PRISON—WITNESSES—CONTEMPT.

The governor of the state of Rhode Island has power to appoint or employ others to make inquiry for him, and report the facts, upon charges made of malfeasance and non-feasance in the management of the state prison, etc., but they would not be "officers," within the meaning of Pub. St. R. I. c. 23, § 5. They could not administer oaths or summon witnesses, and compel them to testify, or punish them for contempt.

#### 2. SAME—REPORT OF COMMISSION—PRIVILEGED COMMUNICATION.

The report of such a commission of the facts elicited by their inquiry would be regarded as a privileged communication, and as such would not be actionable without proof of express or actual malice.

Under article 10, § 3, of the constitution of the state, providing that "the judges of the supreme court shall give their written opinion upon any question of law whenever requested by the governor or by either house of the general assembly," the governor addressed in October, A. D. 1887, the following communication to the justices of the court:

*To the Honorable Judges of the Supreme Court:*

I have the honor to submit the following matters for the consideration of the judges of the court:

Whereas, representations have been made to me of malfeasance and non-feasance in the management of the state prison, and of some of the other penal institutions of the state under the charge of the board of state charities and corrections, of such a character that, if they should be ascertained to be true, it would be my duty to suspend, or, with the consent of the senate, to remove from office the members of said board who have been responsible for such malfeasance or non-feasance; wherefore, inasmuch as it is inconvenient and, perhaps, will be impossible for me in person to make due inquiry into the truth of the said representations, I request the written opinion of the judges of the court whether I may, as governor, in aid of the due execution of the duties of my office, and to enable me more certainly to take care that the laws be faithfully executed, in accordance with right to all parties, appoint persons, and commission them to make inquiry as to the truth of said representations, and to report to me the facts as they may ascertain them to be, with their recommendations to me thereon, and whether such commission may summon witnesses, to matters pertinent to such inquiry, compel them to testify, and take their testimony under oath, and whether the members of such commission will be protected in acting thereon, and in making their report to me.

JOHN W. DAVIS, Governor.

#### OPINION OF THE COURT.

*To His Excellency, John W. Davis, Governor of the State of Rhode Island and Providence Plantations:*

We have received from your excellency a communication asking for our opinion upon the three following questions, to-wit: *First*, whether you have

power to appoint and commission persons to inquire into the truth of representations which have been made to you of malfeasance and non-feasance in the management of the state prison, and some of the other penitentiary institutions, under the charge of the board of state charities and corrections, and report the facts. *Second*, whether, if persons be so appointed and commissioned, they can summon witnesses and compel them to testify under oath on matters pertinent to the inquiry. And, *third*, whether they will be authorized in acting under their commission and making report to you.

We think your excellency has power to appoint or employ others to conduct the inquiry for you, and report the facts; but we are of opinion that the persons so appointed would not be officers within the meaning of section 23 of chapter 23 of the Public Statutes, which provides that "a commission shall be issued to every person elected to office by the general assembly, to every justice of the peace elected by any town, and to every person appointed to office by the governor;" and that, therefore, their commission, if their appointment is by commission, will give them no power and no protection which they cannot have without it. We think the offices meant in the section quoted are offices recognized or created by the constitution or statutes of the state, and such appointments as are contemplated in your communication.

We think the second question must be answered in the negative. Merely the issue of commissions of inquiry appointed by the governor are not mentioned among the officers and persons upon whom power to administer oaths is conferred by statute, and we know of no rule or principle of the common law under which they can administer oaths, and, still less, under which they can summon witnesses and compel them to testify under oath before them. The way in which unwilling witnesses are compelled to testify is by fine or imprisonment for contempt. Power to punish for contempt is a high judicial power, exceedingly summary, and absolute in its exercise. It seems to be confined at common law in England to the two houses of parliament and the courts of record, and in this country it has been held to have but little, if any, wider latitude. *Remington v. Peckham*, 10 R. I. 550. We do not think that power can be implied in favor of the commission because your excellency has power to suspend, or, with the consent of the senate, to remove from office members of the board of state charities and corrections for malfeasance or non-feasance, or because it is declared by the constitution that "the governor shall take care that the laws be faithfully executed." For, as we remember in the recent case of *Hanley v. Wetmore*, 6 Atl. Rep. 777, the governor, in performing his duty under this clause, "has no arbitrary power, but must himself proceed according to law."

The first part of the third question is answered by our answers to the first and second questions. We think that the report of the commission, if the facts elicited by their inquiry, would be regarded as a privileged communication, and as such would be not actionable without proof of express or actual malice.

THOMAS DUFEE.

P. E. TILLINGHAM.

CHARLES MATTESON.

GEORGE A. WILBURN.

JOHN H. STINESS.

### IRVIN'S APPEAL.

(*Supreme Court of Pennsylvania*. October 3, 1887.)

#### EXECUTION—SALE—ISSUE UPON DISTRIBUTION.

Under section 2 of the Pennsylvania act of April 20, 1846, (Purd. Dig. p. 763, p. 764) providing that an issue shall be directed by the court upon the distribution of proceeds arising from sales under execution, etc., there must be material facts in dispute which must be set forth in an affidavit, and upon which the court will determine whether such issue shall be granted. It cannot be said that there is a material issue in dispute where the affidavit is made upon information, is vague, uncertain

indefinite in the facts stated, is not made in conformity with the act, and is not supported by a single fact or circumstance shown to the court upon which it can form an intelligent conclusion.

Appeal from court of common pleas, Huntingdon county, refusing to direct issues to determine certain disputed and material facts in the distribution of the proceeds of the sheriff's sale of the real estate of John W. Mumper, and in overruling certain exceptions to, and confirming, the report of D. Caldwell, Esq., auditor, to distribute, etc.

The facts are fully stated in the following opinion of FURST, P. J.:

"We come now to consider the application before the auditor for issues to try the validity of said judgments, and the petition presented to the court upon the filing of his report, upon which rules were granted upon Mary A. Mumper and the Provident Life & Trust Company of Philadelphia, to show cause why said issues should not be awarded. These cases were all heard in connection with the exceptions to the auditor's report. Mary A. Mumper obtained, by confession, a judgment in the court of common pleas, to No. 82, April term, 1883, against John W. Mumper on the twelfth April, 1883, for the sum of \$20,951.86. This judgment was entered upon a bill signed, dated February 13, 1883, for an indebtedness accruing prior to the partnership of John W. Mumper & Co., which partnership began in the year 1881. She also obtained a judgment against John W. Mumper and H. L. Beltzhoover, trading as John W. Mumper & Co., upon a bill signed on the twenty-fifth April, 1883, for \$9,764.50, to No. 129, April term, 1883.

"Before the auditor two petitions were presented by the attorneys of certain creditors of John W. Mumper & Co., namely: Jones, Hoar & Co., H. H. Kline, Henry & Co., S. H. Irvin, and others, praying for issues to be directed by the court of common pleas to try the validity of these judgments. Afterwards a petition was presented to the court on behalf of all the creditors asking for like issues, etc. These several petitions have the names of the creditors, signed by their several attorneys. They are attached to the auditor's report. The material allegations of fact are contained in the petition presented to the court, and are set forth in three distinct divisions: *First*, that petitioners believe that the aforesaid judgments were, without consideration, fraudulently and collusively confessed by and between the parties thereto for the purpose of hindering, delaying, and defrauding the petitioners, etc.; *second*, that judgment No. 82, April term, 1883, against John W. Mumper, for \$20,951.86, was fraudulently confessed for a larger sum than was due, etc.; *third*, that if there was any consideration whatever for said judgment No. 82, or if John W. Mumper was, at the execution of the note, in any manner indebted to said Mary A. Mumper, such indebtedness petitioners are advised and believe was fully paid and satisfied prior to the sale of the real estate of John W. Mumper, etc.

"This petition is verified by three of the creditors in the following manner, namely: 'B. F. Isenberg, one of the members of the firm of Henry & Co., being duly sworn according to law, doth depose and say the facts set forth in the foregoing petition are true to the best of his knowledge, information, and belief.' Upon the filing of this petition in court, a rule was granted to show cause why a feigned issue should not be awarded, etc. Thus a full opportunity was given to the petitioners to show to the court, by deposition or in any other proper manner, some fact or facts that were material and in dispute. They failed to show a single fact, and, although the case was before the auditor for over a year, not a single fact was shown before him as to the fraudulent character of either of said judgments, or that the judgments were paid as alleged in the third paragraph of petition.

"Upon the other hand, it was shown by the deposition of Mary A. Mumper and John W. Mumper that the judgment for \$20,951.86, (the other judgment was not attacked at the same time the deposition was taken,) was given for a

good and *bona fide* consideration, which existed for more than a year prior to the formation of the partnership between John W. Mumper and H. L. Hoover; the nature and character of the indebtedness being fully set forth in both in the depositions and in the answer referred to therein in the proceeding between these same parties. It was further shown that the Provident Life & Trust Company of Philadelphia, which corporation was guardian of the minor son of Mary A. Mumper, and a part owner of the same real estate, had made a full investigation into the consideration of the judgment, and thereupon had advanced the money to purchase the real estate at the sheriff's sale, taking an assignment of this judgment as security. According to the facts shown in the answer and depositions, none of the petitioners could have had any personal knowledge of the facts set forth in several petitions. This is also apparent from the manner in which the petitions are drawn. They are signed by the counsel for the petitioners; there is no allegation in any one of the petitions that any petitioner or creditor has knowledge of the facts therein stated; and this is also further apparent from the careful manner in which the affidavits are made—'upon information that these affidavits to the petition merely amount to hearsay derived from others; the source of which information is withheld from the court by refusal to produce the same in evidence upon the rule to show cause.

"The question then is simply this: Do these petitions, in the manner in which they are verified, show a material fact in dispute, which should mine or influence the court to grant the issue? The eighty-seventh section of the act of sixteenth June, 1836, (Purd. Dig. p. 763, pl. 117,) provides that if any fact connected with such distribution shall be in dispute, the court shall, at the request in writing of any person interested, direct an issue to try the same,' etc. Under this act the law was mandatory, and the issue in this case would have to be granted, and to this effect are a number of decisions of the supreme court. Issues could be obtained upon the written request of an interested party, upon the allegation of a fact in dispute. The result was an endless variety of issues, resulting in serious delays and expensive litigation. To meet this the act of twentieth April, 1846, was passed. The second section (Purd. Dig. p. 763, pl. 118) provides as follows: 'Provided, that if an issue shall be directed upon the distribution of money, arising from an execution, or orphans' court sales, the applicant for such issue shall make affidavit that there are material facts in dispute therein, and shall set forth the nature and character thereof; upon which affidavit the court shall determine whether such issue shall be granted, subject to appeal or writ of error,' etc., if issue be refused. Are the affidavits to these petitions made in accordance with the act of 1846, and do they of themselves afford sufficient evidence to the court of the existence of a material fact in dispute?

"In *Knight's Appeal*, 19 Pa. St. 493, Chief Justice BLACK, delivering the opinion of the court, says: 'A fact is properly said to be in dispute when it is alleged by one party and denied by the other, and by both with some color of reason. A mere naked allegation without evidence, or against the evidence, cannot create a dispute within the meaning of the law. If it could, a party might stop the distribution whenever he chooses to make a groundless issue. The court was right in refusing the issue.'

"In *Robinson's Appeal*, 36 Pa. St. 83, Justice WOODWARD says: 'It is not enough for a creditor to swear that the judgment which is in his hands was confessed by collusion between the parties thereto, and for the purpose of hindering and delaying certain other creditors, but he must set forth in his affidavit that there are material facts in dispute, and also the nature and character of such facts.' Even under the act of 1836 such an affidavit made and have upon record would have been insufficient. *Dickerson's Appeal*, 7 Pa. St. 258, and the cases therein cited. Much more is it insufficient under the act of twentieth April, 1846, which, instead of granting the creditors an

as matter of right, restricts it to the terms and conditions stated. Where material facts are stated positively, and are shown to be within the parties' knowledge stating them, and it is further shown that they are in dispute, it would then be the duty of the court, if they deemed them material, to award the issue. But when the party does not state facts within his own knowledge, but upon rumor or hearsay, or information derived from others, we think before the court should arrest the distribution and grant the issue the evidence should be laid before the court, so that the court may have facts upon which to determine the propriety of granting or refusing the issue. This principle is fully recognized in the authorities cited, and also in the case of *Christophers v. Selden*, 28 Pa. St. 165, and *Dormer v. Brown*, 72 Pa. St. 404. The cases of *Bichel v. Rank*, 5 Watts, 140, *Trimble's Appeal*, 6 Watts, 133, and *Reigart's Appeal*, 7 Watts & S. 269, were all decided under the act of 1836, and therefore cannot affect the question under the act of 1846. The practice indicated of requiring the facts to be shown to the court before an issue is granted or refused, we think has received the sanction of the supreme court in a number of recent cases, all of which show the wisdom of requiring this preliminary proof before subjecting parties or estates to tedious and expensive litigation. This practice obtains now in the orphans' court, under the several acts of assembly, which are quite as mandatory upon the court, if not more so, than the act of 1846.

"By the forty-first section of the act of fifteenth March, 1832, (Purd. Dig. p. 1476, pl. 20,) 'whenever a dispute upon a matter of fact arises before any register's [now orphans'] court, the said court shall, at the request of either party, direct a precept for an issue to the court of common pleas of the county for the trial thereof in the form hereinbefore prescribed, for the direction of registers, changing such parts thereof as should be changed, and the facts established by the verdict returned shall not be re-examined on any appeal.'

"In *Harrison's Appeal*, 100 Pa. St. 458, tried before Judge ELWELL, whose able opinion was adopted as the opinion of the supreme court, referring to the section cited, the court says: 'This section is imperative in its terms, and makes a request for an issue a matter of right in any case within its purview.' *Cozen's Will*, 61 Pa. St. 196; *Graham's Appeal*, Id. 43; *De Haven's Appeal*, 75 Pa. St. 337.

"The important question with which we have now to deal, is when, within the meaning of the statute, may a dispute be said to arise? Is it whenever facts are alleged by the contestant and suggested by the record, or is it when evidence has been given from which it appears that there is a conflict in the testimony, and a substantial dispute upon material facts? By the thirteenth section of the act in question the register is authorized to direct an issue when a person entering a *caveat* shall allow matter of fact touching the validity of a will. The forty-first section requires that a dispute in matter of fact shall have arisen before the court can be required to direct an issue. Now, if nothing more was intended to be required by the latter section than a specification of facts alleged to be in dispute, it is difficult to understand why the phraseology of the two sections is different. But if we consider that the register is not necessarily learned in the law, we may find satisfactory reason why he may send the case to the court upon an allegation of fact. But the same course of reasoning does not apply to the court, and therefore the law requires that it must appear that a dispute has arisen, before the case can be properly sent to a jury for trial.

\* \* \* The construction of the act of 1832 was under consideration by the court soon after its passage. In 1845, Judge KING, sitting in the register's court in Philadelphia, in which the inquiry was in regard to when a dispute may be said to arise, said: 'The dispute as to facts must arise when the cause is on hearing before the court. That is the time when the court is to judge

whether there are truly any facts in dispute. What a party may call a disputed fact, may, if the court proceeds, never appear in proof, or may be material to the question before the court," etc. This case was an appeal to the court for an issue *devisavit vel non*, to test the validity of the will of Wm. Cameron. The request for the issue was first dismissed upon the ground that it was premature and inadmissible. Afterwards, voluminous testimony was taken, and the application was again made to Judge E. for the issue, based upon the facts as proved before the examiner, who, after full consideration thereof, refused to grant it. The acts of assembly are nearly alike in their requirements as to the manner of granting the issue, and the grounds upon which the court should determine the propriety of awarding or refusing it, that it seems to us this case should settle the propriety of establishing uniformity of procedure in both courts. To the same effect see *Schwilke's Appeal*, 100 Pa. St. 628.

"Applying these principles to the case under consideration, we have an affidavit made upon information, which is vague, uncertain, and inconsistent in the facts stated; not made in conformity with the act of 1846; not supported by a single fact or circumstance shown to the court, upon which we can form an intelligent conclusion as to whether there is a fact in dispute. Ample time has been given, both before the auditor to show payment or non-payment, if such fact existed, and in court upon the rule to show cause. No evidence has been produced that facts exist which are material, involving the merits of the judgments. Nothing has been shown, and we are led to the conclusion that this application is based upon suspicion, or mere allegation. As we are furnished with no facts in dispute upon which we can judicially determine the issue, we are obliged to dismiss the application. At the same time, the parties opposing this issue have shown facts before the court which fully sustain the validity of the judgment, and which, in our opinion, show the consideration thereof. Cross-interrogatories were filed and answered by both Mary A. Mumper and John W. Mumper, which in no manner impeach the integrity of this judgment. This testimony is not contradictory to any evidence in the cause. The only attack upon it is contained in the exceptions made upon information alone.

"As to judgment No. 129, April term, 1883, before the auditor, no claim was made; according to the evidence submitted to us, the lien of this judgment was released as to all the money in court, and also as to any real estate in Huntingdon county, upon which contesting creditors had liens. This judgment, therefore, does not in any manner stand in the way of petitioner's claim. The reasons given, the exceptions to the auditor's report are overruled, the report confirmed, and the rules for feigned issues are discharged, the issues refused."

Whereupon this appeal was taken.

*Myton & Schock, Petriken & McNeil, and Stevens & Owens*, for appellants.

Under the Acts of 1845 and 1846, an issue to try disputed facts is a matter of right by setting forth in an affidavit that there are material facts in dispute with the nature and character of the same. *Souder's Appeal*, 57 Pa. St. 408; *De Haven's Appeal*, 75 Pa. St. 341; *Dormer v. Brown*, 72 Pa. St. 408; *Robinson's Appeal*, 43 Pa. St. 159; *Robinson's Appeal*, 36 Pa. St. 81; *Christy v. Selden*, 28 Pa. St. 165; *Knight's Appeal*, 19 Pa. St. 494.

*R. M. Speer and Geo. B. Orlady*, for appellees.

The affidavit was insufficient to warrant the court in directing an issue. *Dickerson & Haven's Appeal*, 7 Pa. St. 258; *Montgomery's Appeal*, 10 Pa. St. 125.

PER CURIAM. We affirm the decree in this case for reasons stated in the well-considered opinion of the court below. Decree affirmed, at cost of appellant.

## BOWLEY v. CARRON.

(Supreme Court of Pennsylvania. October 3, 1887.)

## JUDGMENTS—FOREIGN—TRANSCRIPT OF RECORD OF JUSTICE OF THE PEACE.

When by the statute of another state the transcript of the record of a justice of the peace filed in a court of common pleas of said state is directed to be treated as a judgment of said court, said judgment, when transferred to another state as the judgment of said court, is entitled to the same faith and credit as a judgment originally obtained in said court, and where the plaintiff declares on a judgment of the foreign court, the production of such a record does not amount to a variance, and the same is admissible in evidence.

Error to court of common pleas, Philadelphia county.

Debt by J. J. Carron against Salmon B. Rowley. The facts are stated in the opinion. Verdict for plaintiff, \$261.69, and judgment thereon, whereupon defendant took this writ.

*Richard C. Dale and Samuel Dickson*, for plaintiff in error.

The judgments of justices of the peace are not within the meaning of the provisions of the acts of congress of May 26, 1790, under article 4 of the constitution of the United States. 1 Greenl. Ev. § 504. The record offered was not of a judgment of the common pleas, but simply a transcript of the docket of a justice of the peace. *Brandt's Appeal*, 16 Pa. St. 343; *Beck v. Church*, 18 Wkly. Notes Cas. 272, 6 Atl. Rep. 57; *Mellon v. Guthrie*, 51 Pa. St. 116; *Lacock v. White*, 19 Pa. St. 495; *Boyd v. Miller*, 52 Pa. St. 481; *Drum v. Snyder*, 1 Bin. 381; *Datley v. Gifford*, 12 Serg. & R. 72.

*T. Elliott Patterson and John F. Keator*, for defendant in error.

A judgment recovered in any state of the Union before a court of competent jurisdiction, upon due notice to the defendant, is not to be regarded as a foreign judgment, but is to be treated as a domestic judgment throughout the United States. Const. U. S. art. 5; *Desty*, Fed. Const. 230; Rev. St. U. S. § 905; *Bawley v. Linah*, 16 Pa. St. 241; *Mills v. Duryee*, 7 Cranch, 481. The record offered was a duly authenticated record of a judgment of the court of common pleas of Cuyahoga county. Rev. St. Ohio, §§ 5377-5379, 5399; 2 Rev. St. Ohio, § 5380; *Sparrow v. Kohn*, 42 Leg. Int. 511, 2 Atl. Rep. 498; *Rogers v. Burns*, 27 Pa. St. 525; *State v. Daily*, 14 Ohio, 91-98; *McCurdy v. Baughman*, 43 Ohio St. 85, 1 N. E. Rep. 93; *Goodrich v. Jenkins*, 6 Ohio, 45; *Sipes v. Whitney*, 30 Ohio St. 69; *Ror. Int. St. Law*, 116.

GORDON, C. J. This was an action of debt, and the plaintiff declared on an exemplification from the court of common pleas of the county of Cuyahoga, state of Ohio. On offer of this exemplification the defendant interposed the objection that the plaintiff had declared upon a judgment obtained by the plaintiff against the defendant in the court of common pleas of Cuyahoga county, and the record offered was of a judgment obtained before a justice of the peace. This objection was overruled and the record admitted. The question, then, that we have before us is the correctness of this ruling. The argument on part of the plaintiff in error assumes that the entry of the justice's transcript in accordance with the Ohio statute did not make it a judgment of that court, for it seems to be conceded that if, under the laws of that state, it is to be treated as a judgment of the common pleas, it must, under the fourth article of the constitution of the United States, be so treated in this state. We must give "full faith and credit" to the public acts, records, and judicial proceedings of the state of Ohio. What, then, was the credit given to these proceedings in the courts of that state? Did the entry of the transcript give it the force of a judgment of the common pleas? If so, it is beyond the reach of collateral inquiry either in that state or this. But to determine this question

we need go no further than the Ohio statute itself. That statute provides the entry of the transcript in the common pleas, and by force of such becomes a lien on the defendant's real estate. It further provides, 5379:) "Execution may be issued on such judgment at any time after the transcript, as if the judgment had been rendered in court, but the remain as provided in the preceding section." From this it follows that "credit" given to an entry of this kind in Ohio is the same as if the judgment had been rendered in the court of common pleas. This determines its value in this state; hence the court below was right in refusing to sustain the defendant's objection, and in admitting the transcript in evidence. The judgment is affirmed.

### THUDIUM v. YOST.

(*Supreme Court of Pennsylvania.* October 3, 1887.)

#### EVIDENCE—PAROL TO VARY WRITTEN AGREEMENT—REQUISITES OF.

A written agreement may be modified, explained, reformed, or altogether negatived by parol evidence of an oral promise or undertaking, material to the subject-matter of the contract, made by one of the parties at the time of the execution of the contract, and which induced the other party to put his name to it. Such evidence must be clear, precise, and indubitable; that is, the witnesses must be found credible, and must distinctly remember the facts to which they testify, and narrate the facts accurately; and their statements must be true.<sup>1</sup>

Error to common pleas, Cumberland county.

Covenant, upon a lease, by A. C. Yost against Jacob Thudium, to deliver possession of the premises, and to pay damages by reason of the failure of defendant to deliver possession of the premises and of the mixed property.

Upon the trial plaintiff offered in evidence a lease dated August 3, 1886, from Jacob Thudium to A. C. Yost, whereby the former leased to the latter a hotel known as the "Mansion House," in the borough of Carlisle, for one year from April 1, 1886, at a rent of \$1,500. Plaintiff also proved that he was going to take possession of the property he was informed by defendant that he had leased it to a Mrs. Wilder, the then tenant, for another year. Plaintiff offered to prove that after the negotiations for the lease had begun before there was any conclusion or agreement of any kind between the parties, Yost came to him, and told him that he had heard that Mrs. Wilder had leased the house for another year, and that he, the defendant, couldn't give him, plaintiff, a lease for that year; that the defendant told him that it was the fact that Mrs. Wilder had the house for another year; that they talked the matter over, and that finally, and before the execution or conclusion of any agreement between the parties, they went together to see Mrs. Wilder; that in the presence of Mrs. Wilder and the plaintiff, Mr. Thudium, the defendant told the plaintiff that he could not make a lease to him unless he first settled with Mrs. Wilder; that she had the house for another year; that they talked the matter over as to how it should be settled; that the plaintiff thereupon agreed, and said that he would conclude a bargain with Mrs. Wilder, he would pay her out, and he would put up \$500 as a forfeit to carry out his agreement; that the plaintiff told him on the same day that he had finally concluded an arrangement with Mrs. Wilder, and she had assented to it; that on the next day of that, believing the plaintiff, he executed this agreement; that the defendant's representations of his having concluded an agreement with Mrs. Wilder were

<sup>1</sup>The rule excluding parol testimony, in an action on a written contract, is intended to prevent the parties to the contract from showing that, either contemporaneously with the execution of the contract, or from establishing by parol the performance of the written contract, or from establishing by parol a preliminary measure, a distinct oral agreement was entered into on some other matter, or from establishing by parol that the performance of the written contract was to depend on some condition. *Michels v. Olmsted*, 14 Fed. Rep. 219. *Mans v. Lindsay*, (Pa.) 6 Atl. Rep. 332, and note, as to the admissibility of evidence to establish a verbal agreement entered into contemporaneously with a written contract.

This is for the purpose of showing that the signature of the defendant to this lease was obtained by false and fraudulent representations. This testimony was admitted under objection by the plaintiff, and its substance is set forth in the opinion.

The plaintiff presented the following point: "The evidence produced by the defendant under the offer to show that plaintiff made fraudulent representations to the defendant, and except for which defendant would not have executed the lease of thirty-first August, 1885, wholly fails to make good the offer under which it was admitted, and, being insufficient in law to avoid the lease or affect the plaintiff's rights thereunder, the court is respectfully asked to strike out all the evidence which was received under said offer, and to instruct the jury to wholly disregard the same. *Answer.* This request is granted. We do not think that the evidence was so clear and precise that Thudium was induced, by reason of the fraudulent representations of Yost, to sign the lease as to justify its submission to you for your consideration in the determination of the rights of the parties to this action." Verdict for plaintiff, \$1,097.88, and judgment thereon; whereupon defendant took this writ.

*F. E. Beltzhoover and Hepburn, Jr., & Stuart*, for plaintiff in error.

This parol evidence is admissible. *Thomas v. Loose*, 6 Atl. Rep. 326; *Spencer v. Colt*, 89 Pa. St. 314; *Phillips v. Melly*, 106 Pa. St. 536; *Walker v. France*, 112 Pa. St. 203, 5 Atl. Rep. 208; *Bown v. Morange*, 108 Pa. St. 75; *Callen v. Lukens*, 89 Pa. St. 134; *Greenawalt v. Kohne*, 85 Pa. St. 369; *Lippincott v. Whitman*, 83 Pa. St. 246; *Graver v. Scott*, 80 Pa. St. 88; *Shughart v. Moore*, 78 Pa. St. 469; *Coal Co. v. McShain*, 75 Pa. St. 238; *McGinity v. McGinity*, 63 Pa. St. 38.

*Landis & Smead, J. M. Weakley, and John Stewart*, for defendant in error.

Parol evidence should not be submitted to a jury for the purpose of showing that a written contract had been obtained by fraud, unless the evidence was clear, precise, and indubitable. *Railroad Co. v. Shay*, 82 Pa. St. 198; *Lippincott v. Whitman*, 83 Pa. St. 244; *Rowand v. Finney*, 96 Pa. St. 197; *Burger v. Dankel*, 100 Pa. St. 118.

STERRETT, J. It clearly appears from the evidence recited in the specification of error that, pending the negotiations between the parties for the lease in suit, plaintiff below was fully informed that the lease of the tenant then in possession would not expire until April 1, 1887; that possession of the premises, before that time, could not be obtained by him or any one else without buying the furniture and unexpired term of the tenant; and that defendant would not lease the premises for a term commencing April 1, 1886, except on the condition that such purchase was made by the new lessee, and carried out in good faith; that on the condition above stated, and with the distinct understanding that plaintiff below had purchased the furniture and outstanding term of Mrs. Wilder, and made a satisfactory arrangement with her for possession on or before April 1, 1886, defendant was induced to sign the lease in controversy; that, while plaintiff below had agreed to buy the furniture and interest of Mrs. Wilder, he had not in fact consummated the purchase, and afterwards refused to carry out, in good faith, his agreement with her, and for that reason she refused to surrender possession of the premises.

Without referring in detail to the testimony of Thudium himself, Mrs. Wilder, Alexander Klink, and others, upon which defendant below relied, it is sufficient to say that if it had been submitted to the jury, with proper instructions, they would have been warranted in finding a state of facts substantially the same as the foregoing,—facts that would have been a complete answer to plaintiff's claim for damages for non-delivery of possession on April

1, 1886. There is no room for any doubt or difference of opinion as to the kind and degree of proof necessary to sustain a defense such as was interposed in this case. Our books are full of cases on the subject, some of the more recent of which are *McGinity v. McGinity*, 63 Pa. St. 38; *Coal Co. v. McShain*, 75 Pa. St. 238; *Shughart v. Moore*, 78 Pa. St. 469; *Graver v. Scott*, 80 Pa. St. 88; *Lippincott v. Whitman*, 83 Pa. St. 244; *Greenawalt v. Kohn*, 85 Pa. St. 369; *Callan v. Lukens*, 89 Pa. St. 134; *Phillips v. Meily*, 106 Pa. St. 536; *Spencer v. Colt*, 89 Pa. St. 314; *Bown v. Morange*, 108 Pa. St. 69; *Walker v. France*, 112 Pa. St. 203, 5 Atl. Rep. 208; *Thomas v. Loose*, 6 Atl. Rep. 326.

In *Bown v. Morange*, *supra*, it is said: "No principle has been better settled, by a long line of decisions, than that parol evidence is admissible to show a verbal contemporaneous agreement which induced the execution of a written obligation, though it may have the effect of varying or changing the terms of a written contract;" or, as the same idea is expressed in *Walker v. France*, *supra*, "a written agreement may be modified, explained, reformed, or altogether set aside, by parol evidence of an oral promise or undertaking, material to the subject-matter of the contract, made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name to it." But while parol evidence is admissible to establish a contemporaneous oral agreement which induced the execution of a written contract, though it may change or reform the instrument, such evidence, in the language of all the cases, must be "clear, precise, and indubitable." By these words it is meant, as defined in *Spencer v. Colt*, *supra*, that "it shall be found that the witnesses are credible; that they distinctly remember the facts to which they testify; that they narrate the details exactly, and that their statements are true. Absolute certainty is out of the question." The difficulty is not so much in the principles themselves, as in their application to particular cases.

An examination of the evidence on which plaintiff in error relies has satisfied us that, if believed by the jury, it was quite sufficient to have warranted a verdict in his favor, and hence the learned judge erred in not submitting it to the jury.

Judgment reversed, and a *venire facias de novo* awarded.

#### REAMEY v. BAYLEY, Trustee.

(*Supreme Court of Pennsylvania. October 3, 1887.*)

##### MARRIAGE—POST-NUPTIAL CONTRACT—BOND IN PURSUANCE OF, WHEN ENFORCEABLE.

A bond, given by a husband in pursuance of a post-nuptial agreement between him and his wife, which agreement stipulated that the bond was only to be due on the contingency of the husband not treating his wife kindly and faithfully, is not void, and, upon the maltreatment of the wife by the husband, payment of the bond may be enforced by an action thereon.<sup>1</sup>

Error on common pleas, Blair county.

Debt by William C. Bayley, trustee for Mary E. Reamey, against Daniel K. Reamey, on a certain bond. Upon the trial, before DEAN, P. J., the following facts appeared:

Daniel K. Reamey and Mary E. Gardner, intending to enter into the marriage relation, on the fifteenth of November, 1877, executed an antenuptial agreement, wherein it was stipulated that she was to receive \$4,000, with interest from the date of his decease, out of his estate, which amount he was to devise and bequeath to her. This, it was further stipulated, was to be in full of her claim for dower or distributive share in his real and personal es-

<sup>1</sup> As to the validity of contracts entered into between husband and wife, see *Valensin v. Valensin*, 28 Fed. Rep. 599, and note.

tate. The parties were shortly afterwards married, and she went to live with him at his home, the American Hotel, in Hollidaysburg, of which he was proprietor. Unhappy differences afterwards arose between them, resulting in a separation, and to the January term, 1881, of the common pleas of Blair county she filed her petition praying a divorce *a mensa et thoro*, on the ground of alleged intolerable treatment. On the twenty-sixth November, 1881, the parties became reconciled, and entered into another agreement, wherein Daniel K. Reamey was the party of the first part, and William C. Bayley, trustee for Mrs. Mary E. Reamey, and Mrs. Mary E. Reamey, were the other parties. This agreement stipulated that the suit by her for divorce should be discontinued, which was done. Also that the first or antenuptial agreement of fifteenth November, 1877, should be so altered that the \$4,000 therein mentioned should read \$10,000. Also that Reamey should execute a bond, secured by a mortgage on a certain farm, for the purpose of securing to Mrs. Reamey the payment of the \$10,000 at his death, in case she survived him, "and also for the purpose set forth in article four (4)" of the agreement. Article 4 stipulated that each should behave towards the other kindly and faithfully; and in case he behaved otherwise towards his wife, so that her life should by his conduct become miserable and intolerable, in that contingency the bond and mortgage were to become immediately due and payable to the trustee for the absolute use of Mrs. Reamey. It further provided that Mrs. Reamey should alone and exclusively determine the happening of such contingency, and the bond and mortgage were to bear interest from the happening of the contingency. It was further stipulated that, in case the bond was collected, Mrs. Reamey was not to be entitled to any further share in his estate in case she survived him. The bond and mortgage were duly executed, and, as before stated, she returned to live with him in her former home. They continued to live together until twenty-second June, 1885, when she left his house. On said date a written notice was served on Mr. Reamey that she had left his house for the reason that his treatment of her for a long time past had been so cruel that she could bear it no longer. At the times she left Reamey was, and had been for some days, absent, and was not aware of her purpose to leave. Suit on the bond was brought twenty-fifth June, 1885. Evidence of Mr. Reamey's cruel treatment of his wife was offered.

The defendant requested the court to charge the jury as follows: "(1) The agreement of the twenty-sixth of November, 1881, upon which the bond in suit is founded, is a post-nuptial contract, and is void. If the agreement is void, there can be no recovery on the bond. *Answer.* This point is denied. (2) The fourth article of the agreement having stipulated that the bond was only to be due and payable on the contingency of the defendant not treating his wife kindly and faithfully, such maltreatment was not a sufficient consideration for the bond's falling due in the defendant's life-time, and no action can now be sustained on the bond. *A.* This point is denied. (3) The stipulation in the fourth article, that defendant's maltreatment of his wife should render the bond due and payable in his life-time, is against public policy, and void, and no action can now be sustained on the bond. *A.* This point is denied on the authority of the case we have mentioned, (*Fisher v. Filbert*, 6 Pa. St. 61.) (4) A post-nuptial contract, as in this case, stipulating for the payment to the wife of her dower in defendant's estate in his life-time, upon a rupture of friendly relations, is void, and cannot be enforced in an action at law. *A.* This point is denied. (5) From the fact that the husband and wife agreed upon a trustee to whom the bond was to be due and payable, it is not of greater binding effect, as the parties, being in coverture, cannot enlarge their powers to contract with each other in regard to the wife's share in her husband's estate. *A.* This point is denied. (6) The *cestui que* plaintiff and the defendant, being man and wife, could not, through the intervention of a trustee, enter into an executory contract for the payment of money to

the wife which was not her own estate or property. A. This point is denied. (7) It is for the court to construe the meaning of the fourth article of agreement, and, if it was a provision for the payment of money to the wife for her maintenance upon the contingency of a future separation, it is affirmed, and there can be no recovery on it. A. This point is affirmed, but we do not construe the fourth article as a provision for maintenance upon the contingency of a future separation. On the contrary, it is upon a contingency which is to be found by you from the evidence in the case, as we have already instructed you. (8) No suit can be entertained by the wife against the husband except for the causes and in the manner provided in the act of the 11th of April, 1856, and the act of the 15th of April, 1851, providing for the entering of judgments against the husband for her money. This suit was not brought to recover her 'property' in the sense meant by the act of 1851, and therefore the suit cannot be sustained. A. This point is denied. (9) The parties to this suit, Mrs. Mary Reamey and Daniel K. Reamey, being in error on the twenty-sixth of November, 1881, could not at that time avail themselves of the provisions of the act of the 11th of April, 1856, so as to appoint a trustee, and agree that a suit should be brought against the defendant upon the happening of a future contingency in his life-time to recover the amount which it was at the same time agreed was to be her share in his estate at his death; and therefore this suit cannot be sustained. A. This point is denied.

The court charged the jury, *inter alia*, that "while that case stands (*Filbert v. Filbert*) as the law this contract must be treated as a valid one. You therefore turn your attention to the evidence bearing on this issue."

Verdict and judgment for plaintiff, \$10,000; whereupon defendant took a writ, assigning for error the above answers to his points, and extracts from the charge.

*Aug. S. Landis* and *W. I. Woodcock*, for plaintiff in error.

The post-nuptial contract was void, and the bond based upon it was likewise void. *Campbell's Appeal*, 80 Pa. St. 305; *Steer v. Steer*, 14 Serg. & R. 379. Furthermore, this is an effort to collect the widow's share in the husband's estate in his life-time. Contracts looking to a separation in the future or dependent upon some contingency, are void, are against the policy of the law, and will not be enforced. *McKenna v. Phillips*, 6 Whart. 576; *Hutton v. Hutton's Adm'rs*, 3 Pa. St. 100; *Dillinger's Appeal*, 35 Pa. St. 362; *Hitt v. Hitt's Appeal*, 54 Pa. St. 114; Tyler, Inf. 329; 1 Smith, Lead. Cas. 620; Add. 1384; *Ritter v. Ritter*, 31 Pa. St. 396; *Miller v. Miller*, 44 Pa. St. 170.

*Samuel S. Blair*, for defendant in error.

The agreement and bond given in pursuance thereof were valid. *Holder's Appeal*, 105 Pa. St. 38; *Wilson v. Wilson*, 14 Sim. 405; *Barr v. Railway Co.*, 1 H. L. Cas. 40; *Hart v. Hart*, 18 Ch. Div. 670; *Smythe v. Smythe*, L. R. 18 Q. B. 544; *Fisher v. Filbert*, 6 Pa. St. 61.

PER CURIAM. An examination of this case fails to reveal to us any error committed by the court below. The charge and answers to the points assigned to be accurate, legal, and fair, and the argument of the learned counsel for the plaintiff in error has failed to convince us of the rectitude of all or any of the assignments of error. The judgment is affirmed.

KUHN and others v. WARREN SAVINGS BANK, Garnishee.

(Supreme Court of Pennsylvania. October 3, 1887.)

1. JUSTICE OF THE PEACE—JURISDICTION—ATTACHMENT—EXECUTION.

A justice of the peace in Pennsylvania has jurisdiction to the extent of \$500 in cases of attachment execution.

**2. SAME—APPEAL—EFFECT OF.**

An appeal from the judgment of a justice cures all irregularities in the proceedings before him, and the case on appeal is heard *de novo*.

**3. NEGOTIABLE INSTRUMENTS—CHECK—PRESENTATION AFTER GARNISHMENT.**

An attachment execution was served on A., a bank, as garnishee, on October 23, 1886, at which time there was a sum of money on deposit with A. to the credit of the defendant. On October 29, 1886, a check was presented, given by defendant on October 23, 1886. *Held*, that the holder of the check had no claim or lien on the fund in the hands of A.

**4. GARNISHMENT—CLAIM OF EXEMPTION—WHEN IN TIME.**

A claim of exemption made by defendant at the time the garnishee in an attachment execution files an answer, is in time.

Error to court of common pleas, Warren county.

Appeal by J. R. Kuhn & Co. from the judgment of a justice entered in favor of the Warren Savings Bank, garnishee, in an action against S. E. Bickel and G. T. Pryor.

The parties agreed upon the following facts as a case stated: "That on the seventeenth of March, 1884, a judgment was obtained by the plaintiffs before GEORGE O. CORNELIUS, Esq., J. P., of said county, against the defendants, as above named, for the sum of \$192.14, and costs, amounting now to \$222.30, and costs; that on the twenty-seventh of October, 1886, an attachment execution was issued by said justice upon said judgment, and on same day served upon Warren Savings Bank, as garnishee, and on the twenty-eighth of October, 1886, said attachment was served on the defendant, G. T. Pryor, but no service was made on said Bickel; that on the same day interrogatories were likewise issued, and served upon said garnishee and on said defendant Pryor on the twenty-eighth of October, 1886; that on the twenty-third of October, 1886, and up to the date of the service of said attachment on said garnishee, there was on deposit in said bank (the garnishee) to the individual credit of said Pryor the sum of \$214.02, and there was no money on deposit to the credit of said firm of Bickel & Pryor or said Bickel individually; that on the twenty-ninth of October, 1886, two days after the service of said attachment on said garnishee, and while said sum of \$214.02 was still in said bank, a check dated and given October 23, 1886, *bona fide*, and for good consideration, payable to the order of W. P. McMurtrie for \$200, and signed by said G. T. Pryor, and indorsed by said McMurtrie to John Benner, and by said Benner to Citizens' National Bank of Warren, was presented to said bank, the garnishee, by said Citizens' National Bank on October 29, 1886, for payment, and the same was paid to said Citizens' National Bank by said garnishee; that said interrogatories were answered by said garnishee on the fourth of November, 1886, and said answer was filed with said justice on said day; that said defendant, when said answer by said garnishee was filed, gave notice to said garnishee of his claim to the benefit of the exemption act of April 9, 1849, which is duly set forth in the said answer to said interrogatories, and at the time of filing said answer the justice told the garnishee and the defendant that the exemption could not be claimed for him by the garnishee, whereupon the defendant's attorney and the defendant claimed the benefit of the said exemption act for said defendant, and gave notice to the justice of said claim; that at the return of said attachment the plaintiffs did not appear and nothing was done by the justice; that on the sixth of November the plaintiffs appeared before the justice, and asked for judgment against the garnishee, whereupon said garnishee was notified to appear on the fifteenth of November, at 3 P. M., and upon that day the attorney for the plaintiffs and garnishee appeared, and attorney for garnishee claimed that the justice had no jurisdiction, for the reason that the amount involved in said attachment exceeds \$100. If the said justice had jurisdiction to issue an attachment for said sum, and if, upon the foregoing facts, the court should be of the opinion that the plaintiffs are entitled to judgment, then judgment to

be entered in favor of the plaintiffs against the garnishee for two hundred fourteen (\$214) dollars, and costs. Otherwise judgment for said garnishee and against said plaintiffs, for costs, with right to a writ of error to the party. Neither party hereby waives objection as to materiality or relevancy of facts herein agreed upon."

Upon these facts, the court, in the following opinion by CUMMIN, P. J., entered judgment for the garnishee:

"After a careful examination and consideration of the law and facts of the case, the following conclusions are arrived at on questions involved:

"(1) Had the justice of the peace jurisdiction in the attachment execution proceedings, the amount in controversy being above \$100? The statute of the fifteenth April, 1845, (P. L. 459; Purd. Dig. 999, p. 125,) whereby attachment execution process was extended to justices of the peace, contains no words limiting it to sums not exceeding \$100, nor to any sum whatever. At the time this statute was approved the justices had no jurisdiction where the amount in controversy was not above \$100; afterwards this was increased to \$300. The statute extending this process to the justices is equally consistent with the \$300 jurisdiction as it was with the \$100. In *Jacoby v. Shafer*, 105 Pa. 610, the enlarged jurisdiction of justices of the peace was held to embrace proceedings by attachment relating to fraudulent debtors. For like reasons I am of opinion it embraces proceedings by attachment execution.

"(2) As to irregularities in the proceedings before the justice of the peace. This case comes into court on appeal by which all irregularities are cured. The statute of March 10, 1810, (Purd. Dig. 964, p. 103,) on this subject, is as follows: 'Provided, that upon any such appeal from the decision of the justice of the peace to the court of common pleas, etc., the cause shall be decided in the court on its facts and merits only, and no deficiency of form or substance in the record or proceedings returned, nor any mistake in the form or name of the action, shall prejudice either party in the court to which the appeal shall be made.'

"(3) Does the check given by the defendant to McMurtrie, *bona fide*, and for a good consideration, October 23, 1886, operate as an equitable assignment *pro tanto* of the defendant's funds in the hands of the garnishee, in view of the facts that the attachment execution, at the suit of the plaintiffs, Kuhn & Co., was served on the garnishee October 28, 1886, and said check was presented to the garnishee for payment until October 29, 1886, which was the first notice the (drawee) garnishee had of its existence? The legal question here involved has been the subject of much controversy in the court. Many fine-spun theories have been woven, and hair-splitting distinctions made, and, of course, by such processes it was hardly to be expected that uniformity could be reached. Fortunately it will not be the duty of this court to attempt to bring harmony out of such discord. The respective rights and duties of attaching creditors, garnishees, and check-holders under like circumstances, are reasonably well settled in adjudicated cases. As to the check-holders: In *Saylors v. Bushong*, 100 Pa. St. 27, it is regarded as settled that the holder of a check cannot maintain an action in his own name against the drawees, though they have sufficient funds of the drawer, if they refuse to accept it. A check may be revoked by the drawer before presentment, etc. As to the garnishee, THOMSON, J., in *Bank v. Munford*, 3 Grant, Cas. 232, declares: 'It is true a garnishee is bound to make every legal defense that a claimant of the fund may make.' As to the attaching creditor: An attaching creditor stands in the shoes of the debtor. *Patten v. Wilson*, 84 Pa. St. 299. An attachment execution served, wherever it lies, places the attaching creditor in the same position to the garnishee as that occupied by the debtor before the attachment was laid. An attachment is an equitable assignment of the thing attached, a substitution of the creditor for the debtor, and to the latter's right against the garnishee. An attachment places a judgment creditor in the shoes of

debtor, with all his rights and privileges, just as he stood at the date of the service of the attachment. *Reed v. Penrose*, 2 Grant, Cas. 472, etc.

"The rights of the respective parties must be ascertained as of the time when the attachment execution was served on the garnishee, viz., October 28, 1886. On that day the garnishee had in its hands \$214.02 of the funds of the defendant. On that day the attachment execution for \$222.30 was served on the garnishee at the suit of the plaintiffs. This, by operation of law, worked an equitable assignment, as of that date, to the plaintiffs, of all the defendant's funds in the hands of the garnishee, as the amount was less than the claim of the plaintiffs. As to plaintiffs, the judgment creditor on that day stood in the shoes of the debtor, defendant, with all his rights and privileges, of all of which the garnishee then had notice, and was bound to know. The service of the writ on the garnishee was an appropriation, by operation of law, of the whole fund of the defendant in the hands of the garnishee to the claim of the attaching creditor. On that day the garnishee had no notice of the check previously given, and had in no way obligated himself to pay such check. The plain duty of the garnishee, then, was to hold the fund until the rights of the judgment creditor thereto could be adjudicated. But we are not without authority on the main question. After a collation of all the authorities, this conclusion is arrived at in 2 White & T., Lead. Cas. Eq. pt. 2, p. 1653, (4th Amer. Ed.): 'Agreeably to the weight of authority, a check is, essentially, a bill of exchange, and will not, therefore, operate as an equitable transfer or appropriation.'

"In *Jordan's Appeal*, 10 Wkly. Notes Cas. 37, Mr. Justice STERRETT, in delivering the opinion of the court, says: 'It is well settled that a check or draft, without more, is neither a legal nor equitable assignment or appropriation of a corresponding amount of the drawer's funds in the hands of the drawee. It gives the payee no right of action against the drawee, nor any valid claim to the funds of the drawer in his hands. If, before acceptance or payment of the draft, the drawer executes a voluntary assignment for the benefit of creditors, the funds in the hands of the drawee pass by the assignment, as assets of the insolvent's estate, to his assignees in trust for creditors.' See, also, cases cited in this opinion. It seems clear, therefore, that in the case at bar the holder of the check has no sort of lien or claim of any kind on the funds in the hands of the garnishee, and therefore has no rights which need be considered in the further investigation of this case.

"(4) Is the defendant's claim for the benefit of the exemption law valid? This question must be determined as of the time and under the circumstances existing where the claim was made. October 27, 1886, attachment execution issued. Same day served on garnishees. October 28, 1886, attachment execution served on defendant. Same day interrogatories filed and served. November 4, 1886, answers filed. Same day defendant claimed the benefit of the exemption laws, and gave notice of his claim to the justice of the peace. In an attachment execution, the defendant's claim of exemption relates only to what is attached in the hands of the garnishee. *Landis v. Lyon*, 71 Pa. St. 473. An attachment execution was issued from a justice, and a rule taken at the same time on garnishee to answer interrogatories then filed. On the return day of the attachment the defendant claimed the \$300 exemption. Held, to be in time. *Yost v. Heffner*, 69 Pa. St. 68. See, also, to same effect, *Landis v. Lyon*, *supra*; *Bittinger's Appeal*, 76 Pa. St. 105; *Loan Ass'n v. Railroad Co.*, 102 Pa. St. 220. The amount attached in the hands of the garnishee was less than \$300; so, if the defendant's claim was a valid one, judgment should have been entered for the garnishee. The defendant had a right to make the claim, and he made it in a proper way and in proper time.

"But it is claimed that the rule laid down in *Bowyer's Appeals* 21 Pa. St. 210; *Garrett's Appeal*, 32 Pa. St. 160; *Shelly's Appeal*, 36 Pa. St. 373,—viz.: 'That a debtor cannot waive his right to the \$300 in favor of a junior lien

creditor,'—applies to this case, because the check-holder has or may get this money in the hands of the garnishee if the defendant's claim for exemption is sustained. It seems to me there are many reasons why the rule just stated does not apply to this case. The check-holder is not a party to this record, and in no event can the whole or any part of the fund in controversy be awarded to him in this case. The check-holder is not a lien creditor. He has no lien or claim of any kind on the fund, nor has he any claim or right of action against the custodian of the fund, the garnishee. Nor is it of any importance, in determining the rights of the parties, what the garnishee has done with the fund; as the unauthorized acts of the garnishee cannot prejudice or prevent the defendant's lawful claim for the benefit of the exemption. When the justice entered judgment for the garnishee he thereby awarded to the defendant the benefit of his claim for exemption, and in this, it seems to me, he was clearly right.

"And now, February 26, 1887, judgment for the Warren Savings Bank, garnishee, and against the plaintiffs, J. R. Kuhn & Co., for costs, with right to a writ of error to either party."

Whereupon plaintiffs took this writ.

*Samuel T. Neill*, for plaintiffs in error.

The justice had jurisdiction in attachment execution beyond \$100. Act July 7, 1879, P. L. 194. The proceedings were regular. *Shaffer v. Wilson*, 1 Chest. Co. Rep. 161; *Strouse v. Becker*, 38 Pa. St. 190. By the attachment, plaintiffs acquired a lien on the fund. *Baldwin's Appeal*, 86 Pa. St. 483; *Roig v. Tim*, 103 Pa. St. 117; *Boyer's Estate*, 51 Pa. St. 432. The holder of a check has no claim against the bank on which it is drawn, and cannot maintain a suit against the drawee. *Saylor v. Bushong*, 100 Pa. St. 27. Whatever a debtor does not claim for himself or his family, he leaves in the general fund under the control of the court to be distributed among those who are legally entitled to it. *Bowyer's Appeal*, 21 Pa. St. 210; *Shelly's Appeal*, 36 Pa. St. 373; *Garrett's Appeal*, 32 Pa. St. 160. The claim was too late. *Rush v. Swope*, 3 Leg. Gaz. 221; *Bavi v. Steinman*, 52 Pa. St. 423. The defendant having transferred his right to the fund by the check, there was nothing on which the claim could operate. *Gilleland v. Rhodes*, 34 Pa. St. 187; *Emerson v. Smith*, 51 Pa. St. 90.

*Freeman & Trunkey*, for defendant in error.

The claim of exemption was properly made, and in time. *Yost v. Heffner*, 69 Pa. St. 68. The check operated as an equitable assignment *pro tanto* of the fund. 2 Daniel, Neg. Inst. (3d Ed.) § 1638.

STERRETT, J. An examination of the record satisfies us that the judgment entered on the case stated is correct; and, for reasons given in the opinion of the learned judge of the common pleas, it should be affirmed.

#### HUFFMAN v. IAMS and another, Ex'rs.

(*Supreme Court of Pennsylvania*. October Term, 1887.)

NEGOTIABLE INSTRUMENTS—FROM FATHER TO SON—CONSIDERATION—BURDEN OF PROOF.

Where promissory notes were given by a father to his son, who was also his trustee under an assignment for benefit of creditors, held, that the evidence disclosed such a confidential relation between the parties as threw the burden of proving the consideration for such notes upon the son.

Error to court of common pleas, Greene county.

The plaintiff had brought suit in the trial court against the executors of his deceased father upon three promissory notes, dated (1) October 10, 1878, for \$500; (2) April 8, 1879, for \$444.96; and (3) November 29, 1881. Upon the

last only he recovered judgment, and from the adverse verdict of the jury upon the two others he appealed. The notes appeared to have been given when the father was upwards of 75 years of age, were not witnessed, the evidence did not show that any one was present when they were executed, and their existence was not disclosed to other members of the family until after the father's death. He had in 1877 assigned his estate, for the benefit of his creditors, to plaintiff and a co-trustee, who managed it until 1883; and in plaintiff's verified accounts no disclosure was made of the notes, although some portion of the consideration was alleged to have been services rendered in connection with the father's farms.

Upon the trial the court admitted evidence tending to show that deceased had signed and sealed the notes; that he lived, during the six years of the assignment, with the family on the home farm; saw the work going on, and what the plaintiff did there; acquiesced in the accounts filed by the assignees, —showing, as plaintiff contended, that, although deceased had given the note for \$444.96, he must have known that it did not embrace any of the commissions charged against him in the accounts; that the notes were ratified by the absence of any requirement in his will that plaintiff should surrender them before receiving his share, and, by the release of the assignees, the confirmation of their accounts, and the reconveyance to the assignor; that for the first two years of the assignment the plaintiff lived at and managed the home farm; that the account of the assignees showed that the plaintiff for two years' services only charged \$39.91, which, he contended, could not have paid him for his time, labor, and commissions; and that deceased made his will after the notes in suit were given by him, which will, and the probate thereof, was in evidence. As to the note for \$500, evidence was also admitted tending to show that deceased started out in the first place to give his children about \$500 apiece; that he advanced one son \$500, gave him some stock and a farm of about 140 acres of land; that he had paid debts for other sons; that, by his will, he gave to two of his sons and one daughter \$1,000 "in addition to what he had already given" to each of them, to another daughter \$500 "in addition to what he had already given her," (besides the \$500 given to her daughter,) and also gave to each of his children, including those before referred to, an equal share in the residue of his estate,—thus showing, as the plaintiff contended, by the very terms used in the special bequests to said last-named legatees, that he had made gifts and advancements in his lifetime to each of them.

The offers of evidence on the part of the plaintiff, referred to in the opinion, were as follows:

"(1) We propose to show by the witness that from March 30, 1877, until, I believe, the sixth day of February, 1883, or thereabouts, James Huffman, the plaintiff, one of the assignees for the benefit of the creditors of John Huffman, [the deceased,] had the almost exclusive management of the property, real and personal, of John Huffman; that in addition to making sales of real estate and personal property, and paying the debts of John Huffman, he carried on farming operations on the home place,—had it done,—for the purpose of raising money for the payment of the debts of John Huffman; that he did work himself upon the farm, had the management of the farm, the stock, and the whole assigned estate; that during the first two years after the assignment, or perhaps longer, he lived at the house of John Huffman, and did the work and services already spoken of; that this work and management was done with the knowledge and consent of John Huffman, and was approved by him; that in said work and management the plaintiff rendered valuable services for the said John Huffman, which his share of the commissions set forth in the account failed to pay, for the purpose of showing, in connection with other evidence, a consideration for the note marked 'Exhibit No. 2,' being the note for \$444.96, and for the purpose of repelling the allegations of the defendants,

—the allegations and any evidence of the defendant that the plaintiff formed for the said John Huffman no such services.

"(2) The plaintiff renews the offer just made, and proposes to prove in addition thereto, that the co-assignee of John Huffman directed the plaintiff to run the farm, and do the work stated in the foregoing offer, for the purpose of raising money with which to pay the debts of John Huffman, and that the commissions charged in the account, as the plaintiff's share thereof, were wholly insufficient to compensate the plaintiff for the work and services which he did for the said John Huffman during a period of near six years, and that the commissions charged in the account were only on the money passing through their hands, and did not include the services and work upon the farm. This, for the purpose of showing and enabling the jury to infer from such evidence that the note in suit for \$444.96, marked 'Exhibit No. 2,' was given by the said John Huffman for such labor and services on the part of the plaintiff not compensated or paid for by his share of the commissions."

"(3) I wish to show by the witness William P. Reese that at the time this arrangement was made for paying the judgment of James Huffman in Washington county, or about that time, that plaintiff spoke of having advanced to his father that he had received from his father for work and labor on the farm and for his services. This, for the purpose of showing that there was such a consideration, and that the assignees had notice of it before they settled the account, and that the assignees had notice of it before they settled the account, for the further purpose of showing a consideration for the note for \$444.96, marked 'Exhibit No. 2,'—this having occurred in the settlement of the business of the estate, and in the life-time, of John Huffman."

"(4) We propose to show by the witness on the stand, and by other evidence, that John Huffman during his life-time was possessed of a large estate in lands and other property; that from time to time he made gifts and advancements of lands, stock, and money, and paid debts to a large amount for his children. This, for the purpose of showing that the other children of John Huffman were advanced and received from him property, money, and in an amount greater than that given to the plaintiff, James Huffman, and that the plaintiff received from him an amount greater than the debts paid for the plaintiff, including the note for \$500 now in suit, for the purpose of showing that the plaintiff has received from the estate of John Huffman no more than his share, and no more was intended for him by the said John Huffman; and for the further purpose of showing a consideration for the note for \$500."

The questions involved in the plaintiff's assignments of error were stated by the defendant: "(1) Are notes given by a *cestui que trust* to a trustee during the existence of the trust relation to be treated as constructive frauds, and the burden of proof cast upon the trustee that the notes were obtained; that the trustee, in obtaining them, made no improper use of confidence reposed in him; and that his *cestui que trust* was fully informed when he gave the notes, of all the facts necessary to enable him to act intelligently? (2) Was there sufficient evidence adduced upon the trial of this case to warrant the court in submitting to the jury whether the state of law required by the foregoing rule of law existed at the time either of the notes in controversy was given? (3) Was the evidence contained in plaintiff's case and rejected by the court, sufficient within itself, or in conjunction with the evidence admitted upon trial, to establish the facts required by the foregoing rule of law?"

*Wyly, Buchanan & Walter and James & Barb*, for defendants in error.

PER CURIAM. This case is ruled by *Darlington's Appeal*, 86 Pa. St. 100. There was undoubtedly such a confidential relation between James Huffman and his father, John Huffman, not only as father and son, but as one of the assignees of his father, as threw upon him the burden of proof of showing a consideration for the notes in question, and the court was right in its

structing the jury. Nor can we see in the offers of evidence anything which tended to show such consideration, hence the court did well in rejecting them. It follows that the third point of the defendants was properly affirmed. The judgment is affirmed.

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LEONARD v. LEONARD.

(*Supreme Court of Pennsylvania.* October 3, 1887.)

**ERROR, WRIT OF—REVIEW BY SUPREME COURT—DISCRETION OF COMMON PLEAS.**

The supreme court cannot review the exercise of the lawful discretion of the court of common pleas in refusing to allow the acknowledgment of a sheriff's deed, and setting aside the sheriff's sale..

Error to common pleas, Juniata county.

Exceptions to acknowledgment of a sheriff's deed of real estate of Samuel Leonard, sold upon a judgment obtained against him by Reuben Leonard.

The facts are sufficiently stated in the following opinion of BARNETT, P. J.:

"It appears from the auditor's report in the assigned estate of Samuel Leonard, confirmed on the sixteenth December, 1884, that Samuel Leonard made a deed of voluntary assignment for the benefit of creditors to Reuben Leonard, on the first day of December, 1874; that Elizabeth Leonard commenced a proceeding in divorce *a mensa et thoro* (as also appears from the exceptions filed in this case) to No. 11, September term, 1875, and obtained a decree in her favor on the sixteenth August, 1877, and awarding her alimony at the rate of \$240 per annum, payable quarterly. It also appears from said auditor's report, and the exceptions filed in this case, that Reuben Leonard entered a judgment note against Samuel Leonard for \$1,065.79 to No. 70, December term, 1876, subsequently revived to No. 23, December term, 1883; and upon this latter judgment the sale of the real estate was made by the sheriff to Reuben Leonard as a lien creditor; and this sheriff's sale and sheriff's deed is now excepted to by the said Elizabeth Leonard, because the real estate so sold is the same real estate conveyed as aforesaid by said deed of assignment; and the alimony of the said Elizabeth Leonard has not been paid, except to the extent of \$188.58. It appears from the said auditor's report that all of the debts of Samuel Leonard in existence at the date of the said deed of assignment have been paid by said assignee; and, so far as known, the only unpaid indebtedness of said assignor consists in the alimony due his wife, and the judgment entered in favor of Reuben Leonard. Neither of these debts were liens upon the real estate of said assignor at the date of the assignment, and we are unable to see how either became liens subsequently thereto. The act of fourth May, 1864, (Purd. 123, pl. 24,) provides that when all the claims upon the assigned estate have been paid, 'the said court may order and direct the assignee to reconvey to the assignor all the assigned estate remaining in his hands and possession, and all outstanding interest in the assigned estate; and the deed of reconveyance shall be acknowledged in open court, and entered among the records thereof; and thereupon the said estate shall be holden free and discharged from any and all the trusts of said assignment.' A reconveyance without either notice to creditors or such authority from court is wholly inoperative. 'This is the only statutory provision for reconveyance of the assigned estate, and it cannot be legally done in any other way, certainly not without the consent of all the *cestuis que trust*. It is not pretended that such assent was given in this case.' *Golden's Appeal*, 1 Atl. Rep. 660. The present is an attempt to circumvent the force and effect of the act of fifteenth April, 1845, relating to the allowance of alimony, and the security for its payment, (Purd. 617, pl. 26;) and to obtain an undue advantage in favor of the plaintiff, which ought not to succeed. Exceptions sustained."

Whereupon Reuben Leonard took this writ.

*Atkinson & Jacobs*, for plaintiff in error.

The judgment, when entered, bound all the interest that Samuel Leonard had in the land sold, and a reversionary interest was secured to him by the deed of assignment itself. *Carkhuff v. Anderson*, 3 Bin. 4; *Pugh v. Good*, 3 Watts & S. 56; *Williams v. Downing*, 18 Pa. St. 60; *Lynch v. Dearth*, 2 Pen. & W. 101; *Westcott v. Edmunds*, 68 Pa. St. 35; *Bacon's Appeal*, 57 Pa. St. 504; *Rife v. Geyer*, 59 Pa. St. 396; *Kay v. Scates*, 37 Pa. St. 40. This was not a matter of discretion, but is a final judgment. *Pontius v. Nesbit*, 40 Pa. St. 309; *Jackson v. Morter*, 82 Pa. St. 291. A writ of error, and not an appeal, lies in such a case. *Hoffa's Appeal*, 82 Pa. St. 297.

*Robert McMeen*, for defendant in error.

The action of the court was a matter in its discretion, and is not the subject of a writ of error. *Cumming's Appeal*, 23 Pa. St. 511; *Rees v. Berryhill*, 1 Watts, 263; *Sloan's Case*, 3 Watts, 194. Defendant in error relied upon the opinion of the court as fully sustaining the decree entered.

PER CURIAM. While we do not by any means approve the reasons given by the learned judge of the court below for setting aside the sheriff's sale, and think it would have been better to have allowed the acknowledgment of the sheriff's deed, and thus have permitted the judgment creditor to have tested his right by an action of ejectment, yet, as the court, in setting aside the sale, did but exercise its lawful discretion, we cannot review that discretion on a writ of error. The writ is quashed.

#### BATES v. WYNN, for Use, etc.

(*Supreme Court of Pennsylvania*. October 3, 1887.)

#### INTEREST, RECOVERY OF—AGREEMENT—TENDER OF PRINCIPAL.

A., in June, 1880, sold real estate to B., who gave a judgment note for a balance of the purchase money. Upon a *scire facias* to revive the lien of this judgment, B. pleaded that the amount due on it should not draw interest from the time it fell due until about March 5, 1884; that at the time of the purchase there were certain incumbrances thereon, (about equal to the amount of the judgment,) and that it was agreed that B. should retain enough of the purchase money to protect him from such incumbrances. The plea averred a legal tender of payment of the principal of the judgment about March 5, 1884, and a demand for a removal of the incumbrances; that on October 10, 1885, the incumbrances having been removed, the principal of the judgment was paid to A. *Held*, that these facts were insufficient to prevent judgment for the interest on the amount of the note from June 1, 1880, to March 5, 1884.

Error to common pleas, Warren county.

*Scire facias* to revive judgment by W. P. Wynn, for use of G. B. Webber, against William Bates and W. P. Wynn. To the *scire facias* the defendant filed a plea, the substance of which is stated in the opinion of the court. To this plea plaintiff demurred, averring that the plea was not sufficient in law to prevent plaintiff from recovering interest on the amount of the judgment from June 1, 1880, to date of payment.

After argument, the court sustained the demurrer, filing the following opinion:

"Defendant, Bates, purchased of the legal plaintiff real estate. Deed was made and possession taken. The judgment on which *sc. fa.* is issued was for balance of purchase money, and was due June 1, 1880. The defendant's plea, as amended, alleged that the amount due on this judgment, or rather the principal thereof, should not draw interest from the time it fell due until about the fifth of March, 1884. This is based on the averment that at the time of the purchase of the land there were certain charges and incumbrances thereon, (as we understand about equal to the amount of this judgment,) and

that it was agreed that defendant Bates should retain sufficient of the purchase money to protect him from such charges and incumbrances. The plea avers a legal tender of payment of the principal of the judgment on or about the fifth of March, 1884, and a demand for removal of the incumbrances; that on the tenth of October, 1885, the incumbrances, etc., having been removed, the principal of the judgment, \$761, was paid to plaintiff, with costs. The only question raised by the plea and amendment thereto is whether the facts alleged therein, taken as true, exempt the defendant, Bates, from the interest on the judgment from June 1, 1880, to March, 1884, (the plaintiff's attorney on the argument only claiming the interest from that time.) We are of the opinion that the facts alleged cannot avail the defendant. The position is analogous to the cases found in the books where a court of equity interposes to protect a defendant from liens on land he has purchased, and in which the courts hold that it is inequitable that the vendee of land should hold both land and the price, and compensate for neither. *Minard v. Beans*, 64 Pa. St. 414; *McCormick v. Crall*, 6 Watts, 207; *Kester v. Rockel*, 2 Watts & S. 365.

"That the plaintiff here had *agreed* that defendant might retain the money to protect himself from the liens, etc., we think makes no difference. This seems to have been distinctly ruled in the case of *Shaller v. Brand*, 6 Bin 435, in which case it was expressly agreed that no execution should issue until the plaintiff had perfected title to the land which was the consideration of the judgment, but nevertheless the supreme court held the debt liable for interest during the time the title remained unperfected. There is a marked difference between a judgment, the payment of which is conditioned on the removal of incumbrances or the perfecting of title, and an absolute judgment, the collection of which cannot be presently enforced by reason of a stipulation of the parties for stay of execution. February 14, 1887, judgment in favor of the plaintiff on the demurrer to the plea is directed to be entered against the defendant for the sum of one hundred and seventy-one and 72-100 dollars and costs."

Whereupon defendant took this writ.

*D. I. Ball and C. C. Thompson*, for plaintiff in error.

In the absence of an agreement to pay interest, it cannot be charged except where money is wrongfully detained. *Brown v. Campbell*, 1 Serg. & R. 176; *King v. Diehl*, 9 Serg. & R. 409; *Com. v. Bank*, 10 Pa. St. 453; *Kelsey v. Murphy*, 30 Pa. St. 341; *Mining Co. v. Jones*, 108 Pa. St. 69.

*Johnson, Lindsey & Parmales*, for defendant in error.

**PER CURIAM.** The judgment in this case is affirmed for reasons given in the opinion of the learned judge of the court below.

#### MASON and others v. AMMON and others.

(*Supreme Court of Pennsylvania.* October 3, 1887.)

#### 1. EJECTMENT—ADVERSE POSSESSION—QUESTION FOR JURY.

Whether a party claiming title by adverse user has such continuous, notorious, and hostile possession as would give him title under the statute of limitations, is a question for the jury.

#### 2. SAME—STATUTE OF FRAUDS—RECEIPT FOR PURCHASE MONEYS.

A simple receipt, not under seal, for the purchase money of land, is not sufficient, under the statute of frauds, to divest the interest of the vendor.

#### 3. DEVISE—RULE IN SHELLEY'S CASE.

In a devise to A., "and at her death to her child, children, or other lineal descendants," the words "other lineal descendants" so qualify the previous words "child or children" as to make them words of limitation, and not of purchase.

Error to common pleas, Union county.

Ejectment by Mary Mason, Elizabeth J. Mason, and Martha Mason against Daniel B. Ammon, Mary Marty, and William H. Marr, to recover a lot of ground on South Second street, in the borough of Lewisburg. The facts stated in the following charge of BUCHER, P. J.:

"The plaintiffs allege that the title to this property, as well as the right of possession, is in them, and not in the defendants. They allege that one John A. Reed was the owner of this land, and that by his deed dated the ninth of December, 1834, he conveyed it to George F. Miller, who, by deed dated May 11, 1835, conveyed the property in dispute to Ralph Ditty and John Ditty as tenants in common. Then the plaintiff followed this with evidence of a receipt dated March 3, 1838, drawn by Ralph Ditty and attested by Alexander Graham, in which he receipted to John Ditty for his share of the purchase money for a lot on South Second street. Thus the plaintiffs contend that the entire title to the property in dispute became vested in John Ditty by reason of his purchase of the share of Ralph. This, then, was followed by the deed of John Ditty dated the fourth day of September, 1837, and probated on the twenty-second of January, 1880. The plaintiffs also gave evidence that they were the children of Martha Mason, who is one of the devisees mentioned in the will of John Ditty. The contention on the part of plaintiffs is that under this will of John Ditty a life-estate was vested in Martha Mason, mother of these plaintiffs, with the remainder over in fee to them at her death, and for that reason they claim that they are entitled to recover in this action. There was evidence given that John Ditty entered into the possession of the land in the spring of 1838, by rolling a house over onto it from an adjacent lot, which he occupied. Thus, you see, he died seized of the property, and because the evidence is undeniable that he died in July, 1838, after this house was erected, and while he was in possession; so he died seized of the land, and this took the title out of the commonwealth, and vested it in John Ditty. The title of the plaintiffs to the property in dispute turns upon the construction to be given to the will of John Ditty.

"The language of this will under which the plaintiffs claim to recover is: 'I also bequeath unto said sister, (Martha, wife of Henry Mason,) and at her death to her child, children, or other lineal descendants, any money and other property, whether real or personal, which I possess at my death, whatsoever situated.' In *Wilds' Case*, 3 Coke, 288, cited in *Ellet v. Paxson*, 2 Wall. & S. 434, the devise was 'to Wild and his wife, and after their decease to his children,' held but a life-estate in Wild and his wife, with remainder to their children. The rule is that 'child' and 'children' are never words of limitation, 'but of purchase, indicating a new stock, and are properly descriptive of a particular class, or generation of issue. They point not to heritable succession, but individual acquisition.' Hayes, 35, cited in *Guthrie Appeal*, 37 Pa. St. 14; *Bussar v. Bradford*, 2 Atk. 222; *Gernet v. Lynn*, 3 Pa. St. 94; *Chew's Appeal*, 37 Pa. St. 23. It is admitted that while 'children' will not, *per se*, be construed to be words of limitation, yet when coupled with some other expression of testator, showing that they were intended as a *nomen collectivum*, signifying 'heirs of the body,' the rule in *Shepley Case* has been applied. In the present case John Ditty devises to his sister Martha, 'and at her death to her child, children, or other lineal descendants,' showing that the testator used 'child' or 'children' in the sense of heirs of her body; 'or other lineal descendants' could be none other than the issue of her body, indicating indefinite issue; and the estate would, under the expression 'lineal descendants,' have gone to grandchildren and great-grandchildren, clearly defining the *nature* of the estate intended to be given to the survivors of Martha as one which he meant they should take by descent from her. In *Allen v. Markle*, 36 Pa. St. 117, the testator gave to his son A. for life, and at his decease to descend to his legitimate offspring forever; but, in case

issue should become extinct, then over to other devisees in fee. Held an estate tail, and that the word 'offspring,' even if not defined by the subsequent use of the word 'issue' is a term of limitation. It is difficult to see why the term 'lineal descendant' is not still more decisive of the intention of the testator to create an inheritable estate in his sister Martha; and as Mr. Hayes says that the word 'children' may be construed to mean heirs of the body, when there is an express warrant for this change of its legitimate meaning, under the hand of the author of the gift, we have here the use by the testator of the very definition itself of 'heirs of the body,' to-wit, 'lineal descendants,' and that, too, used in the same connection with 'child.' No stronger case could exist, showing the use of 'child' and 'children,' in the sense of 'heirs of the body.' Admitting the difficulty, as well as the rarity, of the cases where this construction has been given to 'child' or 'children,' yet if in any case the construction is admissible, it appears to us it is so in the present case, although this conclusion is reached with some hesitation. This conclusion is fortified and strengthened by the language of the will in devising the Venango farm. The language of the will as to that farm is. 'I hereby bequeath unto my sister Martha, during the term of her natural life, and at her death I bequeath it to the child or children of said Martha.' Then comes the devise which we have just been considering. After that the testator returns to the Venango farm devised to Martha, and declares: 'there is to be no dispute with my sister's child or children about my farm, for it is to be theirs at their mother's death. I do not give said sister Martha any legal right to sell said farm, for it is for the child or children, at her death.' This shows that the testator intended a different tenure of title in the Venango farm, and as to that Martha should have but a life-estate. He throws no such guard around the devise of the house and lot in dispute, showing no solicitude about the child or children getting it. We charge you that Martha Mason's estate in the lot in controversy is an estate tail, and not an estate for life, with remainder over in fee to the plaintiffs, who are her children, as is contended for by the learned counsel for the plaintiffs.

"The result is that Martha Mason, the mother of these plaintiffs, had an estate tail in this, and if she had gone into possession of it after the death of John Ditty, and held it, there might be a ground for the plaintiffs to sustain this action. But the proof is undeniable on the part of the defendants, if you believe it, that shortly after the making of this will, and after the death of John Ditty in 1838, Ralph Ditty went into the possession of this real estate by himself or by his tenants, claiming it adversely as his own. The assessments of the lot have been given in evidence to him for a long number of years; and William Ditty, a brother, testifies to an exchange or a partition of the land. You will remember his deposition. We excluded that for the purpose of showing title in Ralph Ditty by virtue of this alleged exchange of land, but admitted the evidence for the purpose of showing that Ralph Ditty was claiming this land adversely; and the evidence of William Ditty is, if you believe it, and it don't appear to be contradicted by anybody, that Ralph Ditty held the uninterrupted possession of this land, claiming it as his own, by himself and his tenants, down until his death in 1865 or 1866. There is also the evidence of witnesses. You will remember them. George Chappel, John Balliet, and others, testify to this adverse possession. Mrs. Miller testified that way back in 1845, or along there, her husband leased this property of Ralph Ditty, and paid the rent; but apart from all this there is no evidence in the case whatever, nor is it pretended, as I understand the contention of the plaintiffs, that Martha Mason or any of her heirs ever had any actual possession of this land, either by themselves or their tenants. It don't appear that they ever exercised any act of ownership over it. Then it is in evidence that Martha Mason died in 1871. That is the time of her death as fixed by the testimony of Mr. Ziegler, a witness for the plaintiffs. This action of

ejectment was not brought until 1885, a period of upwards of 46 years after the estate passed out of John Ditty by his last will and testament, and it has been held adversely ever since. Now, it is true that Martha Mason at that time was a married woman, and was under disability to sue, yet it did not prevent the running of the statute of limitations, because our act of assembly of the twenty-second of April, 1856, followed by the decision of *Hunt v. Wall*, decided in 75 Pa. St. 413, expressly declares that if a party be under disability at the time when their title accrues to real estate, that they are forever barred, unless a suit be brought within thirty years from the time that the right of entry first become vested in them.

"It was distinctly held in *Baldridge v. McFarland*, 26 Pa. St. 338, that an adverse possession of 21 years, during the life of the tenant in tail, will bar a recovery by the issue in tail. The uncontradicted evidence in the case is that adverse possession of the land was taken by those under whom the defendants claim way back in 1838, upon the death of William Ditty, the testator, and maintained up to this time. No action was brought for more than 30 years, and therefore we instruct you that plaintiffs cannot recover.

"The plaintiffs ask us to say that, under the law and the evidence in this case, the will of John Ditty is conclusive; and if the jury believe that John Ditty, the testator, was, at the time of his death, the sole owner of the lands described in the writ, and that the plaintiffs are the devisees mentioned in the will as the children of Martha Mason, the sister of testator, and that Martha Mason died within twenty-one years of the commencement of this action, then the plaintiffs are entitled to recover the premises described in the writ, with damages and costs. And if John Ditty and Ralph Ditty were tenants in common at the time of testator's death, then plaintiffs are entitled to recover the undivided half of the premises, together with damages and costs. *Answer.* Refused.

"The defendants ask us to say: *First.* That, under the will of John Ditty, offered by plaintiffs, Mrs. Mason took, if anything, an estate in fee tail in the lands in suit, and the plaintiffs must claim through her as the heirs of her body and tenants in tail, and not in remainder after the termination of a life estate in the said Mrs. Mason. *Answer.* The law is as stated in this point. *Second.* That the statute of limitations began to run against these plaintiffs at the death of John Ditty, in July, 1838; and under the act of assembly in such case made and provided, and especially under the act of thirteenth April, 1859, (P. L. 503,) the plaintiffs cannot recover. *A Affirmed.* *Third.* That, under all the evidence in the case, plaintiffs cannot recover. *A. Affirmed."*

Verdict for defendants, and judgment thereon; whereupon plaintiffs took this writ.

*Samuel H. Orwig*, for plaintiffs in error.

The "lineal descendants" of the ancestor, in the connection in which the words are employed in the will, cannot be tenants in tail. The children take by gift or purchase, and not by descent. *Nebinger v. Upp*, 13 Serg. & R. 65; 1 Shars. & B. Lead. Cas. 201, and cases cited. No statute of limitations could run against plaintiffs until their right of possession accrued, which was in 1871, when Martha Mason died. *Hall v. Vandegrift*, 3 Bin. 374; *Shepley v. Lytle*, 6 Watts, 500; *Poe v. Foster*, 4 Watts & S. 355; *Marple v. Myers*, 12 Pa. St. 125. It was error to direct a verdict for defendants. *Jones v. Wildes*, 8 Serg. & R. 150.

*Dill & Beale* and *Wolfe & Leiser*, for defendants in error.

The word "children" is primarily a word of purchase, but it may be used in the more comprehensive sense of "heirs of the body," and where the context shows that such was testator's intention, it has always been so construed.

*Guthrie's Appeal*, 37 Pa. St. 10; *Bradon v. Cannon*, 1 Grant, Cas. 60; *Haldeman v. Haldeman*, 40 Pa. St. 35; *Blair v. Miller*, 37 Leg. Int. 414; *Leman's Estate*, 15 Leg. Int. 94; *Dodson v. Ball*, 60 Pa. St. 500; *Huber's Appeal*, 80 Pa. St. 356; *Ogden's Appeal*, 70 Pa. St. 501, and cases cited; *Yarnall's Appeal*, Id. 340; *Williams' Appeal*, 83 Pa. St. 391; *Carroll v. Burns*, 108 Pa. St. 386; *Knoderer v. Merriman*, 5 Cent. Rep. 552.

GORDON, J. None of the assignments of error in this case can be sustained, except that which covers the answer to the defendant's third point; which point and answer are as follows: "That under the evidence in this case the plaintiffs cannot recover. *Answer*. Affirmed." Whether Ralph Ditty, and those claiming under him, had that kind of continuous, notorious, and hostile possession of the premises in dispute as would give them title under the statute of limitations, was, under all the evidence, a question for the jury, and ought so to have been submitted. Originally John and Ralph Ditty were tenants in common of the lot in controversy, and the receipt of March 3, 1838, was not of itself sufficient, under the statute of frauds and perjuries, to divest Ralph's interest; hence *prima facie* his subsequent possession would have to be regarded as a joint possession for himself and his brother. The receipt, however, taken in connection with the other parol evidence, does, undoubtedly, not only tend to rebut the *prima facie* presumption of Ralph's occupancy as a tenant in common, but presents a strong case of adverse possession. Still, strong as the evidence is, it ought to have been submitted to the jury. As to the construction of the will, the learned president of the common pleas has so well disposed of that branch of the case, that we need only say, we entirely agree with him. The words "other lineal descendants" so qualify the previous words "child or children" as to make them words of limitation, and not of purchase. Indeed, the whole case was so well tried, and the result reached so obviously just, that, except to preserve intact a necessary and important legal rule, we would hesitate to send it back for retrial.

The judgment is reversed, and a new *venire* ordered.

#### McELWAIN v. BROWN.

(*Supreme Court of Pennsylvania*. October 3, 1887.)

##### LEASE—WHAT CONSTITUTES—MECHANIC'S LIEN.

An agreement giving one the right to occupy so much of certain land as is necessary in prosecuting the work of finding and producing oil and minerals, including the erection of buildings and machinery, and the building of roads, this right, unless abandoned, to continue to the lessees, their heirs, executors, administrators, and assigns, for the term of 20 years, or "as long as said parties of the second part use it for the purpose of producing oil or minerals or gas," is a lease, and the estate of the lessee is subject to the special lien of mechanics and material-men, under the act of assembly of Pennsylvania of April 8, 1868, (P. L. 752.)

Error to common pleas, Warren county.

*Scire facias sur mechanic's lien* by Charles Brown against J. B. McElwaine, owner, etc.

McElwaine, at the time the lien in this case was filed against him as owner, and Milo White, contractor, was, and still is, the owner of a freehold interest in the premises described in his lease, for purpose of mining for oil, gas, or other minerals therein. The duration of his estate was "for twenty years, or as long as the said parties of the second part use it for the purpose of producing oil or minerals or gas," at the election of the lessee. He employed one Milo White, an oil-well contractor, to drill some wells, and paid him for so doing. The contractor employed Brown to work for him, who filed a lien against McElwaine for his labor, under the provisions of the special act of April 8, 1868, (P. L. 752,) giving a lien to laborers against leasehold estates, held for a certain term of years, for their labor, which act was afterwards

extended to Warren county. McElwaine contended that his estate was subject to this special act, and resisted payment of the claim. Certain were submitted to the jury, the court below reserving the question of law to whether the defendant's estate was liable to the lien under the provision of the act of assembly above referred to, and afterwards directed judgment for the plaintiff on the verdict; the court filing the following opinion:

"The lien is for work and labor under the provision of the second section of 'An act relating to the liens of mechanics, material-men, and laborers on leasehold estates, and property thereon, in the county of Venango.' (P. L. 1868, p. 752,) extended to Warren county, (P. L. 1869, p. 410.) The question reserved is whether the lease or agreement from J. K. Weaver to Ridelsperger and others, given in evidence, and dated November 5, 1883, vests in such an interest in the lessees, and those holding under them, as to render the same subject to plaintiff's lien. By the agreement the lessees acquire nothing but the right to work the land for oil, minerals, etc. They acquire no estate in the land or minerals. The right was to search for oil, etc., if found, take it, rendering the one-eighth to the lessor. *Funk v. Halder*, 53 Pa. St. 229; *Thompson's Appeal*, 101 Pa. St. 232. By whatever name the rights of the lessees may be designated, it seems clear that they have no independent claim, any freehold estate in the premises. They have the right to occupy so much of the land as is necessary in prosecuting the work of finding and producing oil and minerals, including the erection of buildings and machinery, and the building of roads. This right, unless abandoned, continues to the lessees, their heirs, executors, administrators, and assigns, for the term of twenty years, or 'as long as said parties of the second part use it for the purpose of producing oil or minerals or gas.'

"Under the words quoted the defendant claims that the right of the lessees may extend beyond the twenty years, and for the life of the original lessee, and hence that the interest is not such a leasehold estate as is subject to the lien under the act of 1868. In support of this claim we are referred to numerous decisions wherein language of similar import has been held to vest an interest in the lessee greater than a leasehold. Also to decisions of our own supreme court holding that a lease for a given number of years, with an agreement that the lessee shall have a right to purchase on specified terms, vests in him such an interest as is subject to judgment and mechanic's lien under the act of 1836. If it be conceded that, under the lease or agreement in this case, the lessees take an interest of the nature of a freehold, and as they would be bound by the lien of a judgment, we do not think it follows that the agreement may not be also regarded as a lease for years. Had Weaver, by one paper, leased the premises to Ridelsperger for the term of twenty years, and by another stipulated that, if he continued the same for the purpose of producing oil, he should have it for life, could it be claimed that the last paper destroyed or even qualified the first; and, if not, is not the case the same when the two agreements are in one paper?

"In the case of a lease for years, with a right in the lessee to purchase, we think liens may be entered against both the leasehold and the equitable right of purchase; that is, by a laborer under the act of 1868 against the leasehold and property thereon, and by the mechanic and material-man under the act of 1836 against the equitable right to purchase. Upon the question before us we treat the agreement in suit as a lease for twenty years, subject, it is to continue for such indefinite time longer as the lessees use it for the purpose of producing, oil, etc., but none the less a leasehold estate.

"In the case of *Dame's Appeal*, 62 Pa. St. 417, Justice SHARSWOOD, commenting on the very act of 1868, under the provisions of which the lien in suit is entered, says: 'The act is not a penal, but a remedial, one, and should have a fair and liberal interpretation in advancement of the remedy contemplated and provided by the legislature.' Taking into consideration the

as it stood before the act of 1868, and the security the act was intended to give the laborer for his work, (especially for the boring, drilling, or mining for oil, etc.,) we are inclined to the belief that the act gives to the laborer a lien in all cases where the lessee has the exclusive right to occupy for mining purposes only, upon terms of rendering a certain part of the proceeds as royalty or rent, and this whether such right is limited to a specified number of years, or is unlimited in duration; but we do not think it necessary to decide this in the matter pending."

Whereupon defendant took this writ.

*Samuel T. Neill*, for plaintiff in error.

Real interests are not subjected to the lien given by the act of 1868. *Dorsey's Appeal*, 72 Pa. St. 192. The act should receive a strict construction. *Esterley's Appeal*, 54 Pa. St. 192. The use of the word "lease" has no controlling influence. *Railroad Co. v. Sanderson*, 1 Atl. Rep. 394. The estate here is real, and not personal. 2 Bl. Comm. 298; *Wager v. Wager*, 1 Serg. & R. 374; *Tyler v. Moore*, 42 Pa. St. 387; *Taylor, Landl. & Ten.* § 81; *Hurd v. Cushing*, 7 Pick. 169; *Folts v. Huntley*, 7 Wend. 210; *Effinger v. Lewis*, 32 Pa. St. 370; *Kier v. Peterson*, 41 Pa. St. 357; *Funk v. Haldeman*, 53 Pa. St. 229; *Thompson's Appeal*, 100 Pa. St. 478; *Sheltz v. Fitzwater*, 5 Pa. St. 126.

*O. C. Allen and Geo. H. Higgins*, for defendant in error.

No precise form of words is necessary to constitute a lease. Any words which show an intent to convey by their own operation the possession of certain specified land for a limited time will suffice to create a term of years. *Homer v. Leeds*, 2 Amer. Lead. Cas. Real Prop. 30, 37, 42; *Watson v. Ohern*, 6 Watts, 362; *Moore v. Miller*, 8 Pa. St. 288; *Offerman v. Starr*, 2 Pa. St. 394; *Greenough's Appeal*, 9 Pa. St. 18; *Tyler v. Moore*, 42 Pa. St. 374.

PER CURIAM. The agreement of November 5, 1883, was, by the court below, properly held to be a lease, and that the premises were subject to the special lien act of April 8, 1868. Judgment affirmed.

### Appeals of THOMPSON and another.

(*Supreme Court of Pennsylvania.* October 3, 1887.)

#### WILL—TESTATOR'S DEBTS, WHEN A CHARGE UPON ESTATE DEVISED.

Testator, in his will, provided as follows: "And to my son C. I give and bequeath all the balance of my estate, real and personal, with all accounts and moneys due, life insurance policy, and all manner and kind of property whatsoever; for which bequest I order that he, the said C., pay all my just debts, funeral expenses, and the charges of settling up my estate." *Held*, that the debts of testator were a charge upon the estate devised to C.

Appeals of H. S. Thompson and J. M. Blair, lien creditors of Charles Silverthorne, devisee under the will of Richard Silverthorne, deceased, from the decree of the orphans' court, Huntingdon county, reversing the report of the auditor making distribution of the funds in the hands of the executors arising from the sale of the real estate of testator which was devised to Charles Silverthorne.

The facts are fully stated in the following opinion of FURST, P. J.:

"The vital question in this case is, were the debts of the decedent made a charge by his will upon the estate devised to his son Charles Silverthorne? This question was decided by the auditor in the negative. The testator in the first clause of his will declares: 'I will that all my just debts and funeral expenses be paid by my son Charles as shall be after set forth.' He then bequeaths to his widow certain 'household and kitchen furniture,' and also several pieces of land. To his sons John and William he devises a saw-mill, with

certain timber, and also a tract of land; directing them to pay an annuity of \$25 annually to their mother, etc. Then follows this devise: 'And to my son Charles I give and bequeath all the balance of my estate, real and personal, with all accounts and moneys due, life insurance policy, and all manner and kind of property whatsoever; for which bequest I order that he the said Charles pay all my just debts, funeral expenses, and the charges of settling up my estate. \* \* \* And, further, should the life policy herein mentioned, for any cause, not be made available, then I order, that the tract of flint land, and the mountain tract in connection with it, be sold, and the proceeds applied to the payment of the debts.' In a subsequent clause he appointed Charles one of his executors. The policy of insurance was paid to Charles, and therefore the clause directing the sale of the tract of land above referred to became inoperative.

"It will thus appear that the question involved arises upon the true construction of the residuary clause in the will. In his will he first directs the payment of his debts by his son Charles, who is the residuary legatee, devisee, and one of the executors. After making certain specific bequests and devises, the testator blends his real and personal estate into one common fund, in a residuary devise to his son Charles, for which bequest he orders and directs him to pay his debts, funeral expenses, etc.. Does this create a charge upon the estate devised to Charles? That it created a personal charge upon the acceptance of the devise by Charles, is, of course, admitted; but it is denied by the individual creditors of Charles that it created any charge upon the land sold by the executors of Richard Silverthorne for the payment of debts. The lands sold are those included in this residuary devise. The contest is between the general creditors of Richard Silverthorne and the judgment creditors of Charles.

"To determine the question involved we must ascertain the intention of the testator. It is his intent as expressed in the will, either by express words, or necessary implication, which must govern and control our judgment. It has been held by our supreme court, in many adjudged cases, that, in order to charge lands devised with the payment of a legacy or debts, it must appear by direct expression or plain implication that such was the intention of the testator to be gathered or inferred from the whole will. We will only refer to *Brant's Appeal*, 8 Watts, 198; *Mellon's Appeal*, 46 Pa. St. 165; *Okeon's Appeal*, 59 Pa. St. 99; *English v. Harvey*, 2 Rawle, 805; *Montgomery v. McElroy*, 3 Watts & S. 371.

"The residuary devise in this case, after first directing the payment of testator's debts, contains these important words, 'for this bequest,' etc., 'he is to pay all my debts.' It will be noticed that this is not separate and distinct from the devise, but it is part and parcel of the same sentence. In other words, it is the consideration for the devise. It has the same signification as if the testator said: 'In consideration that Charles pay my debts, I devise to him the residue of my estate, real and personal.' It thus becomes the condition upon which he holds the bequest and devise. It is an estate upon condition. The title of the devise becomes absolute upon the performance of the condition, and not until then. It is a charge upon the title which is sufficient notice to all the world. As in articles of agreement for the sale of land, the purchase money which is the consideration for the conveyance is a lien upon the title until paid. The vendee can only compel conveyance of the full legal title upon discharging the purchase money. The principle is the same where the title is conveyed by will, subject to like condition. The donee cannot hold the benefit, and refuse to comply with the condition upon which the devise was made. The land only belongs to the donee when he performs the conditions of the devise.

"In *Hoover v. Hoover*, 5 Pa. St. 351, it is held that both the estate and the person of the devisee of land charged with legacies become liable therefor by

an acceptance of the devise. In the opinion of the court, p. 355, Mr. Justice BELL, says: 'He who accepts a benefit under a will must conform to all its provisions, and renounce every right inconsistent with them.' On same page he refers to the opinion of Mr. Justice KENNEDY, in *Lobach's Case*, 6 Watts, 167. In this case Justice KENNEDY said: 'The testator not only intended to charge the land, but to make it a personal charge on the devisee, and he became personally liable, on taking possession under the will. These distinct liabilities are illustrated by the consideration that the estate given to David may be treated as an estate on condition. In a will no precise form of words is necessary to create a condition. Any expressions denoting such an intention will have that effect. Thus a devise to A., he paying or me to pay \$500 in one year after my decease, would, it is said, be a condition for the breach of which the heir might enter.' 2 Powell, Dev. 251; *Barnardiston v. Fane*, 2 Vern. 366.

"In *Nichols v. Postlethwaite*, 2 Dall. 131, John Davis, the testator, bequeathed several pecuniary legacies. Then he devised as follows: All the rest and residue of his estate, real and personal, he gave to his son, whom he appoints executor, and who after testator's death entered into possession. Testator had no personal estate. It was held by the court that nothing was given to the residuary devisee but what remained after payment of the legacies. These are a charge upon the testator's real estate.

"In the case before us we have, first, the mingling of the realty and personalty in a gift of the residue of the testator's estate. After he has directed the payment of his debts, we have further the express declaration of the testator that for this bequest the debts are to be paid by the residuary devisee, clearly showing that the intent of the testator was to give all the residue of the estate to Charles upon condition that he would pay his debts. In this devise there was also embraced a policy of insurance upon the life of the testator. In order that his son Charles might have an ample fund out of which to pay the debts, the testator provided that, if Charles failed to receive the money due under the policy, certain real estate was devised to him, which he was to sell, to raise a fund with which to pay his debts. Under this devise, if the debts are not expressly charged, can there be any doubt that they are charged by implication; that the testator devised this fund to Charles for this express purpose; and that he should hold the same upon that condition? Taking the entire devise into consideration, as well as all the other parts of the will relating to his debts, we have no difficulty in coming to the conclusion that Richard Silverthorne intended to make his debts a charge upon the residuary estate devised to his son Charles. Under a residuary clause, less forcible and clear, Chief Justice SHIPPEN held that a charge on the land was thereby created. *Tucker v. Melcher*, 3 Yeates, 294. This case is so strong upon this principle that we might here stop. We will cite but a few other cases, which affirm the same doctrine: *Bank v. Donaldson*, 7 Watts & S. 407; *Mellon's Appeal*, 46 Pa. St. 165. Mr. Justice STRONG, at page 175, delivering the opinion of the court, says: 'Certainly a mingling of the real and personal estate in a gift of the residue of a testator's property does with us imply an intent to charge the land, either by itself or in aid of the personalty, with the payment of general pecuniary legacies. Such an implication is necessary to enable the whole will to take effect and all the legacies to be paid.' The rule obtains as well in the payment of debts, for the same reason that the personal fund is the one designated by law for the payment of debts.

"In *Tower's Appropriation*, 9 Watts & S. 103, the language of the devise was: 'To my nephew Jeremiah Tower I give and bequeath all my estate, real and personal; he paying the legacies hereinafter stated.' GIBSON, C. J., held the legacies a charge upon the land. *Gilbert's Appeal*, 85 Pa. St. 347; *McFatt's Appeal*, 8 Pa. St. 290. Where a testator by his will blends his real and personal estate, he thereby charges his lands with the payment of legacies.

*McLanahan v. McLanahan*, 1 Pen. & W. 96. The case of *Trinity Church v. Watson*, 50 Pa. St. 518; *Walter's Appeal*, 95 Pa. St. 305; and *Kelly's Appeal*, 71 Pa. St. 333, are not in conflict with the cases referred to. In *Trinity Church* it was held that a general charge on real estate by devise for payment of debts does not create a testamentary lien of unlimited duration subject only to the presumption of payment by lapse of time.

"In order to continue the lien of debts upon the estate, under such a devise in the will, the creditors must proceed to sue and obtain judgment before the debt is barred by the statute of 1834 limiting their lien to ten years. *Walter's Appeal*, *supra*, only decides that a bare direction by testator to devisees to pay money is nothing more than a personal obligation to the devisees. A charge upon the land is not thereby created. Where there is made a charge upon the real estate by the will of the testator, a trust is created for the benefit of his creditors, and there is no limitation to the payment of such debts as regards such real estate, except only the limitation of time. It may arise from presumption of payment by lapse of time. *Steel v. Haggart*, 523.

"We are therefore led by the authorities cited, and the principles established by text writers upon this branch of the law, to hold that the debt of Richard Silverthorne was, under the residuary clause of his will, a charge upon the estate therein devised to his son Charles, and hence they must be paid, before any part of the fund in court can be distributed to the other creditors of Charles. This determination of the question renders unnecessary the consideration of the other exceptions. It may be proper, however, to state that the auditor erred in the method of distribution of the fund arising from the personal estate. This fund must be distributed *pro rata* among the creditors of Richard Silverthorne; the real-estate fund, to the liens according to their priority. The order of payment and distribution laid down in *McLanahan v. Hoover*, 5 Pa. St. 356, should be observed. If any other method of distribution of the personal fund will reach the same result, with less complication, it can be adopted; if not, the rule indicated must be followed.

"The question involved in the exception, that the auditor erred in holding that a judgment obtained against Richard Silverthorne in his life-time, which had not been revived since his death, within the proper time, was a lien, and must be postponed to judgment creditors of Charles, is now immaterial, and unnecessary to decide. It is only important as between judgment creditors of Richard in his life-time, and in that case priority of lien must be observed. The case referred to by the auditor (*Jack v. Jones*, 5 Whart. 407) was decided under the act of 1798, and not under the act of twenty-two February, 1834; which has made material changes in the law. As we do not decide the question, we will not discuss it.

"The report of the auditor is reversed, and the same is referred back to make distribution according to the principles herein stated.

"NOTE. The following cases hold the same general principle: *Greenawalt*, 98 Pa. St. 422. The language of the will in this case (all the property in the residuary clause) was: 'For which devise I will and direct that Henry shall pay in equal proportion to my two married daughters, at the rate of twenty dollars per acre,' etc. It was conceded in the court below that it was a charge on the land, but merely a personal charge. But Judge G. in the supreme court, in reviewing this, said: 'As the payment of the debt to the sisters was apparently under the peculiar phraseology of the will, and part at least, the consideration of the devise to the defendant, we are prepared to assent to the correctness of the concession.' *Dobbins v. S. S. S.*, 17 Serg. & R. 13; *Alexander v. McMurry*, 8 Watts, 505; *McCredy's Appeal*, 47 Pa. St. 442; *Springer's Appeal*, 29 Pa. St. 208; *Bank v. Donaldson*, 47 Pa. St. 407; *Rustin v. Rustin*, 2 Dall. 243; *Shaw v. McCamery*, 17 Serg. & R. 252; *Bright's Appeal*, 100 Pa. St. 602; *Little v. Hager*, 67

135; *Dodge v. Manning*, 1 N. Y. 298; *Decker v. Decker*, 8 Ohio, 157; *Nellons v. Truax*, 6 Ohio St. 97; *Powers v. Powers*, 28 Wis. 659; *Williams v. Chitty*, 3 Ves. 545; *Greville v. Browne*, 7 H. L. Cas. 689."

Whereupon these appeals were taken.

*W. H. & J. S. Woods*, for appellants.

To make debts a direct charge upon the land of decedent, the language of the will must be not only *positive, but precise and clear* *Agnew v. Fetterman*, 4 Pa. St. 62; *Hepburn v. Snyder*, 3 Pa. St. 78; *Walter's Appeal*, 95 Pa. St. 305; *Cable's Appeal*, 91 Pa. St. 327; *Trinity Church v. Watson*, 50 Pa. St. 518. A general charge on real estate, by devise, for the payment of debts, does not create a testamentary lien of unlimited duration, subject only to the payment of debts by lapse of time. *Fetterman v. Murphy*, 4 Watts, 429; *Kerper v. Hock*, 1 Watts, 13; *Maus v. Hummel*, 11 Pa. St. 228; *Trinity Church v. Watson*, *supra*.

*A. J. Patterson, J. M. Bailey, W. M. Williamson, and D. Caldwell*, for appellees.

**PER CURIAM.** The very able opinion of the learned judge of the court below so fully disposes of this case as to render a further discussion of it unnecessary. The appeals are dismissed, and the decree affirmed, at the costs of the appellants.

#### HAWK v. PENNSYLVANIA R. CO.

(*Supreme Court of Pennsylvania. October 3, 1887.*)

##### MASTER AND SERVANT—UNSAFE CONDUCT OF BUSINESS BY MASTER—DUTY OF SERVANT.

A master may conduct his business in his own way, and when a servant takes service with a master who conducts his business in a way which the servant thinks is unsafe, he cannot recover from the master damages for any injury happening to him. He should refuse to enter upon the employment, or should leave it on discovery of the master's method of doing business.<sup>1</sup>

Error to common pleas, Mifflin county.

Trespass, by William Hawk, against the Pennsylvania Railroad Company, for damages for personal injuries. The facts were as follows:

Plaintiff was employed as a brakeman on the Sunbury & Lewistown division of the Pennsylvania Railroad. On the nineteenth day of October, 1882, plaintiff was called on to make one of an extra crew to go from Lewistown to Selinsgrove to get a train of cars that, some time previously, had been made up at Sunbury and run on the side track at Selinsgrove. The train consisted of some 35 cars, which, owing to the very heavy grades, required two engines to haul it. It was known as a "double-header" train. The locomotive engineer in charge on the front engine was Edward Walters. Between 6 and 7 o'clock in the evening of this day, as they were approaching Lewistown, when on the top of what is known as the "Forsythe Hill," the train broke and separated into four or more parts, on one section of which plaintiff was. As soon as he discovered that the train was broken, he signaled with his lantern that the train had parted, and this was answered by the engineer. The plain-

<sup>1</sup> A servant, knowing the hazards of his employment as the business is conducted, cannot recover for injuries received while engaged therein, on the ground that there was a safer way for conducting the business, the adoption of which would have prevented the injury. *Naylor v. Railway Co.*, (Wis.) 11 N. W. Rep. 24. In general, as to the risks of employment, assumed by a servant on entering the service of his master, see *Railway Co. v. Frawley*, (Ind.) 9 N. E. Rep. 594, and note; *Schultz v. Railway Co.*, (Wis.) 31 N. W. Rep. 321, and note; *Railway v. Bradford*, (Tex.) 2 S. W. Rep. 595, and note; *Hewitt v. Railroad Co.*, (Mich.) 34 N. W. Rep. 659, and note; *Scott v. Railway Co.*, (Or.) 13 Pac. Rep. 98.

tiff then tried to stop his section by applying the brakes, going over the six or more cars two or three times and tightening the brakes, but, owing to several defective brakes, he was unable to do so. After using all the means in his power to stop the cars in vain, he then went forward, and kept signaling to the engineer to go on and keep out of the way, in accordance with the rules of the defendant company. Near the bottom of this grade is a high trestle, on which he collided with another section of the broken train. The two sections then kept on and collided with the engines and front section, which had been negligently stopped by the engineer in charge, in violation of rule No. 100 of the defendant company, which reads as follows: "If a train should part while in motion, train-men are required to use great care to prevent detached parts from coming into collision. Engine-men must give the signal as per rule No. 39, and keep the front part of the train in motion until the detached portion is stopped."

By this collision the plaintiff was so injured as to require the immediate amputation of his leg. This action is for the recovery of damages for this injury. The plaintiff alleges that defendant was negligent in not supplying proper links, pins, and couplings of the strength required in hauling trains over the heavy grades on this road, and in having defective brakes upon the cars on this train, whereby the plaintiff was unable to control the section on which he was left when the train broke, and because of the negligent, careless, and reckless locomotive engineer in charge of this train.

On the trial, plaintiff offered to prove that the grades upon the Sunbury & Lewistown division are heavier and greater than at any point on the main line of the Pennsylvania Railroad between Lewistown and Altoona, for the purpose of showing that it required greater strength of couplings, links, and pins to the cars than is ordinarily required on the main line of defendant, to be followed with proof that defendant used no other or different couplings on this division than on its main line; that it is the custom of the defendant company to use what is known as a "pusher" when heavy trains are being hauled on heavy grades, for the purpose of relieving the links, pins, and couplings. The object of this offer was to show negligence in the company in not furnishing sufficient appliances and instrumentalities for the proper and safe running of its trains on this division under the circumstances. This the court rejected, and is one of the errors complained of.

Plaintiff also offered to prove the reputation of Ed. Walters as a reckless, careless, and negligent engineer,—this to establish his character as an unfit person to be employed, and that his general reputation is such that the defendant could have known his character by due inquiry, and that it was negligence not to have done so before employing him. This offer the court also rejected, and is an error complained of.

The court entered a compulsory nonsuit, which they subsequently refused to take off, **BUCHER, P. J.**, filing the following opinion:

"In this case the plaintiff, an employe of the defendant company, was injured by the parting of a train on the Lewistown & Sunbury division of the defendant's road, on the nineteenth of October, A. D. 1882. The accident happened on a considerable grade, descending from north of Lewistown past the poor-house to the long trestle work near the Lewistown station. It occurred between six and seven o'clock in the evening. Plaintiff alleges that although a brakeman on the train the company are liable.

"1. Because the train was double-headed, *i. e.*, had two engines at the head of the train, instead of one at each end thereof, one pulling and one pushing; that, by putting both at the head, and thus throwing the whole strain on the couplings, the defendant was guilty of negligence. It is a complete answer to this to say that it has been repeatedly held that the master may conduct his business in his own way; that the plaintiff took service with a company which resorted to this method of double-heading. He should have

declined entering upon, or abandoned the service after entering upon the same, when he discovered the company's method of propelling trains in this way by means of double-heading. All evidence as to the methods of the defendant company in using two engines in drawing the same train on other roads of the same company were for the reasons given, if none other, properly rejected. *Naylor v. Railway Co.*, 5 Amer. & Eng. R. Cas. 460, 461, 462; *Ladd v. Railroad Co.*, 119 Mass. 412; *Clark v. Railroad Co.*, 28 Minn. 69, 9 N. W. Rep. 75, 2 Amer. & Eng. R. Cas. 240; *Fleming v. Railroad Co.*, 6 N. W. Rep. 448; *Gibson v. Railway Co.*, 63 N. Y. 449; *Dillon v. Railroad Co.*, 3 Dill. 320; *Railroad Co. v. Welch*, 52 Ill. 183; *Devitt v. Railroad Co.*, 50 Mo. 302; *Kelley's Adm'rs v. Railway Co.*, 53 Wis. 74, 9 N. W. Rep. 816, cited in 5 Amer. & Eng. R. Cas. 469; *Frazier v. Pennsylvania R. Co.*, 38 Pa. St. 104.

"2. Plaintiff alleges negligence on part of defendant, because, out of many brakes he discovered two not in working condition,—the one with what he supposes was a chain too long, and the other with a dog or ratchet which failed to act. The plaintiff offered no evidence to show that it was known to the company that these two brakes were out of order, nor when they became so. For aught that appears, their condition may have been the result of the trip then making, and besides, the company could not be charged with negligence, as between it and its employees, upon the proof that two brakes out of thirty would not act. No such doctrine has been announced by any case within our knowledge, and it should not be, as it would hold companies to a rule of responsibility which would be unreasonable and impossible of compliance. Who could say that when the brakes of five cars which did act failed to arrest the section on the down grade, that the two which did not act would, if added, have done so? This would be the merest guess as to their effect. It could not with certainty be said that these two non-acting brakes were the proximate cause of the accident, or even contributed thereto. The proximate cause was the breaking of the couplings, and whether the non-acting brakes would have prevented the collision if they had acted cannot possibly be known. There is but little authority on the duty of railway companies to have effective brakes. The cases generally arising out of isolated cars in the defective brakes are in *Railroad v. Kirk*, 90 Pa. St. 15, where a lumber car was left standing on a siding leading into plaintiff's warehouse, and was left standing there beyond the time required for its removal by the rules of the company. It had a defective brake, and was not blocked, so that when a number of cars from a freight train were started from main track onto the siding they struck this lumber car and forced it into the warehouse, by demolishing warehouse doors, and killed plaintiff's son, who was inside the warehouse. There was evidence that the nearest [front] car running into the siding had a defective brake. The question of negligence (I take it as to the effective blocking of the car on the siding, and its being left there against the rules of the company) went to the jury, as also the question as to the brake on the front car of the section colliding. But it will be observed that leaving a single car on a siding with a defective brake and unblocked, and permitting a section of a train to run on the siding with a bad brake on the front car,—and, as I understand it, there was negligence in reference to the switch itself,—is a very different question than the one in hand, where, in a train of some thirty to thirty-five cars, two brakes, when applied, were ineffective, without proof that the company knew, and without evidence to show, that the running of the train had not damaged the brakes in the very trip then making. Thus there was nothing to submit to the jury in the matter of the brakes.

"Then, as to the couplings giving way, the principle that the master may conduct his business to suit his own views applies to couplings just as to double-heading the trains. Couplings give way from causes impossible of de-

tection in advance of the occurrence, such as flaws, bad welds, etc. TH to show that on the main line the company used different couplings was rejected, because, if admitted, then if a similar accident happened on the main line it would be competent for plaintiff to show the different couplings used on the Sunbury & Lewistown road, and thus each could be used to condemn the other. There was no evidence whatever to show that the coupling was defective, unless, indeed, it is to be inferred and assumed that it was so from the mere fact that it broke. This, of itself, would not constitute negligence, and make the defendant liable to an employee who for his business from fifteen to seventeen months, and was familiar with the coupling used on the particular train.

"As to the offer to show Engineer Walters reckless by reputation, in the absence of any proof of improper or reckless conduct in the particular accident, it is sufficient to refer to what the court has said when declining the several offers of plaintiff.

"We decline, therefore, to take off the nonsuit."

Whereupon plaintiff took this writ.

*Porter & McKee*, for plaintiff in error.

The duty of the master is to select competent servants, and to provide implements and machinery. *Frazier v. Railroad Co.*, 38 Pa. St. 104; *v. Railroad Co.*, 73 N. Y. 38; *Blake v. Railroad Co.*, 70 Me. 60; *Oil Co. v. Gilson*, 63 Pa. St. 146; *Mullan v. Steam-Ship Co.*, 78 Pa. St. 376; *Gottlieb v. Railroad Co.*, 3 N. E. Rep. 344; *Way Co. v. Bresmer*, 97 Pa. St. 103; *Railroad Co. v. Keenan*, 103 Pa. St. 124; *Jones v. Railroad Co.*, 92 N. Y. 628; *Patterson v. Railroad Co.*, 124 Pa. St. 389.

*Geo. W. Elder and Rufus C. Elder*, for defendant in error.

The plaintiff should have left the employment upon the discovery of an unsafe manner in which the business was conducted. *Ballou v. Railroad Co.*, 5 Amer. & Eng. R. Cas. 480; *Brossman v. Railroad Co.*, 6 Atl. Re. 10; *Whart. Neg. § 214*; *Baker v. Railroad Co.*, 95 Pa. St. 215; *Ryan v. Railroad Co.*, 23 Pa. St. 384. There was no negligence in the use of the defective couplings. It was the result of an imperfect inspection. *Railroad Co. v. Fitzpatrick*, 42 Ohio St. 318; *Mackin v. Railroad*, 135 Mass. 201; *v. Railroad Co.*, 32 Md. 418; *Coal, etc., Co. v. McEnery*, 91 Pa. St. 191; *nonsuit was properly entered. Jennings v. Railroad Co.*, 93 Pa. St. 384; *Baker v. Fehr*, 97 Pa. St. 70; *Railroad Co. v. Shertle*, Id. 450; *Railroad Co. v. Yerger*, 73 Pa. St. 121.

PER CURIAM. After a careful examination of this case, we have failed to discover any evidence tending to show such negligence on part of the defendant or its employees as would render it liable for the plaintiff's injuries. We must therefore concur with the court below in its rulings. The judgment is affirmed.

#### ONOFRI v. COMMONWEALTH.

(Supreme Court of Pennsylvania. October 3, 1887.)

##### 1. CRIMINAL PRACTICE—TRIAL—READING INDICTMENT TO JURY.

It is entirely proper, upon a trial for murder, to read the bill of indictment to the jury precisely as it was found by the grand jury.

**2. SAME—WITNESS—NAME INDORSED ON INDICTMENT—REFUSAL OF COURT TO CALL.**

A writ of error will not lie to the refusal of the court to direct the district attorney to call one whose name is indorsed upon the bill of indictment as a witness for the commonwealth, even if the person be present in court under subpoena of the commonwealth.

**3. SAME—INDICTMENT WITH INDORSEMENTS MAY GO OUT WITH JURY.**

It is not error to allow the bill of indictment, with indorsements of a previous trial and conviction and the granting of a new trial, to go out with the jury against the objection of the prisoner.

Error to oyer and terminer, Philadelphia county.

Indictment by the commonwealth of Pennsylvania against Achilles Onofri, for murder.

The facts are stated in the opinion, and in the assignments of error, which are as follows. (1) Because the court erred in the second trial of the cause in overruling the objection of the prisoner to the reading of the bill of indictment by the clerk to the jury then sworn in its then condition. (2) Because the court erred in directing the clerk to read to the jury then sworn, the indictment, "so far as the same was found by the grand jury." (3) Because the court erred in overruling the motion made by the prisoner, that the court direct the district attorney to call the name of Mabel Cook as a witness for the commonwealth, her name being indorsed upon the bill of indictment, she being present in open court under subpoena of the commonwealth. (4) Because the court erred in instructing the jury as follows, in answer to the prisoner's sixth point: "I have just told you, in pursuance of the prisoner's request, what you must do in point of law. He now asks me to tell you that you are the judges of that law. To declare the law, in cases of this description, is a duty which the law imposes on the court, and in so doing it clothes the court with authority to declare the law, and renders it the duty of the jury to heed the exposition of the law by the court. You have been sworn to try the cause according to the law and the evidence, and it is your duty to administer, not to make, the law. By the law is meant the law of the land,—the law of Pennsylvania,—and not what this person or that supposes to be the law. You are to determine from the evidence what are the facts, and say whether they come within the law. In that sense you are the judges of the law and of the facts." (5) Because the court erred in charging the jury as follows: "I repeat what I said before, that the law supposes that men intend the consequences of their acts, and when grievous bodily harm is inflicted by means that are calculated to produce and actually end in death, this is evidence of malice, and it is for the defendant to point out on their side or the commonwealth's something which may rebut the presumption of malice that would otherwise naturally arise." (6) Because the court erred in charging the jury as follows: "Taking the statements of the prisoner, in conjunction with the testimony as to the condition of the body and the other evidence adduced by the commonwealth, I must confess that taking the commonwealth's case alone it appears to me that a pretty strong case is presented against the accused; but I must caution you again that you are the judges of the facts, and I only express my opinion to aid you. You will take it, and consider it only as you regard it to be borne out by the evidence." (7) Because the court erred in overruling the objection of the prisoner to the bill of indictment, with indorsements made thereon subsequent to the finding thereof, being handed to and carried out by the jury, when they retired to deliberate upon a verdict.

The verdict of the jury was "guilty of murder in the second degree;" whereupon the prisoner took this writ.

*William W. Ker and Joseph T. Ford*, for plaintiff in error.

The witness Mabel Cook should have been called, so as to give the prisoner the opportunity of cross-examination. Hale, P. C. 157, note 6, and cases cited. In criminal cases the jury are the judges of the law and the facts.

*Kane v. Com.*, 89 Pa. St. 522; *Foster v. Collner*, 107 Pa. St. 305; *Huston v. Borough of Bellevue*, 111 Pa. St. 110, 7 Atl. Rep. 210.

*George S. Graham*, Dist. Atty., for defendant in error

There was no error in reading to the jury the indictment as found. The district attorney cannot be compelled to call any witness. As to the indictment going out with the jury, the right has been decided in favor of the practice followed in this case in *Goersen v. Com.*, 99 Pa. St. 388.

**PAXSON, J** The first two assignments of error are without merit. It is entirely proper to read the bill of indictment to the jury. It is not pretended that it was not read precisely as it was found by the grand jury.

The third assignment alleges that "the court erred in overruling the motion made by the prisoner, that the court direct the district attorney to call the name of Mabel Cook as a witness for the commonwealth, her name being indorsed upon the bill of indictment, she being present in open court upon the subpoena of the commonwealth." It is a sufficient answer to this to say that a writ of error will not lie to such refusal of the court. Nor do we find any error in those portions of the charge referred to in the fourth, fifth, and sixth assignments. It would be a waste of time to discuss them.

The seventh and last assignment alleges that the court below erred in allowing the bill of indictment, with the indorsements thereon to go out to the jury against the objection of the prisoner. The bill of indictment was always sent out with the jury when they retire to deliberate upon the verdict. The whole difficulty was that a former conviction of the prisoner was indorsed upon the back of the bill. The first conviction had been of murder of the first degree. This conviction was not satisfactory to the trial judge, so he set it aside and granted a new trial, upon the ground that the weight of the evidence was against the degree of murder as found by the jury. The record of the former conviction as well as the order granting the new trial, was indorsed upon the back of the bill. We learn from the docket entries in this case that the prisoner objected to the bill of indictment being handed to the jury, with indorsements thereon made subsequent to the finding thereof. That the objection was overruled, and the jury instructed to pay no attention to the indorsements upon the indictment. The bill of exceptions is silent on this matter, and as there is no exception, the point is not properly before the court. As, however, the learned district attorney waived this omission, I do not hesitate to say that it has little merit. If there was poison, the verdict went with it. The order for a new trial showed that the conviction of murder of the first degree was wrong. Upon the second trial a conviction in the first degree was not claimed. Aside from this, the learned judge below instructed the jury that they must entirely disregard the indorsement. We must assume that jurors have common sense, and pay some regard to the instructions of the court. The greatest effect that could be claimed for the indorsement is that it brought home to the knowledge of the jurors that it was that upon a former trial the prisoner had been convicted of murder of the first degree, and that such conviction had been set aside by the court. The chances are at least even that the jurors had such knowledge when they entered the box. In a case of homicide attracting as much attention as this one did, the fact of a former conviction must have been known almost to every man in the county, and those who did not know it probably could have read, and would be illy qualified for jury duty. It is not pretended that the knowledge acquired through the newspapers or from other sources would be a ground of challenge to a juror; nor do I see any reason why it should invalidate a verdict because acquired from the indorsement on the bill of indictment. Judgment affirmed.

## HORNER v. CLEMENTS and others.

*(Court of Chancery of New Jersey. November 22, 1887.)*

## 1. HUSBAND AND WIFE—REDUCING WIFE'S PERSONALTY TO POSSESSION—DECLARATION OF TRUST.

Complainant's wife, while the wife of a former husband, had received certain lands as a bequest, and had joined her husband in selling the same. Before the purchase money was paid, the husband, having the legal right to the money, executed an instrument in which he disposed of the same, by appointing a trustee to receive it, and invest it to the sole and separate use of his wife, and that she might by last will dispose of it to whom she saw fit, and renounced all his rights in the premises. The wife accepted the declaration of trust, and the trustee received the money and invested it. Afterwards the wife, then the wife of complainant, by will bequeathed the trust funds and proceeds, absolutely, to complainant. Defendants claimed that the first husband never reduced the trust fund to possession, and therefore had no right to dispose of it. *Held*, that it was clearly the intent of the parties that the money should belong to him, and that intent being made known and acted upon, the declaration of trust, and the execution of the will by the wife under the power, were binding on all parties.

## 2. POWER—EXECUTION BY WILL—REVOCATION BY TRUSTEE.

A husband executed a declaration of trust in favor of his wife of certain funds, which she accepted, and the trustee received the funds. Afterwards the wife, by a last will, bequeathed the proceeds of the trust funds to complainant, her second husband. The trustee finally invested the trust fund in a house and lot, and took the title in the name of the wife, who, with complainant, occupied the same at the time of her death. Defendants claimed that this investment was a revocation of the testamentary gift to complainant. *Held*, that the will could not be revoked by any act of the trustees, and in the absence of a formal revocation by the testatrix, the bequest to complainant is valid.

## 3. SAME—CHANGE OF FUND

A wife, by a last will, bequeathed a trust fund in her favor to complainant, her husband. Prior to her death the trustee invested the trust fund in a house and lot, and took the title in the name of the wife. *Held*, that the identity of the fund being clear, the taking of the title by the trustee in the name of the *cestui que trust* did not defeat complainant's right to recover the fund.

Bill for relief.

*J. W. Wartman and J. J. Crandall*, for complainant. *C. G. Garrison*, for defendants.

**BIRD, V. C.** This suit was instituted for the purpose of procuring a decree declaring that certain moneys invested in a house and lot were trust funds, and that the complainant had a lien on said house and lot by virtue of the facts which are in the case, as stated in the bill and admitted in the answer, or clearly established by proof. To come to a right understanding of the question in controversy, it is desirable to state the facts together with the period of time when they arose. The complainant, John Horner, is the second husband of Mary Ann, a daughter of Merritt Horner. Merritt Horner died in 1843, seized of certain lands which descended to his heirs at law, Mary Ann being one of them; she was then the wife of John Grivison. Afterwards proceedings were taken, and a division of the said lands duly effected between the tenants in common, a portion thereof being assigned to the said Mary Ann. Mary Ann and her husband joined in selling her portion to her brother Merlin Horner for the sum of \$1,925. It is admitted that, as the law then stood, the money which was received for the sale of said land became the property of her husband, and that he had the right to dispose of it at his pleasure, and that he did make disposition of it, or attempted to, by an instrument in writing, in and by which he recited the manner in which he became possessed of it, and also his desire to secure it for the benefit of his said wife, and appointed William Horner, brother of said wife, to receive the said money from Merlin Horner, who had purchased the land, and ordered him to invest the same in his, the said William Horner's, own name, on lands secured by mortgage in this state, and to keep the same invested for the sole and separate use of said

wife during her natural life, and from time to time, as the same might be received, to pay over the interest and proceeds thereof for her sole and separate use, without any interference by him, the said John Grivison, or any other person, husband which she might have; her receipt, whether she be *feme sole* or *feme sole*, to be full and sufficient acquittance thereof; and declaring, by the said writing, that it should be lawful for her at any time during her life, whether married or single, by her last will and testament, or by her power, in the nature of a last will and testament, signed by her in the presence of two witnesses, to designate and appoint any person or persons to receive, and acknowledge the said purchase money absolutely after her death, and, in case of her failure to make any such designation or appointment, the said purchase money, and any interest thereon in arrears, should be distributed to her next of kin, in such shares and proportions as they might be entitled to have and receive in personal property of which she might lawfully be possessed in her own right and estate; and that thereupon the said William Horner, his executors, administrators, or assigns, should pay the said purchase money, and any arrears of interest unpaid at the decease of the said wife, to such persons as she might so designate or appoint; or, in default of such designation or appointment, then to the next of kin, as aforesaid, and also declaring, in and by the said instrument, that his true meaning was that the said William Horner might, instead of receiving from the said wife, the said purchase money, secure all, or any portion thereof, by bond and mortgage; and also declaring that, in case of payment of all or any of the moneys so invested, the said William Horner, his executors, administrators, or assigns should from time to time, as often as it became necessary, reinvest the same, or any part thereof, upon bond and mortgage, as aforesaid, and hold the same in trust, as thereinbefore stated. This trust the said William Horner accepted by a declaration in writing, acknowledging receipt of the sum of \$1,225, secured by bond and mortgage, and the balance in cash. The said declaration of trust bears date the ——— day of ———, 1846. On the seventh day of November, 1847, John Grivison departed this life, leaving behind him said wife, Mary Ann, surviving. On the twenty-eighth day of August, 1847, the complainant intermarried with the said Mary Ann, and on the twelfth day of April, 1851, the said Mary Ann made and published her last will and testament, intending thereby to comply with the powers and provisions of the declaration of trust made by her former husband. In and by the said will she refers to and recites the said declaration of trust, and the appointment of said William Horner as trustee, and the powers committed to him by the said declaration of trust, and the powers and privileges conferred on her by the said declaration of trust, and her desire to dispose of the moneys therein mentioned, according to her wishes, she made and constituted the said writing, and declared the same to be her last will and testament, in and by which she gave and bequeathed to her husband, John Horner, all the said moneys then in the hands or under the control of her brother, William, trustee, as aforesaid, or in the hands or under the control of his legal representatives in case of his death, amounting in all to the sum of \$1,925 of principal, and all interest due and to become due after her decease; further declaring that all of said moneys should vest in and become absolutely the property of her said husband immediately after her death. She thereby appointed her husband the executor of her last will. On the seventh day of February, 1863, the said trustee, William Horner, it is alleged, with a view of further facilitating the enjoyment of the said fund of the said Mary Ann, invested the same funds in a lot of land in the city of Camden, taking the title in the name of the said Mary Ann, he did nothing from her to indicate the trust, or to secure the payment of the said purchase money, in which form the said money remained invested until the ——— day of January, 1876, when the said Mary Ann departed this

after which her said last will and testament was admitted to probate. The said Mary Ann died in possession of the said house and premises, and from thence until now her said husband, the present complainant, has been in the undisturbed possession thereof. - It is alleged in the bill of complaint that his right to the possession has been questioned by the heirs at law of the said Mary Ann.

From these facts the defendants seek to establish certain legal principles upon which they rest their case. They insist, in the first place, that John Grivison had no further interest in the consideration money received for said lands after the said sale until he had reduced them to actual possession, which he never did, and that his admitted disposition of them by the instrument recited in the bill was invalid, and of no effect, and that he did not thereby destroy her power or right of dealing with the fund after his death according to her own wishes, and that all investments made by her, or at her request, or upon her directions, were valid and effectual independently of the said supposed declaration of trust. It is further insisted that the investment of the said funds in the house and lot, by her consent, or upon her directions, was a revocation of the testamentary disposition of the said fund, and, therefore, a destruction of any rights which had been secured to the complainant in and by the said last will and testament.

*First.* What ought the judgment of the court to be, as to the legal effect of the action of John Grivison and Mary Ann, his wife, upon the execution of the paper purporting to be a declaration of trust by him, and the delivery of it to her, and her acceptance of it; it distinctly reciting the facts above enumerated, showing his claim of ownership to the said funds, her acquiescence in that ownership, and her acknowledgment of the validity of his claim by the execution of power afterwards by her, in and by which she gave the said funds to the present complainant? It appears that the title to this land was in her; the land was afterwards sold, and before the money was paid, the declaration of trust was made, and, it must be presumed, with her consent, for she accepted it, and afterwards recognized it by attempting, at least, to comply with all its provisions or requirements. If the husband had not actually reduced those moneys into possession, it is conceded that he had a right to do so. I think it must also be conceded that both parties intended to treat them the same as though they had actually been reduced to such possession by the husband. There seems, therefore, to be no necessity for holding that the husband did not acquire a legal right, because the formality of passing the money over to him was not performed, when both he and his wife regarded it as actually done. There are a multitude of cases illustrating the familiar doctrine that courts of equity will regard as accomplished or performed that which the parties intended should be performed, when that intention has once been made known and acted upon. That just and salutary rule, I think, may safely be applied to the case in hand. I conclude, therefore, that the declaration of trust, the acceptance of it by Mary Ann, and the execution of the power therein conferred upon her, by her, were legitimate and binding upon all parties interested.

*Secondly.* Was the investment of the funds in the house and lot, in the name of Mary Ann, a revocation of the testamentary gift? I cannot understand how, upon principle, it can have any such effect. There is nothing to show that such was her intention, either directly or indirectly. The taking the title to a tract of land in her name, the consideration of which was these trust funds, was no more an act revoking her last will than the taking of a mortgage in her name securing those funds. In either event there would be no difficulty in tracing the funds. In either event the act would be the act of the trustee, William Horner, her brother, and not her act. The performance of it might be with or without her consent. Her consent was not, and could not be, essential, so long as the act was the act of one authorized to perform

it. The performance of the act, (the execution of the deed, in this case, or of a mortgage in the case supposed,) might be irregular or a departure from the power under which the trustee is authorized to act; but the irregularity of an act, or the departure from the strict line of duty by the standard of the instrument creating the trust, certainly cannot be urged as a destruction of the trust itself. Nor is the investment a revocation of any power which has been duly executed according to such declaration of trust. It seems to me that it would be a very dangerous doctrine to hold that wherever a donee, after the exercise of a power conferred, destroys the operation and effect of the instrument by which the power is exercised, simply because a consent is given to some use or disposition of the funds, which is the object of the new power, in a manner not precisely contemplated by the original declaration of trust which gives the power. In this case the only departure or irregularity, was in investing the moneys by taking an absolute title in fee for the land, rather than a mortgage; the money, nevertheless, being secured, its identity placed beyond dispute, and the object in no wise indeterminate. I can find nothing in the case to signify the slightest intention on the part of Mary Ann to revoke her last will. It was allowed to go to probate, and, so far as appears, without any resistance by her heirs at law or next of kin. So there does not appear to have been either a revocation, or an attempted revocation. And, therefore, the statute, (Revision, 1248, § 23,) which requires that all written revocations of wills shall be executed in the same manner that wills are required to be executed, has not been complied with, nor the general rule of evidence that the proof to overcome the force of an existing will, or a paper writing purporting to be a will, must be of the same character and force, both as to credibility and the number of witnesses, as is essential to establish a will. *Boylan v. Meeker*, 28 N. J. Law, 274-285; *Mundy v. Mundy*, 15 N. J. Eq. 290.

Where, then, is the fund given by the will? Can it be traced? It is admitted that the trustee invested it in the house and lot named in the bill. Is the legatee deprived of it because the trustee was recreant? Is it only necessary for a trustee to divert the funds in his hands, or to invest them, in the name of another, in order to deprive a legatee or donee of his just rights? Hitherto courts of equity have not allowed such considerations to prevail. If the trustee had kept these moneys in his own pocket, or had invested them in his own name on bond and mortgage, or in the purchase of real estate, he could be compelled to account for them, or the mortgage could be laid hold of in the one case, the land itself in the other. Wrong-doing can never so shorten the arm of the court that it cannot save such funds. And taking title in the name of another, even the donee of the power, cannot overcome the equity, after the donee has exercised the power.

Counsel for the defendants interposed the doctrine of laches, saying that the complainant had slept on his rights for 23 years. Not 23, for the testatrix did not die until in 1876, about 25 years after she made her will, and about 13 after the purchase of the lot. This being so, and the husband and legatee being in possession of the lot and premises, and no question having been raised until recently, I am persuaded that it was not his duty to open this litigation sooner. It is not shown that any one has suffered, nor that he has gained any advantage.

I will advise a decree making the entire fund, together with the costs of this suit, a lien on the house and lot in question, and that a sale be made to raise the amount due, together with the costs of execution, unless the defendants, or some of them, pay the same within 30 days from the time of the service of this decree on their solicitor. No costs will be allowed against the defendants personally.

## WOOD and another v. ALPAUGH and another.

*(Court of Chancery of New Jersey. November 30, 1887.)***MASTER AND SERVANT—CONTRACT OF HIRING—INCOMPETENCY—ESTOPPEL.**

Complainants, having the reputation of being good practical potters, contracted with defendants to take charge of their pottery, for \$3,000 per year each, and 10 per cent. of the profits, which defendants guaranteed should produce \$2,000 to each annually. With the knowledge of defendants, attempts were made by complainants to manufacture ware of a peculiar character, the experiments lasting some time and proving failures. The pottery, under complainants' management, turned out goods of the value of \$200,000 per year beside these failures. Defendants credited complainants on their books with the \$2,000 a year each for two years, and in their advertisements referred to the good workmanship shown by their wares. They paid complainants the \$3,000 salary, but refused to pay the \$2,000 guaranty, alleging heavy losses owing to the unskillful management and neglect of complainants. The evidence showed that defendants, while not practical potters, had considerable knowledge of the art. *Held*, that defendants were liable on their guaranty, the circumstances showing no fraud or deception on the part of complainants, and defendants having encouraged them to continue their experiments with knowledge of their failures, and having, with such knowledge, given them credit for the amount guaranteed.

**Bill for account.**

*James S. Attkin*, for complainants. *G. D. W. Vroom* and *R. Gummers*, for defendants.

**BIRD, V. C.** The complainants ask that the defendants may be ordered to account to them for services rendered under an agreement. On the seventh day of May, 1883, the complainants and defendants entered into a written agreement, in and by which it was recited that the said defendants owned and operated a pottery manufactory in the city of Trenton, and that they had agreed to employ the said complainants to superintend and manage the manufacturing part of the business, including the decorating department, and taking the entire charge of the works, the employment of hands, and the selection of materials, after which recital it was agreed between the said parties that the said defendants should employ the complainants to take such entire charge and management of the manufacturing department of their pottery, including the decorating department, for the term of three years and two months from the date of said agreement; and the complainants agreed to enter into the employment of the said defendants, and to take the entire charge of the manufacturing department of said pottery, and to give their whole time, labor, and skill towards the proper management of the said business during said term; and the said defendants further agreed that they would pay for said services during the said period a salary of \$3,000 a year to each of the complainants in weekly payments, and also 10 per cent. of the profits of the business, which profits they guaranteed should produce to the said complainants at least the sum of \$2,000 a year each. Under this agreement the complainants took charge of the works of the defendants. They say in their bill that they were practical operators in pottery work. They continued in the employ of the defendants until they were discharged in the month of March, 1886. Their salary of \$3,000 a year was all paid, except a very small amount, but nothing additional,—no part of the profits which it is alleged were made have been paid. They say that they are ignorant of the accounts of the business, and pray that an accounting may be ordered. The defendants admit the agreement, and that the complainants entered into their employ thereunder, and continued therein until they were discharged in March, 1886, just prior to the time when the agreement would have expired by its own limitation. They insist that there is nothing due the complainants, because of their unskillful management of the business which was committed to their charge under and by virtue of the agreement. They say that they had no

practical knowledge themselves of the manufacture of pottery, and relied upon the complainants, but that they so unfaithfully performed their duties that great loss resulted to the defendants.

Ought there to be an accounting? And whether an accounting or not, ought the defendants to be charged with the \$2,000 profits which they guaranteed to the complainants? The accounting is resisted by the defendants on the ground of unskillful management of their pottery by the complainants. It is alleged, because of such unskillful management, they suffered great loss, and that no profits were made. It is undoubtedly true that certain portions of the work undertaken by the complainants were failures. They undertook to manufacture what they called "Bone China," "Imperial China," "Vitrified China," and "Underglazed Decorated Ware," and all proved failures except, perhaps, the imperial china, of which more hereafter. The responsibility for these undertakings, and for the failures, is all charged by the defendants upon the complainants. It is insisted that the complainants represented themselves as able to make the manufacture of these various wares a complete success, and that they, in so many words, guaranteed the defendants that such should be the result of the undertaking. Upon such representations, the defendants permitted the complainants to proceed to make the necessary purchases of the materials, and to construct the proper works, and they also advertised such wares upon the belief that the effort would be successful, and received large orders from Boston, from Chicago, and from Pittsburgh, and other places, amounting in all to many thousands of dollars; and that a short time after the orders were filled, complaints were made, and the goods returned, either to the entire loss of the defendants or nearly so. In some instances they were permitted to supply the orders with other goods. It is proper to state that the goods enumerated were not all the goods that were manufactured; they also manufactured at the same establishment a very large amount of plain white ware, amounting in all to about \$200,000 worth each year; yet, in fact, the insistence is, upon the part of the defendants, that no profits resulted to them from the manufacture of wares as a whole.

Taking these statements, and giving the defendants the full benefit of them, the question still arises, under the circumstances of this case, are the complainants entitled to an accounting in order to ascertain whether any profits accrued in this business during the continuance of their services, of which they are entitled to a share? Now, it is to be observed that one of the defendants, Mr. Magowan, was not entirely ignorant of the manufacture of pottery ware. He was inquired of whether he could say of his own knowledge what the quality of certain wares was. He said that he could, and that he was well acquainted with several receipts for manufacturing pottery, and that he had given a great deal of time and attention to it. Answering further upon the subject, he said that he was thoroughly acquainted with it, so much so that in speaking of the result of the experiment of manufacturing imperial china, he said that it was very bad indeed. It is important to bear this fact in mind. It is entitled, together with other circumstances, to great weight in the further consideration of the question now before me. Mr. Magowan describes the imperfections of the wares that were produced; specifically characterizes the different defects, and the consequences of those defects to the firm. He also tells what produced the defects. He says that they were caused by bad management in and about the kilns, and by a lack of attention to the placing of saggars and keeping the saggars in proper condition, so that when the ware was being fired the dirt would fall upon the ware and become mixed with it. It appears from Mr. Magowan's testimony that he knew of this unskillful management and of these imperfect wares from the first, and that during the first six months of their employment he frequently called the attention of the complainants to them, and to the great loss which they, Alpaugh & Magowan, were sustaining by such management. According to Mr. Magowan's testi-

mony, so seriously was he impressed with the failure of these complainants to accomplish what the defendants expected of them, that they early contemplated discharging them, and would have done so had it not been for the difficulty of getting any one else to take hold of the work, and to carry it on for them. It should be noted in this connection that the defendants had every opportunity to know that these peculiar kinds of wares, which were called "specialties," were not manufactured so as to be acceptable to their customers, and that the experiments were failures. This view of the case is enforced by the consideration that each one of these undertakings to manufacture the specialties above named was an experiment. The testimony makes it perfectly clear that the defendants so understood it. It cannot be said, therefore, that the entire responsibility for the undertaking rested with the complainants, and that the consequences should be visited upon them alone. As intimated, within six months an experiment was tried which proved a failure. The defendants were fully apprised of it by the ill success with which the wares met when put upon the market, and by the fact that large numbers of them were returned to them by their customers. They spoke to the complainants about the misfortune in that particular. The complainants acknowledged that they had made a mistake,—that the effort was not a success; but the defendants allowed them to go on, and to make other experiments in other specialties from time to time, each one, as has been said, being fruitless. The complainants, it is true, were representing themselves to the defendants as expert manufacturers of pottery, and as able to manage the large concern of the defendants with success, but, at the same time, they had, in the course of their employment, demonstrated their inability to manufacture the specialties which the defendants thought were so desirable. After this demonstration, the defendants had no right to go further. It seems to me, upon the plainest principles, that they, being the owners of the establishment, not only had the right, but it was their duty, to prevent any further experiments, unless they were willing to experiment at their own cost. It seems to me that it would be a strange doctrine if servants or employes, whether skilled or unskilled, should be held responsible, without special agreement, for every effort made by them, by way of change or otherwise, to advance the interests of their masters or their employers; and especially does this seem to me to be the proper view when such change or effort is made with the full knowledge and consent of the master or employer. No steps were taken in these experiments without the defendants' knowledge. They were first consulted with, and in every instance, if they did not advise and order the experiment, they consented thereto. I think it may be safely said that they not only approved of their undertaking, but were anxious that it should be made. They, no doubt, had great confidence in success, for they required great speed in the work, and they advertised their specialties very extensively, long before any goods had actually been produced from the kilns, and solicited orders before there was any demonstration whatever that the success would be complete. These views are strengthened by the facts which will appear in the consideration of the liability of Alpaugh & Magowan on their guaranty of profits to the extent of at least \$2,000 to Wood and Barlow, which question we will now consider.

Are Alpaugh & Magowan liable on their guaranty to Wood and Barlow that each of their shares of the profits should amount to at least \$2,000 a year? The language of the agreement respecting this is in these words: "And the said party of the first part do agree that they, the said parties of the second part, shall receive for their said services during the said period the salary of \$3,000 a year each, payable in weekly payments. And do further agree that said Wood and Barlow shall also have and be entitled to ten per cent. of the net profits of said business during said period. And said party of the first part do guaranty that said profits shall bring in to said party of the second part a sum of at least \$2,000 a year to each of them, and said salary and profits to

begin on the twenty-first day of May, 1885." This is the contract respecting salary and profits put in writing by the parties. It is as plain and exact as words can make it, without polish or circumlocution. Its meaning is as certain as the language is plain. There is no possible ground for doubt because of ambiguous words or phrases, or of conflict between different sentences. Alpaugh & Magowan guarantied that said profits should bring in to Wood and Barlow a salary of at least \$2,000 a year to each of them. If any part of the contract is binding upon either of the parties thereto, this certainly is. Under every rule of law, this written agreement must prevail, unless it was procured by fraud, or unless there was a mistake made in the insertion of it, or unless it has been varied subsequently by another agreement, or unless Wood and Barlow have been guilty of gross neglect or inefficiency in the discharge of their duties as managers,—guilty of neglect or inefficiency in discharge of their duty arising out of the written contract. I cannot find that there was any fraud in the conception of the contract, or in its execution. The particular clause arrested the attention of Alpaugh when it was first read in his hearing, and its object and purport were then considered and discussed in the presence of all the parties thereto, and, after a clear understanding respecting it, the instrument was signed. And when the circumstances which led to the execution of this contract are presented and considered, it will be seen that Wood and Barlow neither said nor did anything by which Alpaugh & Magowan could have been misled, or were in any respect deceived.

Barlow had been living in Trenton for years, and had the reputation of being a good practical potter. He had been in the employ of other companies in Trenton, and was, as far as appears, a skillful worker. For sometime before his engagement with Alpaugh & Magowan, he had been in the employ of Mr. James Moses. At the time of this contract he was still in the employ of Mr. Moses, under a contract to work for him for five years, two years of which had yet to run. Mr. Moses was a skillful and successful potter, and Barlow had the reputation of being an efficient helper to him. Alpaugh & Magowan had recently purchased the potteries which they were at this time operating, and they desired additional help in the management of them. Magowan had learned of the abilities of Barlow as a practical potter. He sought an interview with Barlow. Through a friend he arranged for a meeting. At this first interview Magowan offered Barlow \$30 per week, and 10 per cent. of the profits of the business. Barlow refused the offer, and gave as a reason his engagement with Moses, explaining to Magowan that he was under obligations to him for two years to come. Magowan asked Barlow to procure a release from Mr. Moses, which Barlow endeavored to do, but which Mr. Moses refused. The next day Magowan saw Barlow, and learned the fact that Mr. Moses refused to discharge him. But Magowan again pressed Barlow to procure a release, and still Barlow was unsuccessful with Mr. Moses. Magowan then offered \$60 a week, and 10 per cent of the profits. Barlow made further efforts with Mr. Moses for a release, but Mr. Moses told him that if he left his employ he would prosecute him; and this fact Barlow communicated to Magowan, and Magowan told Barlow that he would guaranty to protect him against any action for damages brought by Mr. Moses. Barlow still refused to engage with him. Magowan then called in the aid of Wood, one of the complainants, who was brother-in-law to Barlow, and also a practical potter. Wood called on Barlow at the request of Magowan, and told Barlow that Magowan had offered him \$60 a week, and also 10 per cent. of the profits, and was willing to guaranty that the profits would amount to at least \$2,000 a year, and that he had authorized him to say that he would give the same to Barlow. After this interview, a meeting of Magowan, Barlow, and Wood was arranged for on the following Sunday, at the house of Wood. They had such meeting on the Sunday named, and Magowan assured Wood and Barlow that he would give them the sum of \$60 per week each, and

would guaranty to them that their share of the profits should be at least \$2,000 a year each. At that meeting Magowan also promised to indemnify Barlow against any action which Mr. Moses might bring against him for a breach of his contract, and a willingness to express it in writing. Barlow then promised to enter into the employ of Alpaugh & Magowan. It was understood that Wood and Barlow should have the agreement prepared in accordance with the terms then stipulated, and it was accordingly prepared and signed as above indicated, and so also was the agreement to indemnify Barlow against all costs and damages in any action by Mr. Moses. As I have intimated, when the agreement was read, previous to the signing, Alpaugh expressed some surprise at the clause guarantying that the profits should amount to \$2,000 a year to each of the complainants, but the matter was discussed, and the agreement was signed by the parties with that clause unchanged. It is an important fact that the attention of the parties was particularly called to this branch of the contract. It shows, beyond qualification, that it was regarded as important by all the parties thereto; so important that the complainants were careful to have it inserted in the plainest terms in the agreement, and that Alpaugh, who had taken no great part in the negotiations, should speak of it when the agreement was first read.

From this brief narration, it is very evident that Magowan was extremely anxious to secure the services of Wood and Barlow, and this accounts, in a great part, for the guaranty clause in the contract that the share of the profits to Wood and Barlow should be at least \$2,000 a year for each. It is of great consequence to consider that Magowan was so unceasing in his efforts, so unchanging in his desire to have Wood and Barlow enter into his services, that he was not only willing to pay an extraordinary salary for their services by the week, and to guaranty them two-thirds as much more at the end of each year, with a flattering prospect of an additional amount by way of profits, but was also willing to agree to indemnify Barlow against all the costs and expenses that might result to him from the breach of his contract with Mr. Moses. There is nothing in the case that leads me to the slightest conviction that there was any fraud or any misunderstanding whatever between these parties prior to or at the time of the execution of this agreement. I am satisfied that the complainants were what they were understood to be, good practical potters. I am satisfied that they held out no inducements to either Alpaugh or Magowan that they were anything else. Whatever either of the defendants may have imagined or supposed, there is nothing in the case to have justified them in believing that either Wood or Barlow were greatly skilled beyond their fellows in the art in which they were engaged. Taking the case as it stands, considering the circumstances of the parties, the knowledge which Alpaugh & Magowan had of the business, and the undoubted opportunities which they had to know of the qualifications and experience of Wood and Barlow, they were not deceived or misled by either Wood or Barlow. I do not wish to be understood as saying that Alpaugh & Magowan have not sworn that Wood and Barlow represented to them that they could manufacture certain kinds of ware which upon trial they did not succeed in doing. But whatever on this head has been asserted by Alpaugh & Magowan has been with equal emphasis denied by Wood and Barlow, not only by flat contradiction, but by circumstantial detail. This being so, and the burden being on the defendants, the well-established rule requiring a preponderance of evidence before judgment, I cannot conclude in favor of Alpaugh & Magowan in this branch of the case. And on this same point, consider the fact that Alpaugh & Magowan had become leading pottery manufacturers in Trenton, and had, for some time, an abundant opportunity of becoming acquainted with the skilled potters, and did inquire respecting the abilities of Wood and Barlow, and did learn, beyond question, the exact position which they occupied

as artisans. Both Wood and Barlow had been for years employed in Trenton. Both of them, as far as appears, had been successful; neither of them possessed all the secrets of the trade, nor the ability from experience or education, of manufacturing every kind of ware to the trade. This shows the situation of the parties, the opportunities Alpaugh & Magowan had for acquiring information, and the knowledge they must have had respecting the ability of these complainants when negotiations were commenced and concluded. And the truth of these variations is established, to my mind, beyond question, when it is considered that Magowan pressed his suit with such pertinacity as to induce Barlow to leave Mr. Moses, and at the same time to offer, by way of guaranty, \$2,000 a year out of the profits. And again, how can I conclude that Wood and Barlow were not, in truth, good practical potters, when it is established that their management about \$200,000 worth of wares were manufactured by the defendants' works each year, not taking into the account the experience of the complainants?

There was no mistake in the execution of the agreement. It undoubtedly expressed the offer of Magowan, and the terms on which Wood and Barlow consented to enter into the employ of Alpaugh & Magowan. That the agreement itself is free from any such charge is manifest from the fact that no effort has been made at reformation. Nor can I find that there was any fraud in this contract, either verbal or written, after its execution. There is nothing which shows the slightest intention of the parties to make any modification of it. Whatever rights accrued or obligations were incurred, they were independent of the original written contract, and, if any were, must be considered separately from it. After the fullest investigation, I can lay down nothing that will justify me in holding that such rights or obligations were created upon the written contract. If there should be found any such rights or obligations to exist, another question arises. In such case, should Alpaugh & Magowan show an equitable claim, could it be set off, or could there be a judgment of non est? Under the practice in this court, I think not. This, I think, is established on the firmest footing, by the case of *Trotter v. Iron Co.*, 10 Atl. J. Eq. 229, 3 Atl. Rep. 95. The merits of this branch of the case, however, upon the facts as detailed by the witnesses, I will now proceed to look into, going upon the ground of total failure of consideration.

But Alpaugh & Magowan insisted that they are not bound to comply with the terms of the contract as to this guaranty of \$2,000 a year to each of the complainants, because there were no profits, and because of the failure of Wood and Barlow to manage the manufacture of pottery successfully. The defendants insist that all depended upon the successful operation of the pottery; that the agreement had for its foundation the skill and the ability of the complainants to manage the pottery with profit; that this consideration was the very life of the agreement itself. In one respect this is undoubtedly true, and it may well be admitted that Alpaugh & Magowan would not have entered into an agreement to pay \$5,000 a year to each of their managers, unless, in their own minds, at least, there were the best of assurances of large profits from the operation of their establishment. This is of great importance, and must not be overlooked. But when the rights of the other contracting parties are considered, a different view is presented. As to them, it may well be asked, what was their consideration? That whether there were profits or not is not so much the question. Alpaugh & Magowan can refuse to pay the \$2,000, which it is agreed to be guaranteed to pay, because there were no profits, just as well might they refuse to pay any part of the compensation of \$60 a week for service. The defendants were under just as much obligation to pay the one as the other. They could as well be relieved from the one as from the other; the same reason would excuse payment in one case would in the other; both are equally binding by way of contract. In one case it is an agreement to pay \$60

and in the other \$2,000 a year, the only difference being in the language used to express the obligation. The one is a simple promise, the other is enforced by the stronger term, it may be, of the word "guaranty." The \$2,000 offered out of the profits were just as much compensation for labor and services as the \$60 per week, and if Wood and Barlow failed to earn the one, because of negligence or unskillfulness, they certainly failed to earn the other. The same rules of law and the same reasoning must apply to both alike.

The question remains whether or not the defendants can escape their obligation to pay the \$2,000 a year profits, because of the unskillful or negligent management of the potteries upon the part of Wood and Barlow. In determining this question, I must consider the extent to which Alpaugh & Magowan desired to apply this negligence and unskillfulness. I have said that the testimony satisfies me that Wood and Barlow were, in the just sense of the term, good practical potters. I find nothing in the case to satisfy me that, during their employment with Alpaugh & Magowan, they did anything to falsify their reputation in this respect. Now to what extent do Alpaugh & Magowan desire to make application of their charge of inability and mismanagement? Is it to the whole of the business, to the entire management, to all of the output of the plant, to everything that was manufactured there and put upon the market? No, they only seek to charge Wood and Barlow with inability, unskillfulness, or mismanagement with respect to the vitrified china, the bone china, the underglazed decorated ware, and, perhaps, with portions of the imperial china. When the contract was made, none of these wares were made at the pottery of the defendants; other kinds of wares were made to a very large extent. As I have intimated, it is most clear that the vitrified china, the bone china, and the underglazed decorated ware, were not among the goods commonly manufactured in this country. The underglazed decorated ware was manufactured in Trenton, and it may be elsewhere in this country, and the manufacture of it at other places in Trenton had been made a success; but from the testimony I am led to believe that that success depended upon knowledge of some branch of the manufacture which was a secret; for one of the principal manufacturers of that ware was questioned upon that very point and declined to give the secret which he supposed he enjoyed to the public. Now, therefore, admitting that with respect to these wares Wood and Barlow did not succeed, should the defense so set up by Alpaugh & Magowan, with respect to the \$2,000 a year, prevail? In other words, is the servant or employe, whatever his position may be, chargeable with the failure of every new enterprise which may be entered into, whether it be with his consent and approval, or even recommendation and assurance of success or not? In my judgment under the law, this question must be answered in the negative. I can discover no principle of law that binds a servant or employe to that which is equivalent to compensation in damages for the failure of any extraordinary undertaking, unless he has expressly bound himself thereto. Simple recommendation or assurance is not equivalent to a contract of indemnity. There seems to be nothing, anywhere, in the law of contracts, that binds a servant to the consequences of the extraordinary undertakings which he is directed to engage in, by his master or employer, however enthusiastic his servant may be in the expression of the belief or assurance that he can make it a success. I am speaking now with sole reference to the facts in the case before me. The undertakings to which my thoughts are directed are those which were peculiar, novel, extraordinary in themselves, and from which, if they had been successful, the defendants expected to reap prodigious profits. These peculiar wares were not made when the contract was entered into at this pottery. They afterwards were suggested, and whether by Wood and Barlow, or not, cannot be material. The manufacture of them was not undertaken until Alpaugh & Magowan had been fully consulted respecting it, and their judgment and ap-

proval given. Alpaugh & Magowan insist that Wood and Barlow, in each instance, guarantied success; but this is unqualifiedly denied by Wood and Barlow. These contradictions, like many other absolute and direct contradictions in the case, I cannot reconcile; and I am free to say that there is nothing in the case which enables me to form a satisfactory conclusion that the complainants did, in any binding sense, assure the defendants that they could make the specialties above named. I desire to say, however, that it is clear to a demonstration that when the defendants engaged the complainants to manage their pottery, the defendants were full of hope and enthusiasm, and expected large rewards for their undertaking, profits amounting to \$50,000 or \$60,000 each year, and were thus induced to offer the salaries for the services of the complainants which they afterwards found a burden, and which they now seek to rid themselves of; and I am equally well satisfied that the complainants, elated with the flattering offers which had been held out to them by the defendants, and which had been guarantied to them by the agreement, undertook the work of managing these potteries with a like enthusiasm, and were encouraged thereby to make every effort to please their employers, and thereby reward themselves by greatly increasing the profits of the concern. But the very first efforts at the manufacture of specialties were unsuccessful. As said above, before six months had elapsed this was demonstrated to both Alpaugh & Magowan. Yet, in the face of this warning, they continued or allowed their managers, Wood and Barlow, to continue their experiments, now in one direction, and now in another; at one time, with vitrified china, at another, with bone china; not only allowed but urged them on in this new work. It is not said that Alpaugh & Magowan were absolutely ignorant of the qualities of these wares. They could not mould or fashion them; they did not know how to glaze or temper them; they did not know how to burn, or when to draw the kiln, but they certainly had such a practical knowledge of the quality of the wares as to be able to determine very good from very poor, and to draw some conclusions in a business way, at least, from those efforts which they themselves say were total failures. Alpaugh had been engaged as a salesman for at least seven years, and in that respect, among pottery men, had earned a very good reputation; with this experience must have come an extensive acquaintance with the quality of the goods which he was engaged in vending, though he could not make them. Magowan declares that he had such knowledge of the different kinds of wares, and had the receipts for the manufacture of them. It would be quite absurd, therefore, for the court to proceed in the consideration of this question, upon the ground that Alpaugh & Magowan were wholly ignorant of the art, and that they were relying solely on the judgment and skill of Wood and Barlow.

The propriety, applicability, and importance of the foregoing remarks will be more and more manifest as a few of the well-considered acts of Alpaugh & Magowan are taken into the account. The speech and conduct of the parties, during the ordinary progress of events which they are interested in and have the control of, are of infinitely more value in ascertaining the truth, than what may be insisted upon by them as conclusions of fact in the midst of an excited legal controversy. From this stand-point I think the evidence shows, beyond the possibility of refutation, that Wood and Barlow were good practical potters, and that they proved themselves so to be while in the employ of Alpaugh & Magowan. I now submit what I refer to. July 25, 1884, more than a year after the contract had been signed, Magowan wrote to one of their agents in Detroit, saying: "I am pleased to learn you sold several bills in Cleveland, and hope you will succeed in making sales to new trade for our light imperial china; for, as you are aware, these are the goods, and the only goods, we propose making or selling. We do not care to have sales for granite or C. C. goods pushed at all. Make as many sample sales of hotel china as possible, for we are confident wherever these goods get into the hands of first-class houses they

will appreciate the quality, workmanship, etc., and favor us with a continuance of their trade." August 11, 1884, Alpaugh & Magowan wrote to the same agent, saying: "We beg leave to inform you that at a meeting of the firm yesterday, it was decided to discontinue the manufacture of white granite and C. C. ware, and to devote our entire attention to the production of imperial china. \* \* \* In accordance with our instructions you will, therefore, push the sale of imperial china, and secure all the orders you can." In April, 1885, after Wood and Barlow had been in their employ nearly two years, under the contract, Alpaugh & Magowan issued to the trade a circular, in which they say: "Notwithstanding the enormous productive facilities of this pottery, we have been obliged to discontinue the manufacture of white granite and C. C. ware, and to confine ourselves exclusively to the production of our present leader,—a high grade of extra quality, plain and decorated, thin porcelain dinner, tea, and toilet ware, which we have named 'Imperial China.' We claim for this imperial china a quality, durability, and finish that is unrivaled. It is superior to any thin porcelain made in America, and fully equal in every respect to foreign importation,—we make no exception. Our shapes and decorations have been conceded, by those who have made a comparison, to be the most perfect ever placed upon the market. For beauty, symmetry, and utility, they are without a rival; \* \* \* all we ask to prove the accuracy of these claims is a competitive test. We are the only manufacturers in this country who back their goods with a warranty. We inclose a copy of this iron-clad document, which speaks for itself." In May, 1885, Alpaugh & Magowan issued another circular to the public, headed "VICTORY," in which they use the following language respecting the production of their works, and of their managers, Wood and Barlow, who had now been in their employ for two years: "American sanitary earthen-ware, not only equal but superior to any of foreign manufacture, now being produced in the Empire Pottery. Competitive tests by the most prominent and practical experts of this country have verified this claim. The delusive arguments presented to the trade by certain inspectors of sanitary ware, who are interested in foreign potteries, should no longer be entertained by jobbers or dealers, for in America we not only have the finest clays and crude materials ever discovered, but the Empire Pottery has the same practical managers, and the same experienced workmen, who have been prominently identified with the largest and most prominent English sanitary ware potteries from boyhood, and bring to us the benefit of their long and valuable experience." In another circular they say to the public: "Recollect we are the only manufacturers who have proved, by actual test, that our ware is the best, both in quality, durability, and finish." And as late as November 5, 1885, only a short time before they were discharged, in a circular concerning the management of pottery, directed to Wood, Alpaugh & Magowan say: "The good workmanship of the ware is to be maintained."

Certainly these defendants, Alpaugh & Magowan, are too high-minded, honest, and honorable to expect or think that any court would announce a decree which would be equivalent to convicting them of willful misrepresentation in every one of the utterances by them above quoted. Interest, duty, honor, required them to speak the truth then, and I feel it to be my duty to take them at their word. But it may be asked, if these defendants, Alpaugh & Magowan, be honest and honorable men, having made the foregoing statements, and given them to the public to induce merchants to buy of them, how do they excuse this resistance to the claims of Wood and Barlow under the contract? I have answered this question above, but renew the inquiry, so that the exact point of conflict may not be lost sight of. The answer to the inquiry is, though not so expressed in the pleadings, nor by any admission, direct and open, that, notwithstanding all that was said in the circulars, the "Bone China," the "Vitrified China," and the "Underglazed Decorated Ware," were

failures, and because these were such failures the complainants, Wood and Barlow, have forfeited all right to the \$2,000 each for each year during their service. I have endeavored to show that this contention cannot control. The quotations from the pen of Alpaugh & Magowan given above are irrefutable proofs that Wood and Barlow are good practical potters, and that they did for Alpaugh & Magowan all the law required of them under the contract. In such case, it is the duty of the employed to perform the duties incident to his employment, honestly, with ordinary care, and with due regard to his employer's interest and business; and it is implied that he is competent to discharge the duties for which he is employed, and that he possesses the requisite skill. Wood, Mast. & Serv. §§ 85, 157; *Parker v. Platt*, 74 Ill. 430; *Waugh v. Shunk*, 20 Pa. St. 130; *Page v. Wells*, 37 Mich. 415, 421. In this last case, COOLEY, C. J., says: "Whoever bargains to render services for another undertakes for good faith and integrity, but he does not agree that he will commit no errors. For negligence, bad faith, or dishonesty, he would be liable to his employer; but if he is guilty of neither of these, the master or employer must submit to such incidental losses as may occur in the course of the employment, because these are incident to all avocations, and no one, by any implication of law, ever undertakes to protect another against them." I will only submit one other fact, which, I think, will immovably stand against the contention of the defendants, and that is, in 1884, after Wood and Barlow had been managing for more than a year, Alpaugh & Magowan gave Wood and Barlow credit for the \$2,000, and handed a statement to each to that effect. And in 1885, September 22d, Alpaugh & Magowan directed a like credit to be given to each of them, and a statement to each with a credit of \$4,000. I will advise a decree in accordance with these views. The complainants are entitled to costs.

#### CARPENTER v. NATIONAL BANK AT RAHWAY.

(*Supreme Court of New Jersey. November 28, 1887.*)

##### LIMITATION OF ACTIONS—AGAINST NATIONAL BANK—USURIOUS INTEREST.

The limitation of two years within which suit may be brought against a national bank for taking usurious interest does not begin to run from the time of the agreement for such interest, but from the time of the receipt of the money by the bank. (*Syllabus by the Court.*)

Error to circuit court, Union county; before Justice VAN SYCKEL.

Action by David P. Carpenter against a national bank for taking usurious interest. The plaintiff's note, dated May 20, 1882, at six months, was discounted by defendant same day, the charge for discount being \$164.64. The plaintiff's note, dated July 10, 1882, at six months, was discounted July 25, 1882, the charge for discount being \$17.83. The plaintiff paid the defendant, twentieth April, 1883, \$6.79 for interest. The plaintiff kept an account at the defendant's bank, and at the time of discounting the first two notes was credited with the face of the notes less the discount charged. The first note was paid by the plaintiff, December 4, 1882; the second, April 2, 1883; the suit was begun December 4, 1884.

BEASLEY, C. J. It is admitted that the transactions put in question by this proceeding were usurious; the only defense interposed being the contention that the two years limited by the act of congress within which a suit of this kind can be brought had elapsed before the inception of this action. The only point of difficulty in the case is to ascertain when, or upon what event, this period of limitation begins to run; the defendant contending that its starting point is the date when the notes were discounted, while the plaintiff takes the position that it is the time of the payment of the note, principal, and usurious interest. The theory of the defense was approved by the cir-

cuit court, and accordingly judgment went against the plaintiff, with respect to the claim resting on the two notes which had been discounted before the two years preceding the suit, and which had been paid within such period. Hence this writ of error.

The language of the national act thus construed is as follows: "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: provided such action is commenced within two years from the time the usurious transaction occurred." Upon analysis, this statutory provision will be found to create two distinct offenses, kindred in character, but visited by unlike penal consequences. The one is for reserving or charging the unlawful interest, and such act occasions "a forfeiture," in the words of the law, "of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon; and the other, when the forbidden contract has been executed by the payment of the illegal interest, in which event the party grieved is given the right to recover, by suit, double the money so unjustifiably executed. That this is the effect of this section, has been authoritatively declared by the supreme court of the United States in the case of *Barnet v. Bank*, 98 U. S. 555; and this decision has been since approved of by the same court in *Driesbach v. Bank*, 104 U. S. 52.

Observing, then, this effect of this act,—that it provides distinct penalties for the two classes of usurious transactions,—it is not difficult to perceive which of such transactions it designated in the section as the starting-point in the clause of limitation. The phrase is: "Provided such action is commenced within two years from the time the usurious transaction occurred." Which usurious transaction? Is it the transaction of agreeing for the usury, with which this suit has no connection, or the transaction of actually receiving the money, and which forms the foundation of the action? Looking closely into the matter, it becomes apparent that to conclude that the event, standing as the beginning point of the limitation, is the agreement for the usury, and not its receipt, is to do considerable violence to the statutory expressions. The act describes such event by the phrase, "from the time such usurious transaction occurred;" and the usurious transaction immediately preceding this, and being comprised in the same sentence, is constituted of the mere payment of the money; so that, according to grammatical usage, it is that transaction, being the next antecedent to the phrase, that must be regarded as its relative. And, indeed, we seem to interpolate the act when we say that the contract to take the usury is the event referred to, for plainly such contract, in the present case, was but the first step in the affair leading up to the final act of paying the money; so that, if we adopt the construction that the limitation runs from the time of the agreement, we vary the statutory language, and make the section read that the action must be brought within two years from the time the usurious transaction commenced to occur, and not, as the act says, from the time that it occurred.

These considerations have led me to the view, contrary to my first impressions, that this judgment should be reversed.

## FRANK and another v. CONRAD and another.

(Supreme Court of New Jersey. November 26, 1887.)

## LANDLORD AND TENANT—DUTY OF LANDLORD TO REPAIR.

A landlord who contracts with his tenant to attend to all the repairs of the demised premises is only required to exercise reasonable diligence in ascertaining what repairs are necessary, and in making such repairs as due inspection would show to be proper. He does not by his contract guaranty that the premises will never in fact be out of repair.

(Syllabus by the Court.)

Error to circuit court, Essex county; before Justice DEPUE.

On rule to show cause why a verdict should not be set aside.

S. Kalisch, for plaintiffs. A. Struble, for defendants.

DIXON, J. The testimony in this case warranted the finding of the following facts: That in July, 1883, the defendants let to the plaintiffs for a residence three rooms on the third floor of No. 90 Morton street, Newark, with the right to use for certain purposes a balcony extending along the rear of the third story of Nos. 86, 88, and 90 Morton street; that the landlords agreed to attend to all repairs; that the plaintiffs occupied the premises from the letting until December 22, 1884, when, while they were using the balcony to hang out clothes—one of the authorized purposes—the rail of the balcony broke, and they both fell to the ground, sustaining the injuries for which this suit was brought; that at the time of the accident the rail had become somewhat rotten, and the nails holding it were somewhat rusted, in consequence of which the rail gave way under the strain; and that the plaintiffs were not chargeable with any contributory negligence. Under these circumstances, the trial justice charged the jury that if they found that the landlords had contracted to make repairs to the premises, and that the railing was at the time of the accident in an unsafe and insecure condition for the purpose for which it was used, then a *prima facie* case for the plaintiffs was shown. The jury found in favor of the plaintiffs, and their verdict is now before us on a rule to show cause why a new trial should not be granted.

The charge of the court was, in effect, that the contract of the landlords to make repairs—to attend to all repairs—was equivalent to a guaranty that the premises should not become unsafe or insecure through lack of repair. It ignored any inquiry as to whether the landlords were, or by due diligence would have been, apprised that repair was needed. In this respect we think the landlords' duty was misinterpreted. The contract did not require that the premises should be prevented from getting out of repair, but rather implied that they would be likely to become so. Nor did it expressly provide when, in such case, the landlords should restore the premises to good condition. Hence, to ascertain the time or times for making repairs, we must invoke the usual legal implication applicable to contracts indefinite as to the time of performance, that they must be performed with reasonable diligence and promptness. This legal rule, applied to the present contract, imposed upon the landlords the duty of properly inspecting the premises, and of making such repairs as a due inspection would show to be necessary; but it cannot be stretched so as to include an obligation to repair what a reasonable examination would not discover to be in need of repair. Such straining would deprive the rule of the very element which makes it applicable to contracts in general,—the underlying idea of reasonableness. This principle does not at all trench upon the established rule of the common law that express covenants bind the covenantors to do as they have agreed, if human power can accomplish it; for the principle does not touch the expressed terms of the contract, but only supplies that which the parties have omitted to provide for, and which, nevertheless, is requisite to render their verbal stipulations effectual.

The cases of *Leavitt v. Fletcher*, 10 Allen, 119, and *Green v. Eales*, 2 Q. B. 225, illustrate the force of this principle in relation to agreements of this nature. In *Leavitt v. Fletcher* the landlord had covenanted "to make all necessary repairs on the outside of the buildings." The roof of one of them, a carriage-house, fell from the weight of snow upon it, injuring the tenant's carriages. There was nothing to indicate that the roof, if actually in good repair, would not have sustained the weight, but it is plainly inferable that the roof seemed to be in proper condition. The court decided that the landlord was not answerable for the injuries occasioned by the fall, but was bound to restore the roof. In *Green v. Eales* the landlord had covenanted "to repair, and keep in good and tenantable repair, all the external parts of the demised premises." By reason of the removal of an adjoining building, one of the external walls of the leased building became unsafe, and had to be taken down and rebuilt, and in the mean time the tenant was obliged to live elsewhere. Notwithstanding the landlord's covenant to keep the external parts in good repair, the court considered him entitled to a reasonable opportunity to make repairs, and held that he was not bound to bear the expense of finding the tenant another residence while the repairs went on.

In the present case, the question whether the landlords would, by reasonable diligence, have learned that the railing needed repair, is important; for, although the plaintiffs and many other tenants had frequent occasions for observing the condition of the railing, no one appears to have noticed that it was insecure. The verdict should be set aside.

#### GILLOON and Wife v. REILLY and others.

(*Supreme Court of New Jersey*. November 26, 1887.)

##### LANDLORD AND TENANT—DUTY OF LANDLORD TO REPAIR—LATENT DEFECTS.

When the owner of a building divides it into several tenements, which he lets to various tenants, but retaining to himself control of the halls and stairways for the common use of the occupants, and those having lawful occasion to be there, he is bound to see that reasonable care and skill are exercised to render the halls and stairways reasonably fit for the uses which he thus invites others to make of them; and he is responsible for any injury which others, lawfully using them with due care, sustain through his failure to discharge this duty; but he is not answerable for defects which do not render the halls or stairways reasonably unfit for use, or which reasonable care and skill would not prevent.<sup>1</sup>

(*Syllabus by the Court*.)

Error to circuit court, Hudson county.

On rule by defendants to show cause why a new trial should not be granted.

Action by Martin Gilloon and wife against the executors of Patrick Reilly for an injury to Mrs. Gilloon alleged to have been caused by a defect in the stairway of a building owned by defendants' testator, and occupied by plaintiffs as tenants. There was a verdict for plaintiffs.

*James B. Vredenburg*, for the rule. *Chas. C. Black*, contra.

DIXON, J. The defendant's testator was the owner of a four-story building in Jersey City, divided into eight tenements, which he let to as many families, all of whom had right of passage to and from their respective tenements by means of the common halls and stairways. The plaintiffs were tenants of four rooms on the second floor. The evidence shows that the plaintiff Alice, while going down the flight of stairs leading from her apartments to the street, caught the heel of her boot in the oil-cloth on the stairs, and fell, sustaining the injury for which this suit is brought. The trial justice charged

<sup>1</sup>See *Cole v. McKey*, (Wis.) 29 N. W. Rep. 279.

the jury that "the point was whether there was a tear or wear or defect in the oil-cloth, and whether that threw her down. If they were satisfied of that, then they should render their verdict for damages; there was no defect on the part of the landlord, if there was defect in that particular." The jury found for the plaintiffs, and we are now asked to grant a new trial.

The testimony does not disclose any contract by the landlord for the repair of the demised premises, and consequently he is not to be deemed responsible for their condition. *Mullen v. Rinear*, 45 N. J. Law, 520. But what is that, under the evidence, the halls and stairways should not be regarded as part of the demised premises, within the scope of this rule. It appears to have been the understanding that the landlord should retain control of the portions of the building, lighting the halls, and covering the floors at his expense, and affording to the tenants, and those having lawful occasion to visit the apartments, the right of passage to and from. With respect, therefore, to the halls and stairways, the landlord was under the responsibility of a landlord, owner of real estate who holds out invitations or inducements to others to use his property. *Looney v. McLean*, 129 Mass. 88. The obligation resting upon such an owner is that reasonable care and skill have been exercised to render the premises reasonably fit for the uses which he has permitted others to make of them. *Vanderbeck v. Hendry*, 84 N. J. Law, 40; *Francis v. Cockrell*, L. R. 5 Q. B. 184, 501; *Readman v. Conway*, 122 N. Y. 374; *Looney v. McLean*, *ubi supra*; *Watkins v. Goodall*, 138 Mass. 374; *Camp v. Wood*, 76 N. Y. 92; *Edwards v. Railroad Co.*, 98 N. Y. 24.

It is plain that the directions given to the jury at the trial carried the responsibility of the landlord beyond what the law will warrant. The conditions of his liability were declared to be a defect in the oil-cloth, and the plaintiff's being thrown down by reason of it. Although the testimony was conflicting as to the existence of any noticeable defect, the attention of the jury was not called to, but was diverted from, the important inquiries whether the defect was of such a nature as to render the stairs not reasonably safe for the purpose of passage, and whether the landlord had failed to exercise reasonable care in the matter. The case also presents the question whether the plaintiff was in the exercise of due care, for she testifies that she knew of the defect before the accident; yet this subject also was ignored in the charge, and a new trial should be granted.

#### DRISCOLL v. CARLIN.

(*Supreme Court of New Jersey.* November 26, 1887.)

##### 1. APPEAL—ASSIGNMENT OF COMMON ERRORS.

An assignment of the common errors refers only to what is technically error, as the record, and not to a bill of exceptions.

##### 2. MASTER AND SERVANT—LIABILITY FOR NEGLIGENCE OF SERVANT.

The defendant's employe had, in the course of his employment, deposited boxes upon the sidewalk of a street, and had improperly, against the defendant's instructions, left them there for several days. The plaintiff, while passing along the sidewalk with due care, fell over them, and sustained injury. Held, that the defendant was responsible for the damages.<sup>1</sup>

(*Syllabus by the Court.*)

Error to circuit court, Hudson county; KNAPP, Judge.

Action by Mary Driscoll against James Carlin for personal injuries. The plaintiff had a verdict and judgment, and defendant brings error. *Vredenburg & Garretson*, for plaintiff in error.

DIXON, J. This is a writ of error to the Hudson circuit. The only error assigned is the common one that the judgment was given for the plaintiff.

<sup>1</sup>See note at end of case.

stead of the defendant. The only complaint of error in the plaintiff's brief relates to the charge of the court, and it is not pretended that there exists any error save those which are alleged to appear in the bill of exceptions. Correct practice requires that the grounds relied upon for reversal by writ of error should be specified in the assignment of errors. *Donnelly v. State*, 26 N. J. Law, 463, 512. The common errors relate only to the record itself, and not to the out-branches of the record. Errors outside of the strict record should be specially assigned. 1 Archb. Pr. 501. The bill of exceptions is not a part of the record in this technical sense, as is plain from the statutory provisions under which such bills exist. The act of March 7, 1797, (Paters. Laws, 245; Revision, p. 886, § 242,) speaks of the bill as showing exceptions not found in the record itself, and was designed to provide a mode of examining errors which could not properly be inserted in the record. *Ford v. Potts*, 6 N. J. Eq. 388. So the former rule of this court, now embodied in the practice act, (Revision, § 245,) requires the bill to be returned and filed *with the record*. It plainly, then, is not a part of the strict record. It follows that, upon an assignment of the common errors only, the court cannot be required to look into the bill of exceptions. On this ground the judgment should be affirmed.

But if we consider the point made by the plaintiff in error, the same result must be reached. The case was, that the defendant below had directed his workmen to remove several sticks of timber from Montgomery street to Sixth street, Jersey City, and there to put them in his yard; that his workmen had carted them to Sixth street, and unloaded them upon the sidewalk near the curb in front of the yard, and there had left them; that several days afterwards, the plaintiff, while passing along the sidewalk, with due care, after dark, had stumbled over the timbers, and received the injury for which he sued. The plaintiff in error now contends that as he had directed his workmen to put the timber in his yard, which was lawful, and they had left them upon the sidewalk, which was unlawful, he cannot be held responsible for their act. The application of the rule *respondet superior* does not depend upon the obedience of the servant to his master's orders, nor upon the legality of the servant's conduct. Thus, in *Bayley v. Railway Co.*, L. R. 8 C. P. 148, the instructions of the defendant to its porters were that, if passengers were in the wrong carriage, the porter should inform them of the fact, and request them to alight, but should not remove them. The plaintiff was in the proper carriage; but the porter, thinking he was not, violently pulled him out, and threw him down on the platform. The company was held responsible, KELLY, C. B., declaring the principle to be that, where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable, even though the acts done may be the very reverse of that which the servant was actually directed to do. The same principle was announced by this court in *Aycrigg v. Railroad Co.*, 30 N. J. Law, 460, although the facts were held to put the case outside of it. The defendant's pilot, being in command of its ferry-boat for the purpose of transporting passengers and freight from one side of the North river to the other, voluntarily steamed down the river to catch a burning barge, which he towed to a place where she set fire to the plaintiff's yacht. HAINES, J., stated the question to be whether the pilot was acting within the scope of his authority, within the course of the business of his employment, and decided that he was not.

But the present case does not seem to call for the application of the rule under which a master is held responsible for the tortious act of his servant done in violation of his orders, but rather for the consideration of the question whether a person, who has ordered a certain thing to be done, the doing of which imposes upon him the duty of seeing that something further be done, can escape responsibility for the non-performance of that duty by showing that he ordered his servant to perform it, and his servant neglected to do so;

for it is plain that, when the defendant's workmen unloaded his wagon in front of his yard, they were obeying his directions, and the depositing of the timbers upon the edge of the sidewalk, as a step in their transfer from the wagon to the yard, was neither a tortious nor a careless act, and was in reasonable pursuance of the defendant's orders. When, however, that was done, it was incumbent on the defendant to see that the timbers were not left for an unreasonable length of time upon the public highway; and it was this duty, resting upon the defendant personally, which was never performed, and through the non-performance of which the plaintiff sustained her injury. Thus viewed, the case resembles *Whatman v. Pearson*, L. R. 3 C. P. 422, where the defendant's workman, contrary to his instructions, left his horse and cart unguarded in the street while he went to dinner, and the horse ran away and injured the plaintiff's property, for which injury the defendant was held liable. Indeed, the case comes within the familiar rule that, if one does or authorizes the doing of an act which creates a public nuisance, by unlawfully obstructing or interfering with the free use of a highway or otherwise, he becomes answerable in damages to those who suffer special injury thereby. 1 Add. Torts, § 234; *Harlow v. Humiston*, 6 Cow. 189; *Runyon v. Bordine*, 14 N. J. Law, 472; *Temperance Hall Ass'n v. Giles*, 33 N. J. Law, 260; *McAndrews v. Colterd*, 42 N. J. Law, 189.

The judgment below must be affirmed.

#### NOTE.

**MASTER AND SERVANT—LIABILITY TO THIRD PERSONS.** A master is liable for injuries resulting to third persons from the negligent conduct of his servant while acting within the scope of his employment. *Smith v. Packet Co.*, (Tenn.) 1 S. W. Rep. 104. And it makes no difference that the acts complained of were in negligent disregard of or in disobedience to the instructions of the employer. *Heenrich v. Car Co.*, 20 Fed. Rep. 100; *Cleveland v. Newsom*, (Mich.) 7 N. W. Rep. 222; *Paint & Color Co. v. Conlon*, (Mo.) 4 S. W. Rep. 922; *Railway Co. v. Kirk*, (Ind.) 1 N. E. Rep. 849; *Railroad Co. v. Conway*, (Colo.) 5 Pac. Rep. 142; or that they are fraudulent or deceitful, or amount to a positive malfeasance. *Marrier v. Railway Co.*, (Minn.) 17 N. W. Rep. 852; or of such a character that the servant would be criminally liable. *Marion v. Railway Co.*, (Iowa.) 21 N. W. Rep. 86. But see *Cleveland v. Newsom*, *supra*. The fact that, at the time the tortious acts were committed, the servant was not acting exclusively for his employer, but was combining business of his own with that of the master, will not affect the liability of the latter. *Rahn v. Manufacturing Co.*, 26 Fed. Rep. 912. But if the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the master is not liable for an injury inflicted while the servant is thus engaged. *Marrier v. Railway Co.*, *supra*.

#### HODGE v. GIESE.

(Court of Chancery of New Jersey. December 9, 1887.)

##### 1. REGISTRATION—ACT DOES NOT APPLY TO LEASES.

The registry acts do not apply to leases. The first in date stands first in right.

##### 2. INJUNCTION—IRREPARABLE INJURY.

A court of equity may protect legal rights in real estate, where the right, though formally denied, is yet clear on facts which are not denied, and according to legal rules which are well settled, and the injury against which protection is asked is irreparable.

##### 3. SAME.

An injury is irreparable which is material, and which cannot be adequately redressed by pecuniary damages.

##### 4. SAME—MANDATORY INJUNCTION AT INCEPTION OF SUIT.

Contrary to the general rule, a mandatory injunction may issue at the inception of a suit for the protection of an easement, and other rights of like nature.

(Syllabus by the Court.)

On application by James Hodge for injunction against Albin Giese. Heard on bill and affidavit, order to show cause, and answer and affidavit.

*Thomas S. Henry*, for the motion. *Theodore Runyon*, contra.

VAN FLEET, V. C. This is an application for an injunction. The complainant and defendant occupy parts of the same building as tenants, under the same landlord. The defendant occupies the basement as a barber shop, and the complainant occupies the two floors immediately above. The complainant is a clothier. He uses the first floor as a store for the sale of clothing, and the second for cutting garments. The defendant has occupied the basement continuously for over 25 years, and the complainant has held the two floors now occupied by him since April, 1879. Prior to the commencement of the complainant's tenancy, the owner of the building put a heater in the cellar, in the rear of the basement occupied by the defendant. Pipes were attached to conduct the heat from the heater to the first floor, and subsequently others were attached to conduct it to the second floor. There are registers on both floors by which the volume of heat transmitted to each is regulated. This connection existed in January, 1887, when the last lease to the complainant was made. The heater is an appurtenance or adjunct to the part of the building occupied by the complainant. It transmits heat to no other. Both parties now hold under leases made in 1887. That to the complainant was executed on the fifth of January, 1887, and grants a term of five years from the first day of April, 1887, and that to the defendant was made in March, 1887. The complainant's lease grants him the use of the heater, with right of access to it. The defendant, by his answer, admits that the complainant has no means of access to the heater except through his shop, and, also, that the complainant has, every fall and winter since 1879, passed through his shop, with his knowledge, and without objection, to give such attention to the heater as it required. Whether there is a door opening from the defendant's shop into the cellar where the heater is, the pleadings do not expressly state; but the defendant's admission that there is no way of approach to the heater except through his shop, makes it certain that there is either a door there, or some other means of access from his shop to the heater. The defendant notified the complainant on the nineteenth of November, 1887, that he would not thereafter be permitted to pass through his shop to the heater. The complainant thereupon filed his bill asking for an injunction restraining the defendant from preventing him from passing through the defendant's shop to give such attention to the heater as may be necessary to enable him to have the use of the heater.

It cannot be denied that, unless the complainant can have access to the heater through the defendant's shop, that clause of his lease which grants him the use of the heater will be rendered nugatory, and that he will be deprived of that part of the demised premises which, just at this season of the year, is absolutely essential to the safe and comfortable enjoyment of the other parts. No complaint is made that the complainant has exercised the right which he claims in an oppressive or improper manner. The dispute is as to his right, not as to the manner in which he has exercised it. If the complainant was seeking protection against the wrongful prohibition of his lessor, there can be no doubt that he would be entitled to it. His lease grants him the use of the heater. The heater constitutes, not only a valuable part of the demised premises, but an almost indispensable part. It is the only means by which his occupation of the demised premises can be made safe and comfortable during five or six months of each year of his term. His lease grants him the same right to the use of the heater that it does to occupy the two floors. The heater would be utterly useless to him without a right of access to it. A simple grant of a right to use the heater would, without a single word expressly declaring such a purpose, confer, by implication, a right of access. Access is so absolutely essential to the beneficial enjoyment of the heater that, under a grant thus framed, the right would pass as an indispensable part of the principal thing granted. But here a right of access is given by express words. The particular way by which it shall be had is not, however, defined by ex-

Does the defendant stand in a stronger or better position than would occupy if he were the defendant in this suit? The complainant is first in date, and therefore, so far as it covers rights or property, is first in time. The defendant, by his lease, confers the paramount right. The complainant, after having made a lease to the defendant, could not grant another lease to the defendant which he had previously granted to the complainant. In other words, if, by the lease made to the complainant in January, 1887, the complainant had access to the heater, through the basement, passed, the lessor could not have made a subsequent lease made to the defendant in March, 1887, granting him the free from the easement created by the prior lease. After having made a lease to the complainant, all that it was possible for the lessor to grant, by a subsequent lease, was such right in the demised premises as was not covered by the prior lease. The complainant's right to the easement in question does not, in the slightest degree, depend upon the fact that the defendant accepted the lease under which he now holds, had notice, either direct or constructive, that the complainant's lease gave him right of access to the heater. The registry acts do not apply to leases. The first in date has the right in point of right. Leases under seal for a term of not less than ten years, acknowledged or proved, may be recorded, (Revision, p. 157, § 19.) A statute which authorizes this to be done imposes no penalty for non-recording. This statute, it has been decided, was intended to give the lessee title to the estate to be derived from registry, if his lease was sealed and duly acknowledged, but to leave him, as at common law, if he did not record his lease, subject to a lease not under seal. It was framed for the benefit of the case of *Hutchinson v. Bramhall*, 42 N. J. Eq. 372, 7 Atl. Rep. 873. It was then to be entirely clear that, if the case is considered in its pure legal aspects, nothing can be found in the defendant's position which renders his claim whit stronger or better than that which his lessor would occupy, in relation to the person against whom relief was sought. There may be this difference between them as to actual knowledge. The lessor knew that he had access to the heater to the complainant. This, the defendant says, he did not know; but it is not disputed that he possessed knowledge which was equivalent. He knew that the complainant, like himself, was a tenant, and that for eight years the complainant had had the exclusive use of the heater, and that, during all that time, the complainant had passed through the door to give such attention to the heater as was necessary, without asking permission, and that he had never disputed the complainant's right to do so. His submission to the exercise of a right, which at times must have been attended with some inconvenience to the defendant, would, in most instances, be taken as a belief that the defendant submitted to it because he knew the complainant was simply doing what he had a right to do.

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though formally denied, is yet clear on facts which are not denied, and according to legal rules which are well settled, and the injury against which protection is asked is of an irreparable nature. *Hart v. Leonard*, 42 N. J. Eq. 416, 7 Atl. Rep. 865.

It is obvious that no remedy will be adequate in this case which does not prevent a repetition of the injury. The injury consists in depriving the complainant of an essential part of the demised premises. It is continuous in its character, and, so long as it shall be persisted in, will necessarily result in the complete destruction of the safe and comfortable use of the demised premises for the purposes for which they were rented, for nearly one-half of the complainant's whole term. The law gives no adequate remedy for such a wrong. Successive suits at law, in which only pecuniary damages could be awarded, would give the complainant neither the full measure of his rights, nor justice, but would permit the defendant to deprive the complainant of his rights for such compensation as a jury might see fit to award. The complainant's case presents a strong instance of irreparable injury. All that is meant by that phrase is that the injury shall be a material one, and of such a nature as cannot be adequately redressed by pecuniary damages. Mere inconvenience, resulting in but slight damage, may, in consequence of its peculiar character, constitute an injury so irreparable in its nature as to be the proper subject of redress by injunction. *Kerr, Inj.* 199, 200.

The right involved here is an easement. The complainant, on the undisputed facts of the case, has a right to pass through the defendant's shop to and from the heater. Courts of equity exercise a very liberal jurisdiction in the protection of such rights. Mandatory injunctions may, contrary to the general rule, be issued at the very inception of the suit for the protection of such rights. *Locomotive Works v. Railway Co.*, 20 N. J. Eq. 379. An inspection of the record in *Shivers v. Shivers*, reported in 32 N. J. Eq. 578, shows that a mandatory injunction was granted on filing the bill, and without hearing the defendant, commanding the defendant forthwith to take down and remove a gate which he had erected across a private way running through his land. Like injunctions have recently been granted in several similar cases. The true rule on this subject, in my judgment, is that declared in *Whitecar v. Michenor*, 37 N. J. Eq. 14. Chancellor RUNYON there said: "The court is always very reluctant to grant a mandatory injunction on an interlocutory application, but where extreme or very serious damage would ensue from withholding it, as in cases of interference with easements, or other cases demanding immediate relief, it will be granted."

The complainant is entitled to the writ he asks, but it must be so framed as to limit the exercise of his right of passage to such use of it as may be necessary to give such care and attention to the heater as shall be required to enable him to have the use of the heater for the purpose of heating the two floors covered by his lease.

#### ARNETT v. TRIMMER and others.

(Court of Chancery of New Jersey. December 13, 1887.)

##### 1. CHATTEL MORTGAGES—DESCRIPTION—PROPERTY USED IN CARRYING ON BUSINESS.

A mortgage was executed upon a stock of goods, and chattels used in carrying on the business, and the evidences showed that a horse, wagon, sleigh, and harness were used in such business. *Held*, that such chattels were included in the mortgage.

##### 2. ASSIGNMENT FOR BENEFIT OF CREDITORS—LIENS OF SECURED CREDITORS NOT AFFECTED BY.

On bill to restrain an assignee from disposing of property covered by mortgages to its full value, respondent claimed that, whatever the liens upon the debtor's estate, the latter had the right to make assignment for the equal benefit of creditors, and the assignee power to dispose of the assets in disregard of such incumbrances.

*Held* that, as an assignor cannot destroy liens of his own creation, by making an assignment for the benefit of his other creditors, his assignee disposes of the property covered by such liens at his peril.

**2. SAME—SALE OF SECURED PROPERTY BY ASSIGNEE—NOTICE TO SECURED CREDITORS—COSTS OF SALE.**

Mortgagees had notice of an assignment of the stock of goods covered, and of its inadequacy, and did not interpose until after sale of part of the property, of which they also had notice. *Held*, that the assignee will be permitted to retain from the amount in his hands costs actually incurred by him in the sale.

On bill to restrain the assignee from disposing of property covered by mortgages. The opinion states the facts.

*John Lilly*, for complainant. *W. F. Hayhurst*, for defendants, *Arnett & Martindale*. *M. L. Trimmer*, for himself, assignee.

**BIRD, V. C.** Arnett, a son of the complainant, was engaged in the mercantile business, and sold his interest therein to one Griggs. At the time of the sale his mother held a chattel mortgage upon the goods, and so did Arnett & Martindale. After the sale to Griggs he executed chattel mortgages for like amounts to the complainant and to Arnett & Martindale; but they were not immediately recorded, nor were the transactions with respect to them actually consummated at the time, because, as the proof shows, there was a promise upon the part of Griggs to pay the cash for the amount due upon the said mortgages. This, however, was not accomplished. Such sale was made on the first of January. On the first day of February the mortgages were acknowledged and delivered. The mortgage of the complainant was recorded on the second of February, but that of A. & M. not until March 16th. Soon after this Griggs made an assignment to the defendant Mr. Trimmer of all of his estate, for the benefit of his creditors. As such assignee, he immediately proceeded to make sale of a portion of the goods, and sold to the amount of \$232.10 worth, at an actual expense to him of \$23.50. At this juncture the bill in this case was filed in order to prevent Mr. Trimmer, as such assignee, from further proceeding with the sale of the said goods, or intermeddling therewith; the complainant claiming that her interest in the said goods was equal to, if not more than, the value thereof, and that as such mortgagee she had a right, under the circumstances presented in the bill, to make disposition of them. Such a case was made by the bill and proofs as to satisfy the court that Mr. Trimmer, as such assignee, ought to be restrained, and an injunction was accordingly issued. Since then it was deemed expedient to appoint a receiver to take charge of and dispose of the goods; and as such he has disposed of them, the result of which, so far as appears, is an ample justification of his appointment in behalf of the mortgagees, sufficient assets not having been realized to satisfy the amount due upon the lawful incumbrances.

An answer was filed, disputing the validity of the mortgages as to the general creditors. The answer insisted that there was an understanding between the mortgagor and the mortgagees that the mortgages were not to be recorded, because of the imputation arising therefrom of financial inability upon the part of the mortgagor, and also because the general creditors had a right to act upon that understanding which it is said was communicated to them, and, acting upon it, they suffered thereby in giving greater credit to the mortgagor than they otherwise would. The great preponderance of proof, however, is that there was no such understanding between the mortgagor and the mortgagees; and, furthermore, I believe there is no proof whatever that any creditor was deceived by the alleged understanding between the other contracting parties. It may be said that that branch of the case was practically abandoned.

At the hearing the principal question seemed to be whether or not a horse, a wagon, sleigh, and harness came within the purview of the chattel mortgages as part and parcel of the goods and chattels used in carrying on the said business. And the testimony upon this point is most clear that they are included in the chattel mortgages, and I cannot avoid so advising.

Mr. Trimmer, the assignee, insists that as such he is entitled to be protected. He insists that if this court, under the circumstances, had the right to interfere by injunction and by the appointment of a receiver, whom it authorized to dispose of the estate, he should be protected against all costs and expenses whatsoever in the management of the estate, and in the proceedings instituted in this court. He insists upon this as a general and universal proposition of law, and maintains that whatever may be the liabilities of a debtor, and whatever may be the extent or character of the liens upon the debtor's estate, he has an absolute and unqualified right, under the statute, to make an assignment for the equal benefit of his creditors, and that as such assignee can resist all the rights and claims of such lienholders, and proceed to the disposition of the assets assigned to him in total disregard of their rights, providing he proceeds according to the directions of the statute which authorizes such assignment. I have no doubt that a statute so beneficial in its nature, so demanded by the business interests of the community, should be so construed as to give the utmost favor and protection to an assignee for the benefit of the creditors whom he is supposed to represent. Mr. Trimmer has called my attention to *Currie v. Knight*, 34 N. J. Eq. 485, and to *Sager v. Hewes*, 32 N. J. Eq. 652, as being opposed to my views; but I do not see that I am at all in conflict with them.

But to say, in an unqualified sense, that lien creditors must, under every condition, hold their hands and abide the time and methods of an assignee, even though he commit no flagrant acts, is a proposition which seems to me the legal mind cannot readily assent to. For example, it can scarcely be said that a mortgagor of real estate would in such a case be obliged to await the settlement of the affairs of an assignee, even though the assignee should be adjudged to have power to sell the land; and the same principle would apply in the case of the mortgaging of goods and chattels. If the assignor had created an effectual lien upon the goods, equal, or more than equal, to their entire value, he could not, in any way, destroy or impair the interest which he himself had created by making an assignment for the benefit of his other creditors. In such a case, all that is conceived the assignee could do would be to sell the interest which the mortgagor might have in what is called the equity of redemption in the goods. But if his intermeddling with such goods for the purpose of making a sale of the equity of redemption should be such as tended to the destruction or impairment of the interests of the mortgagee, I think no court would hold that the mortgagee would be obliged to hold his hands, and allow the assignee to go on with the waste, which, as to him and his interests, he might be committing. Conceding, therefore, great latitude of right to an assignee, under the statute, I think, at least in the instances named, it has a limit.

With these considerations in mind, taking the case before me, what appears? An assignment, it is true, for the benefit of creditors, and other creditors than the mortgagees; but with the clear proof that the chattels included in the mortgages are insufficient to satisfy them. In such a case it seems to me, beyond question, that the complainant had a right to foreclose her mortgage as against the assignee, and to call upon this court to aid her in the protection of her property as such against the assignee; and especially as in this case it was established before the injunction issued that waste was threatened by the assignee. I must therefore hold that when, in such a case, an assignee takes possession of property so mortgaged, and meddles with it, he does it at his peril. I do not say that he might not obtain protection from

the court. I only hold that he is not justified in any act of waste, or in taking any steps that will tend to the diminution of the value of the property as against the mortgagee. If he attempts to sell and deliver goods and chattels, under such circumstances, without the aid and protection of the court, the mortgagee has a right to interpose and ask a court of equity to protect him. These things being so, an assignee would not be entitled to costs as against a mortgagee, unless the mortgagee in some way contributed, by his action or his silence, to the proceedings upon the part of the assignee. And in this case it appears that the mortgagees knew of the assignment and of the limited amount of goods, and of the action of the assignee, and made no interference until after some sales were made, which must have been made with their full knowledge. The costs, therefore, in this case which were actually incurred by the assignee, amounting, as he says, to \$23.50, he will be permitted to retain out of the fund which he has in his hands as the proceeds of the sale of these goods made by him, amounting, in all, to \$232.10, the balance of which he will be directed to pay over to the receiver. I will advise a decree in accordance with these views.

It is plain that the complainant's mortgage is second in order of priority. The receiver should first pay the costs of the complainant, and then the said mortgage of Arnett & Martindale, and then the mortgage of complainant, and, if then anything remain, Mr. Trimmer is entitled to it as such assignee.

#### WESTCOTT v. MIDDLETON.

(Court of Chancery of New Jersey. December 9, 1887.)

##### 1. NUISANCE—UNDERTAKER'S ESTABLISHMENT—BURDEN OF PROOF.

The burden of showing that an undertaker's establishment, in which he keeps coffins, ice-boxes, and cases in which he preserves the bodies of the dead, and in the rear of which he cleanses and dries such boxes, is a nuisance, is on the complainant.

##### 2. SAME—NOT NUISANCE PER SE.

Such an establishment in a populous place is not a nuisance *per se*.<sup>1</sup>

##### 3. SAME—ANNOYANCE TO ONE PERSON.

That a single person of a most sensitive taste on the subject is seriously disturbed thereby, and no others are called who have been annoyed, a case is not made requiring the interference of the court.

##### 4. SAME—PHYSICAL DISCOMFORT.

Physical discomfort arising from a morbid taste or an excited imagination, as distinguished from such discomfort arising through the organs of sense common to all, is not enough to justify the court in closing such an establishment.

(*Syllabus by the Court.*)

##### \* Bill for permanent injunction.

*J. J. Crandall*, for complainant. *E. A. Armstrong*, for defendant.

**BIRD, V. C.** The parties to this controversy own adjoining lots in the city of Camden. The complainant occupies his as a dwelling-house and for offices. The defendant occupies the basement and first floor of his dwelling to carry on the business of an undertaker, using the front room as an office, the second room as a place to keep supplies, and the second and third stories with his family. On the lot of the defendant, back of the first and second rooms, is a kitchen or extension, between which and the lot of the defendant is an open space going back to the rear of the lot, which is 180 feet deep. In this open space is a hydrant. The cellar of the defendant is used for storing lumber, which, as occasion requires, he takes out in the rear, through this open space, to a shop which is at the extreme rear end of his lot, there to be used in mak-

<sup>1</sup> Concerning nuisances *per se*, see *Trulock v. Merte*, (Iowa,) 34 N. W. Rep. 307, and note.

ing boxes. The complaint is that the defendant is guilty of maintaining a nuisance in the maintenance of this business of undertaking, and that the complainant is entitled to the aid of this court in being relieved therefrom. There is a charge that the defendant disturbs the complainant in the manufacture of boxes. This point is practically abandoned. But the complainant insists, in the first place, that this business is carried on in an unlawful manner; and, in the second place, that the defendant has no right to carry on this business where he does. The proof shows that the defendant buries from 100 to 150 persons a year, and the vehicles which he uses for that purpose are driving to and from his place of residence about four times in every case; so that from five to six hundred times during the year the complainant has the opportunity, if he attends thereto, to be reminded that death has taken place, that some one is a corpse, and that preparations are being made for the funeral; or that some one has just been buried. In every such case the defendant uses a large box in which the corpse is preserved, as far as possible, from decomposition, by use of ice in another box, made of tin, which is placed directly over the corpse. Formerly the tin box opened underneath, by a tube running down through the box containing the body, to carry off the water as the ice melted. This is now dispensed with, so that there is no connection whatsoever between the ice and the corpse. These boxes which are so used to preserve the body are taken, after the burial, to the residence of the defendant, through his office and store to the rear thereof; and in this narrow space, by the side of the hydrant, are often washed, and, if not washed there, are washed further back in the yard. They have been allowed to remain there for an hour, and sometimes longer; occasionally all night. The complainant insists that he has several times noticed offensive odors from those boxes, which have greatly distressed him, and given him alarm. Indeed, it may be said that there is no doubt but that the complainant has been frequently exercised in his mind on account of the presence of these boxes, which have been receptacles of the dead; nor is there any doubt but that he has observed offensive odors, but whether from these boxes or not is not so clear to my mind. There were odors arising from that locality, but the defendant insists that they came from a drain which he found to be choked up on two occasions, and that after the drain had been opened and cleansed there were no longer any odors. The complainant insists that these odors were of the character that he says they were, because flies were attracted there in great numbers, among which was what is known as the blow-fly, which is supposed, according to the testimony, more likely to be attracted to places where there is animal decomposition than the ordinary fly.

The defendant admits the use of his premises for the purposes alleged in the bill. He also admits placing the boxes referred to immediately in the rear of the main part of his house, and by the hydrant in question, and of cleansing them there; but he insists that they were never allowed to remain there any longer than was necessary before they were thoroughly cleansed and dried, and, when cleansed and so dried, were immediately taken away and put under cover. He says, also, that he never takes to this place of business any box which has been used in case the corpse was of a person who had died of any contagious disease without first thoroughly cleansing the box. The defendant has also shown that on two occasions the drain referred to was so stopped up as to produce offensive odors, which were not perceived when the drain was open. So that, after the fullest consideration, my mind is led to the conviction that the odors complained of may have arisen from some other source than that alleged by the complainant. In other words, I am not satisfied that the defendant has conducted his business in such an unlawful manner as to cause any undue annoyance or discomfort to the complainant.

But the further contention, that the business itself is a nuisance, is of great importance, and cannot be passed by without the fullest consideration. The

claim is that it is impossible to carry on a business of this character without constant liability to communicate diseases to those who reside in the neighborhood, and that this liability creates dread, discomfort, and apprehension, which abridges the rights of property. It is insisted that the deadly spore will, in spite of the utmost precaution, be carried about in such vessels, and are liable to be dislodged and to be communicated to the nearest inhabitant at any moment, impregnating them with the seeds of death.

In the first place, admitting the possibility of danger lurking in every box where the person buried therefrom has died of a contagious disease, what is the duty of the court? Should the court say that such business, however lawful, cannot be carried on in a populous part of the city? I am not prepared to assent to that doctrine. It is quite clear, to my mind, that this, like many other occupations, may be so conducted as to be a nuisance. For example, a grocer might allow his vegetables to decay in such quantities, and in such localities, upon his premises, as to do infinite harm to his neighbors, and subject him to the penalties of the law, or to the restraint of a court of equity. The same may be said of the vendor of meats; so negligent might he be as to scatter disease and death to multitudes. But because these things are possible, or may occasionally happen, it is not pretended for a moment that it is unlawful to carry on the grocery business, or to vend meats, in populous parts of our cities. It seems to me that the same reasoning may be applied, with great certainty, to the business of undertaking. It may be carried on so negligently, with such indifferent regard to the rights and feelings of others, as to be not only an offense to the tender sensibilities of the intelligent and refined, but to be a direct menace to the health and open violation of the civil rights of all residing in the neighborhood. Now, as, in the cases supposed, there is a remedy which does not go to the destruction of the occupation, but which at the same time protects the rights of others in the comfortable enjoyment of their property, so, in the case in hand, it seems to me most clear that the court has it within its power to prevent the misapplication of a legal right, and that to go further would be a destruction of that legal right. The law means to protect every one in the enjoyment of such rights,—in the enjoyment of his health, as well as in the enjoyment of his property, on the one hand; and, on the other, in the enjoyment of his legitimate vocations, as well as in the possession of his property. The defendant has a right to the possession of his property; and to carry on a legitimate business there in a lawful manner is an equally sacred right. Is the business in which the defendant is engaged a lawful one? To a certain extent that is not disputed. Has he a right to carry it on on the premises which he owns and occupies? He certainly has, unless it unreasonably interferes with the lawful rights of another. The counsel for the complainant, perceiving the force of this view, and what would be likely to result therefrom under the evidence, insisted, at last, that carrying on the business of an undertaker by the defendant was in itself so obnoxious to the complainant as to render his house uncomfortable, and that that fact alone was sufficient to justify this court in restraining the defendant from the use of his premises in carrying on said business. But it has not been shown that disease of any kind has ever been communicated by any act or omission of the defendant. It is not in evidence that the fatal spore has ever been allowed to remain in any of the boxes which the defendant and his employes have handled as children do their toys; nor does it anywhere appear that any special risk has been presented in the management of this business. Therefore, as to the first question, I must conclude that the complainant cannot prevail.

In the second place, it is urged that the business of an undertaker is a nuisance *per se*. Is this proposition maintainable? Must the undertaker retire from the inhabited parts of our villages, towns, and cities? Is an occupation which is absolutely essential to the welfare of society to be con-

demned by the courts, to be classified with nuisances, and to be expelled from localities where all other innocent and innoxious trades may be carried on? In other words, is this business so detestable in itself as unreasonably to interfere with the civil rights or property rights of those who dwell within ordinary limits, and who can and do, without effort, see and hear what is being done? The inquiry is not whether it is obnoxious to this or that individual or not; but whether or not it is of such a character as to be obnoxious to mankind generally, similarly situated. There are certain obscene or offensive sights, certain poisonous or destructive gases or odors, certain disturbing sounds or noises, which affect most persons alike; can the business of an undertaker be classed with any of these? Is the business of an undertaker of this class? Before the court can condemn a trade or calling, it must appear that it cannot be carried on without working injury or hurt to another; and, as I have said, that injury or hurt must be such as would affect all reasonable persons alike similarly situated. The law does not contemplate rules for the protection of every individual wish or desire or taste. It is not within the judicial scheme to make things pleasant or agreeable for all the citizens of the state.

But to proceed with the case before me. Let us ascertain from what standpoint, or under what circumstances, the complainant regards this employment a nuisance *per se*. Mr. Westcott is one of the most highly respected citizens. He is about 72 years old. As to the subject-matter in hand, and everything akin to it, he is most sensitive or tender. It is conceded that he has an extraordinary horror or repugnance to contemplating anything pertaining to death or to the dead. Such emotions or feelings so control him that he has not attended a half-dozen funerals during his long life. As he advances in years, this sentiment becomes more and more intolerable. It is urged, and with great reason, that, these facts being so, Mr. Westcott's judgment is not only overcome by his imagination, but that innumerable evils are created thereby for his soul to feed upon, which he charges in this case to the defendant. Plainly, the circumstances are special, and most unsafe to found any general rule of law upon. Giving the complainant credit for all he can possibly be entitled to, and keeping in mind what he actually suffers, whether justly or unjustly, whether it be the result of imagination or an oversensitive nature or not, and also keeping in mind the rights of the defendant, how far can the court go, with safety, in protecting Mr. Westcott in his home, and securing to him every comfort that a citizen is entitled to in the enjoyment of that home? Many observations which have been made in disposing of the first branch of the discussion are equally applicable here; they will not be repeated. The court, in disposing of every such question, cannot but at once look beyond the judgment to be given in the particular case; the court cannot but inquire, what next, or where will such judgment lead to? The inquiry inevitably arises, if a decision is rendered in Mr. Westcott's favor because he is so morally or mentally constituted that the particular business complained of is an offense or a nuisance to him, or destructive to his comfort, or his enjoyment of his home, how many other cases will arise and claim the benefit of the same principle, however different the facts may be, or whatever may be the mental condition of the party complaining. One may complain of the smell of vegetables, another of fresh meats, another of the ordinary sound of the anvil, another of the running of a saw, or the humming of machinery, and the like, without limit; every case being as meritorious as the one now under consideration. Hence the value of general principles can never be lost sight of. A wide range has indeed been given to courts of equity, in dealing with these matters, but I can find no case where the court has extended aid, unless the act complained of was, as I have above said, of a nature to affect all reasonable persons, similarly situated alike.

My attention has been called to the case of *Railroad Co. v. Angel*, 41 N.

J. Eq. 316. The principle there laid down is of great value in every such case. The defendant was engaged in a lawful business, but so used its tracks in making up its trains and distributing the cars in front of the complainants' dwelling that, by reason of stench, noises, smoke, steam, and dirt thereby occasioned, the comfort of the complainants' home was seriously impaired. The court below allowed an injunction against such use of the road; but the court did not pretend to hold that the company must abandon the use of its tracks altogether. It was only decided that the company had no right to allow its engines or its cars to remain in the presence of or near by the house of the complainants, making hideous noises, emitting smoke and steam and unwholesome odors, to the great discomfort of the complainants in their home. The judgment of the court simply looked to the proper exercise of the lawful rights of the defendant, and, in the lawful exercise of those rights, what inconvenience or annoyance the complainants might suffer they must submit to. Engines in passing might whistle or emit smoke, steam, and dirt, cattle might bellow, sheep bleat, and hogs squeal, but to that extent the complainants must yield to the general demand. To this extent the court was sustained on appeal. I can find nothing in that case to lead me to say that the business of an undertaker is a nuisance *per se*.

My attention has also been directed to *Cleveland v. Gas-Light Co.*, 20 N. J. Eq. 201, in support of complainant's views. In that case, the court held: "Any business, however lawful, which causes annoyances that materially interfere with the ordinary comfort, physically, of human existence, is a nuisance that should be restrained. \* \* \* To live comfortably is the chief and most reasonable object of men in acquiring property as the means of attaining it; and any interference with our neighbor in the comfortable enjoyment of life is a wrong which the law will redress. The only question is, what amounts to that discomfort from which the law will protect?" The learned chancellor then made this important observation: "The discomforts must be physical; not such as depend on taste or imagination. But whatever is offensive, physically, to the senses, and by such offensiveness makes life uncomfortable, is a nuisance; and it is not the less so because there may be persons whose habits and occupations have brought them to endure the same annoyances without discomfort." For a strikingly similar definition, see *Walter v. Selfe*, 4 Eng. Law & Eq. 15.

In this case, then, we have the broad, yet perfectly perceptible or tangible, ground or principle announced, that the injury must be *physical*, as distinguished from purely *imaginative*. It must be something that produces real discomfort or annoyance through the medium of the senses; not from delicacy of taste or a refined fancy. This is very comprehensive; indeed, I cannot conceive of a more liberal or broad statement of the law; yet I apprehend it is a true delineation of the law. How, therefore, shall I apply this rule? I must find that physical discomfort has been produced, or will be; but, in so doing, I must not forget the influence of the imagination or a morbid or abnormal taste on the mind and body. What has been disclosed by the proofs? These facts: Mr. Westcott and the defendant have lived side by side, in these same houses, for about 11 years. During all this time the latter has carried on this business of burying the dead, in about the same open and unpretentious manner that he now does. There is no evidence that Mr. Westcott or any other person has ever been afflicted by reason of the defendant's occupation; indeed, nothing has been attempted in that direction. Yet it is admitted that this trade has been and is carried on by the defendant in the midst of the most populous part of the city of Camden. And what, to my mind, is of very great consequence, in considering whether this trade affects the body of Mr. Westcott through what is known as the bodily senses, or through his imagination or taste, is the fact that not another person has been produced who has been affected as he has been. As just stated, great numbers, from day to day, look out upon this establishment just as

Mr. Westcott does, although at a greater distance; but, if the injury results from *seeing* these evidences of the havoc of disease and of death, then, surely, distance cannot mitigate it, and, while so many others have been subject to the same influences, not one has been offered to say that he has suffered any annoyance or discomfort by the presence of this employment in the neighborhood; and, although the business of undertaking, caring for and burying the dead, has been conducted in about this same manner from the earliest times, (that is, in an open and public manner, in the town and city, as well as in the country,) and so continues to be, where the most refined and cultivated abide, as well as where the unpretentious do, yet from no class has any one been brought to testify to any bodily or mental injury or suffering because an undertaker was carrying on his vocation in his neighborhood.

Hence, in my judgment, before a trade or business can be declared to be a nuisance *per se*, it must be made to appear that it necessarily works injury, discomfort, or annoyance to the property or persons of citizens generally who may be so circumstanced as to come within its influence. It is not enough that only one person, and that one the complainant, alleges discomfort; and certainly his case is greatly weakened when he admits that so sensitive is he on the subject that in 72 years he has not attended a half-dozen funerals. If the court can compel this defendant to cease his trade next door to Mr. Westcott, because the sight of these instruments used in burying the dead have an unhealthy influence on his mind, then the vendor of crape, and the artist who cuts tomb-stones and monuments, will inevitably be liable to the same condemnation. See *Demarest v. Hardhan*, 34 N. J. Eq. 469, 474.

Perhaps I ought to remark that the case of *Barnes v. Hathorn*, 54 Me. 124, so much relied on by counsel of the complainant, rested on a very different state of facts, in this; that there was not only a tomb on the land of the defendant within 44 feet of the dining-room of the plaintiff, but that at the time of the action the defendant had a dead body in it, and it was shown that once before it had six deposited therein, and that experts swore that effluvia injurious to health escaped therefrom. Nor is the case of *Clark v. Lawrence*, 6 Jones, Eq. 83, in any sense like the one before me.

The results of my inquiries are that while the defendant has no right to conduct his business so as to endanger or threaten the health of the complainant, or to make his home uncomfortable, either by filling the air with noxious vapors, or the germs or seeds of disease, the evidence does not show that he has done either, and that the business of an undertaker is not a nuisance *per se*. The bill should be dismissed, with costs.

#### NEWALL and others v. STAFFORDVILLE GRAVEL CO.

(Court of Chancery of New Jersey. December 14, 1887.)

#### INJUNCTION—TO RESTRAIN LAYING RAILROAD—DEPUTE AS TO TITLE.

On motion for preliminary injunction to restrain defendant from laying its railroad track over lands to which both parties claimed title, and from digging and removing gravel therefrom, the evidences showed that the chief value of the land was the gravel beneath its surface, and that defendant's agents had expressed a determination to remove gravel from, and defendant had graded a roadway for a railroad across, the land. *Held*, that the acts of defendant would work an irreparable injury to and destroy the inheritance, and a preliminary injunction should issue until the titles are settled.

On motion for preliminary injunction by Newall and others to restrain defendant, the Staffordville Gravel Company, from building a railroad across, and committing acts of waste to, certain lands in dispute between the parties. The facts appear in the opinion.

*T. W. Carmichael*, for complainants. *Garrison & French*, for defendant.

BIRD, V. C. On one side of the Tuckerton Railroad lie three tracts of land,—one of which being next to the said road, and the third of which being furthest therefrom, are owned by the defendant; the second of which, lying between the other two, is claimed by both the complainants and the defendant, and is the subject of this controversy. The controversy was precipitated by the defendant grading a roadway for a railroad nearly across the land in dispute, and threatening to lay ties and rails thereon for the purpose of running engines and cars from the Tuckerton Railroad to their tract of land furthest away from said railroad to a pit known as a gravel pit, for the purpose of carrying said gravel to the seaside resorts on the Atlantic coast, for improvements of streets and sidewalks and other like purposes. In addition to this, it may be said that the defendant, by its agents, expressed a determination to dig and remove gravel from the tract of land named in the bill. To prevent the defendant from proceeding with the construction of this railroad, and from digging and removing any gravel, is the object and prayer of this bill. The bill shows the title to be in the complainant; but, while this appears plain enough as expressed in the bill, it is denied by the answer, and the answer sets up a title in the defendants, with a claim of possession for a long period of time, being for 20 years. The complainants claim that their possession has been consistent with their title; the land being wild timber and brush land, wholly uncultivated, and without house or other evidence of habitation upon it. The defendant insists that it has driven across it whenever it had occasion to, and carted gravel from their own land over it; and, besides the assertion of claim of title and ownership for a long period, they have paid the taxes which have been assessed thereon for over 20 years.

The simple question therefore is, should a preliminary injunction go upon this order to show cause? I believe it is well settled that, in order to justify the granting of a preliminary injunction when the title to real estate is in dispute, it must appear that the acts complained of, and which are sought to be restrained, will either work irreparable injury to the complainant, or will tend to the destruction of the inheritance. The case has been one of great interest to me, and has elicited the most careful consideration, and I conclude that the injunction has been properly asked for upon both grounds; namely, the threatened removal of gravel, and the building of the railroad. To the extent that the soil is removed, it is a destruction to the inheritance; and it is alleged in the bill, and sustained by very strong proof, that the chief value of this land is the gravel that is buried beneath its surface. It is true, the defendants deny the existence of gravel upon the lands claimed by the complainants; but they do not show any search therefor, nor, what is more important, do they deny, or in any way contradict or overcome, the charges in the bill, which have been sustained by proof, that certain agents of the defendant have declared that the defendant intended to excavate gravel, and remove it from the lands claimed by the complainant. The material part, therefore, of the bill, in that particular, has not been answered or denied in any way by the defendant. The construction of a railroad may be said, with great truthfulness, to work irreparable injury to the owner of the inheritance. It may be, trespasses more grievous to be borne might be committed; but, certainly, grading land for railroad tracks, the laying of ties and heavy iron rails thereupon, and the running of trains, daily or otherwise, must be conceded by all to be very destructive of what an American understands to be his right of property. And if the complainant be in the right, the threatened acts of the defendant—the running of cars and engines—will be a continuing trespass, requiring a multiplicity of suits for redress. The principles which guide in such cases are found in *Folley v. Passaic*, 26 N. J. Eq. 216; *Johnston v. Hyde*, 25 N. J. Eq. 454; *Stanford v. Lyon*, 37 N. J. Eq. 94; *Carlisle v. Cooper*, 21 N. J. Eq. 577-580; *Kerlin v. West*, 4 N. J. Eq. 449; *Cornelius v. Post*, 9 N. J. Eq. 196; *Lord v. Carbon Co.*, 42 N. J. Eq. 157, 6 Atl. Rep. 812; *Hart v.*

*Leonard*, 42 N. J. Eq. 416, 7 Atl. Rep. 865. But in addition to this, very clearly, another familiar principle has been properly invoked in support of the complainants' claim; that is, that injunctions will go in such cases to restrain the action of a defendant, even where titles to land are in dispute, until those titles are settled by an action at law.

I will advise in accordance with these views.

### SMOCK v. JONES and others.

(*Court of Chancery of New Jersey. December 14, 1887.*)

#### HUSBAND AND WIFE—REDUCTION OF WIFE'S FUNDS TO POSSESSION—VALIDITY OF MORTGAGE TO WIFE.

A husband in 1839, as administrator of an estate, had \$222, which was due to his wife; in 1853, as executor of another estate, \$385.15. In 1866 there was paid to him for his wife, as proceeds of a sale of real estate in which she was interested, \$210.28. In 1879 the husband executed a bond and mortgage for \$3,000 to his son, who assigned it to the wife. The next day, the husband, being insolvent, made a general assignment. From the first transaction, in 1839, until the day before the assignment, there had been no claim made by the wife for the money, and no account asked or submitted. *Held*, that as, under the law of 1839, the husband had the right to reduce the property of the wife to possession, he will be presumed to have held the money received at that time as in his own right, and not as administrator and trustee, and, in view of the circumstances of the case, the mortgage was void as against creditors.

The object of this action is to determine whether a surplus, remaining after the foreclosure of a first mortgage, shall be paid to the assignee of the mortgagor, or be applied on a second mortgage on the same property given to the mortgagor's wife.

*Robert Allen, Jr.*, for A. C. Hartshorne, assignee. *Parker & Vredenburg*, for Letta H. Jones.

**BIRD, V. O.** The question in this case is whether the assignee of Samuel W. Jones is entitled to a certain fund in court for the benefit of the creditors of Samuel W. Jones, or whether the wife of said Jones is entitled to it. Mr. Jones and his wife are over 80 years of age. In 1879, being largely indebted and insolvent, he made an assignment for the benefit of his creditors. This assignment bore date the seventh day of ———, 1879. On the day before, he executed and delivered a bond to his son George which was conditioned for the payment of \$3,000; and executed and delivered to him, also, a mortgage upon his real estate to secure said bond; which bond and mortgage were both delivered to the said George, and by him at once assigned to his mother, the wife of Samuel W. Another mortgage upon the same premises of prior date was foreclosed, the property sold, and this is the surplus part of the proceeds of such sale.

The assignee contends that, as to creditors, this mortgage, given to George, and by him assigned to his mother, was fraudulent. On the other hand, it is insisted that it is not only not fraudulent, but *bona fide*, and given for a valuable consideration; that it was given in payment of an outstanding indebtedness of the husband to the wife. The consideration upon which Mrs. Jones seeks to establish her claim to this surplus is, in brief, thus detailed by her husband, (she being unable, from age and infirmity of mind, to give to the court any very satisfactory account of how the various transactions, out of which the money she says is due to her, arose:) Mr. and Mrs. Jones were married before 1830. About that time, or soon thereafter, Mrs. Jones' father conveyed to Mr. Jones a tract of land, and when Mr. Jones was paying the money, \$1,000 less than the contract price was accepted in full payment thereof by the vendor. Mr. Jones remembers this fact, and speaks of it as one of the first instances of his receiving money which his wife, as he under-

stood it, was entitled to. In 1835 or 1836 the father of Mrs. Jones Jones was one of the administrators. In 1839 the estate was set administrators finally accounting, and the balance in hand due to on the twenty-second day of July, in that year, was \$222.51. In 1853, Mr. Jones, as the executor of the last will and testament of in-law, was found, by his account as such executor, to have in hand to his wife, the sum of \$385.15. On the nineteenth of April, 1866, paid to Mr. Jones, as the husband of Mrs. Jones, \$210.26, the proceeds of real estate of which Mrs. Jones was one of the owners in fee in common with others. These are the three items of principal, which, with interest, make the \$3,000 mentioned in the condition of the bond named. A calculation of interest upon the first item above (\$222.51) shows that, at the time of the execution of the bond, it amounted at simple interest to \$756; and of the \$385.15, to \$623.94; and of the \$210.26, to \$163.93,—making of principal and interest the aggregate sum of \$3,000. To secure these items, the said bond and mortgage for \$3,000 were given. It was not intended that the first \$1,000 should be included.

The creditors being interested, can this claim stand? I can but say that from the treatment of the case, by Mrs. Jones, from the time of the transaction, until the period of her husband's difficulties, the claim strongly arises that she not only never contemplated a charge against her husband, but that, upon the contrary, she intended to submit all her affairs to her husband's control absolutely, and in such a manner as to be in the law to an unqualified gift. So inevitable is the inference in this case, that counsel made no effort whatsoever to include in the claim the money which Mr. Jones says was the first that he received on account of the estate, and this same view is greatly strengthened by the fact that, upon the assignment, at no period of time, from that first transaction until the day of the assignment and the making of this bond and mortgage, was there any effort upon the part of Mrs. Jones to recover any of these sums, or any recognition from Mr. Jones, her husband, of these moneys, as due to her.

As to the \$222.51, which he received July 22, 1839, it is claimed that Mr. Jones, having that money in his hands at that time as trustee, was liable, at any time in the future, to account for it as such trustee, in whatever matter what may occur, or what rights may intervene, or what time may elapse, Mrs. Jones, the *cestui que trust*, has a right to demand of him an account for that money. It is insisted that the relation of *cestui que trust* continued to exist. This proposition does not seem to be tenable. It is true that, at that particular juncture, that amount of money was by law due to the wife as the proceeds of the personal estate of her father; but it is equally true that, as the law then stood, the husband was entitled to it, and had the right to reduce it to actual possession. So, and he having possession of it, it seems to me very clear that the presumption is that he held it and continued to hold it in his own right. To me that, after the lapse of 40 years, the burden of showing that he had not *continued* to hold it, as trustee, is upon those who insist upon the contrary. I cannot believe that the law would impose upon the husband in such a case, the duty, in the first instance, of turning money over to his wife, in order that she might hand it back to him, or of his making a formal declaration that he held this money as administrator for the benefit of his wife, in the first instance, but that now he holds it in his own right for her husband. But if the declarations of the understanding of the parties of any value, this branch of the controversy has been settled by the fact that Jones himself said when upon the witness stand. With reference to the moneys he had, he declares it was understood then that, by the fact that the money belonged to the wife belonged to the husband; and in my judgment

as the \$222.51 enters into the controversy, it is settled against Mrs. Jones. But supposing the trust was not actually satisfied, and supposing it be considered that the parties maintained the relations which they held at the very instant of the passage of the final account ascertaining the amount due, then, in such a case, is there anything in the evidence to justify the court in saying that the creditors of Mr. Jones have an inferior right to that of Mrs. Jones? I cannot come to that conclusion. It is said that a trust once created continues without limitation, and that the trustee can at any time be called to account and be compelled to pay. This may be so in very many instances, as between the trustee and his *cestui que trust*. To enforce this doctrine, my attention was called to the case of *Yeomans v. Petty*, 40 N. J. Eq. 495, 4 Atl. Rep. 631, where at least 40 years had elapsed after the creation of a trust. The general principle is, perhaps, correctly laid down in that case; but in that case the money was received by the husband for a definite purpose, and upon the distinct declaration that he should hold it as of and for his wife's separate estate, followed by repeated declarations that he held it for such purpose, which declaration was, at length, and many years after the original trust was created, put in writing by the trustee himself; and what is important to have in mind is that creditors were not interested in that case, and their rights were not considered, as they must necessarily be in this case.

The other two items may fairly be considered together. In the one case the money was received by the husband in September, 1852, 27 years before the execution of the bond and mortgage, and the other about 13 years before the execution of the bond and mortgage. The differences between these claims and the former are that they both originated subsequent to the passage of the married woman's act in 1852, and are both less stale. Every other consideration which is applicable to the former is equally so to the latter two. The testimony establishes the fact that at no time from 1839 until 1879, or from 1852 until 1879, or from 1866 until 1879, was there ever a word said by Mrs. Jones indicating a claim upon her part against her husband for any of those moneys, or by him indicating liability upon his part to her for any of them. There never was any memorandum of any account, or account in any shape, made and submitted, or demanded, to the one or by the other. And at length, when the crisis in the affairs of Mr. Jones culminated, and his burdens became more than he could bear, Mrs. Jones made no claim; at least, if she did, it was not until after she was prompted so to do, and that not by Mrs. Jones recognizing and claiming her just rights, but by her sons, of whom George was one, and who, perhaps, first reminded their father that he had these moneys at one time, and prompted their mother to ask him to secure her. But the inference, to my mind, from the testimony, is very strong, indeed, that the giving of this bond and mortgage was an arrangement upon the part of the sons, with which the mother had little, if anything whatsoever, to do. That she made any demand, or had the slightest thought of any claim, until the sons were informed of the situation of their father with regard to his creditors, is not at all proved. It seems to me that, if creditors can be defeated of their just rights by such circumstances, then, in a multitude of cases, wives, children, and other near relatives may, with the greatest ease, revive stale claims, and interpose them as against creditors. In support of these views I need not look beyond *Luers v. Brunjes*, 84 N. J. Eq. 19, Id. 561, and the cases cited on page 21.

I will advise that the said bond and mortgage are void as to the creditors of the mortgagor, with costs.

## DAVIES and others v. DAVIES and others.

(Supreme Court of Errors of Connecticut. February 11, 1887.)

1. **WILL—DEVISE—LIMITATION**—"PERSONAL REPRESENTATIVES"—NEXT OF KIN.  
A testator gave to each of his sons four-fifths of his share devised at his death, and the income and interest of the one-fifth to be paid each during life, and upon the death of a son the share "shall be distributed or go to his personal representatives who would be entitled to his personal estate according to law." One of the sons died leaving a widow but no issue. He bequeathed all his estate to her. The court held that the "personal representatives" of the son were his next of kin.
2. **SAME—VESTED TITLE.**  
A will provided that one-fifth of the share of each son should be paid to the executor, and the income paid to each son during his life, and that upon the death of the principal "shall be distributed or go to his personal representatives who would be entitled to his personal estate according to law." The court held that the title to the one-fifth share did not vest in the son, and he conveyed it by will. *CARPENTER and GRANGER, JJ., dissenting.*

Reserved case from superior court, New Haven county.

Alice H. Davies *et al.*, executors, brought suit against John M. Davies and others to obtain a construction of a will. The court reserved its decision until the next term of this court.

C. H. Farnam, for executors. J. S. Beach, for Grace W. Davies and others. C. R. Ingersoll, for defendants next of kin.

**PARK, C. J.** The ninth article of the will of the late John M. Davies is as follows: "It is my will, and I hereby direct, that four-fifths of the share of any and every of my sons shall be paid to him as soon as it can conveniently be done after my decease; and, as to the remaining one-fifth of the share of each son, I hereby direct that the same be invested in bonds and securities, or if it shall be thought best by my executrix and executors in real estate, that the same be kept invested for his use during his life, and that the interest therefrom shall be paid to him during his life, and that on his death the share shall be distributed or go to his personal representatives who would be entitled to his personal estate according to law."

The testator left three sons surviving him at the time of his death. The share of each in his estate was \$166,666, of which the one-fifth in question in this case is \$33,333. The sons, Cornelius C. Davies, has since died, leaving a will, and Grace Welch Davies, one of the defendants, but no issue. By his will he gave all his property, both real and personal, to his widow, and she is now the executrix of his will.

The executors of the will of John M. Davies present to this court the following questions for our advice. (1) Who are the personal representatives of Cornelius C. Davies intended by the testator in the ninth article of the will? (2) To whom is it the duty of the plaintiff to deliver the estate now in his hands, under the trust of said ninth article,—to the defendants, the heirs at law of said John M. Davies and the next of kin of said Cornelius C. Davies, or to the defendant Grace Welch Davies, who is the executrix of his will, or to the defendant Grace W. Davies as the widow, and the other defendants as the personal representatives, of said Cornelius, in proportions according to the statutes of this state relating to intestate estate?

The ultimate gift of the property in question was made to the "personal representatives" of Cornelius C. Davies, "who would be entitled to his personal estate according to law." We think this description was not intended to include scribe parties who might represent Cornelius in an official capacity as executors or administrators; neither was it intended for those who might be devisees or legatees; but was intended to designate his next of kin.

be entitled to his personal estate by right of consanguinity. We think it clear that the testator never intended by this description that those should enjoy his bounty who might happen to be Cornelius' executors or administrators, to the exclusion of his children, should he leave any surviving him. The improbability of such a gift to those who might not only be strangers to the blood of the testator, but strangers to him personally,—strangers who might come within the description by the accident of appointment by Cornelius as executors of his will or by the probate court as administrators of his estate,—would be so great that it would require unequivocal language to establish it. As said the lord chancellor in *Palin v. Hills*, 1 Mylne & K. 470: "If by personal or legal representatives, or executors or administrators, we suppose the testator to mean those whom the legatee might appoint executors or those to whom the ecclesiastical court might give administration, we presume a great improbability, to-wit, that he should leave it to the choice of another, or the accident of a grant of administration, to determine in what channel his bounty should flow." Such a gift would have put it in the power of Cornelius to make a disposition of the property, in effect, to whomsoever he would, for he could select whatever party or parties he might feel disposed, to be his executor or executors, and he might make the selection in order that others might have the property, to the exclusion of his children,

All this he might do when no power of appointment has been given to him directly in the will, and no such power has been given, unless intentionally given in the indirect manner suggested. This seems preposterous; and especially so when we consider that the testator granted the power of appointment in the sixth and tenth articles of his will to his widow in one case, and to his daughters in the other, and the grants are made in clear and direct terms. The conclusion is irresistible that, if the testator had intended that the sons should have this power, the grant would have been made in equally explicit and direct language.

Again, the cases are numerous, both in England and this country, where the words "personal or legal representatives," when used by a testator to describe the objects of his bounty, have been construed to mean natural representatives and not legal representatives,—representatives in the sense of next of kin, and not representatives in an official or fiduciary capacity.

In the old and leading cases of *Bridge v. Abbott*, 3 Brown, Dec. 224, and *Cotton v. Cotton*, 2 Beav. 67, the gift was to certain devisees, and, in case of the death of either, then to his or her "legal representatives;" and in the latter case one of the devisees had died leaving a will. But the master of the rolls held that the next of kin in both cases were entitled to take as the representatives intended by the testator.

In *Baines v. Otley*, 1 Mylne & K. 465, the trust was for M. K. for life, with remainder as she should appoint, and, in default of appointment, in trust to transfer and assign the personal estate to and among such person or persons as would be the personal representatives of M. K. These words of distribution were held sufficient to show that the executors were not intended, but that persons who could take beneficially must be the parties intended.

In *Robinson v. Smith*, 6 Sim. 47, the trust was for the life of a daughter, and after her decease to pay the trust moneys to such persons as she should by will appoint, and in default of appointment to her "personal representatives." The next of kin were regarded as the persons intended. To the same effect is *Walter v. Makin*, 6 Sim. 148.

In *Smith v. Palmer*, 7 Hare, 225, and *King v. Cleveland*, 4 De Gex & J. 477, a direction for a distribution among "legal representatives" was held to mean the next of kin.

In *Re Grylls' Trusts*, L. R. 6 Eq. 589, a legacy was given in trust for a married daughter for life, with power of appointment, and in default of appointment to transfer the same to such persons as would be her "personal

representatives" in case she had died sole and unmarried. The vice-chancellor said: "It is a most improbable thing that the testator meant his daughter's executor or administrator to take beneficially." The next of kin took the property.

In *Briggs v. Upton*, 7 Ch. App. 376, the marriage settlement was in trust for the life of the wife, with power of appointment, "and in default of such direction or appointment, then upon trust to pay or transfer the trust moneys unto the legal representatives of the said J. B. in a due course of administration." It was urged that these words, "in due course of administration," indicated the executors as the legal representatives, but the lord chancellor said: "I do not think that to be the natural meaning of the words. The natural meaning of the words would be that the trustees were to pay it over to those who in a due course of administration beneficially represented him, and that, of course, would bring in the statute with reference to the administration of intestate estates."

In this country the English cases, giving to "representatives" the significance of "next of kin," have been generally followed. 2 Redf. Wills, 78. Such has been particularly the case in the state of New York, where the will in question was executed, and in reference to whose laws, presumably, it was made.

The case of *Drake v. Pell*, 3 Edw. Ch. 270, is a leading one in that state. The bequest was of personal property in trust for the benefit of nine children of the testator, with this provision: "And in case any of my said children shall die after me under the age of twenty-one years, and leaving a child or children him or her surviving, then the share, portion, or interest of the child so dying shall go to the heirs, devisees, or legal representatives of the child so dying." One of the sons died a minor and intestate, leaving a widow and two children; and the question was whether the son's administrator took as his legal representative, or his children as his next of kin. In deciding the question the court say: "And with respect to the words 'legal representatives,' if the property transmitted be personal estate, the persons designated by and answering to this description are those who, by the statute of distributions, are known as the next of kin, and not the executors or administrators of the deceased child. The testator doubtless meant those who should take beneficially to themselves as owners, and not in a mere official or representative capacity in the right of a deceased child." The two grandchildren of the testator were declared to be the parties described to take under the will, and the mother of the children to be entitled to no interest in the property.

The case of *Tillman v. Davis*, 95 N. Y. 17, fully and clearly shows that the law of New York excludes the widow and husband from the class of "next of kin" in personal property and from "heirs" in real estate. In that case the testatrix gave property to her executors in trust for the use of her husband during life, and then directed its division into a number of shares, each of which she gave to a beneficiary, and then the will provided that "the heirs of any or either of the foregoing persons who may die before my husband, to take the share which the person or persons so dying would have taken if living." One of the persons died in the life-time of the husband, leaving a widow, to whom by his will he gave all his property. The court held that the widow took nothing by her husband's devise to her, but that his heirs took by substitution under the original will. It was also held that the word "heirs" was to be construed as "next of kin," which did not include the widow.

The word "representatives" has also been regarded as meaning "next of kin" in *Brokaw v. Hudson's Ex'rs*, 27 N. J. Eq. 135. In this case the gift was made to the testator's sister "or to her representatives." The court say: "In a gift of personal property, where the substitutes of the primary legatee are described by the word 'representatives,' those will take who have the

right to represent the primary legatee as next of kin under the statute of distributions, and not his executors or administrators."

But we think, aside from the adjudged cases on the subject, that the language of the description of the parties who are to take the remainder of the property in question clearly excludes both the executors and administrators of Cornelius C. Davies and his legatee and widow. The language is: "Shall be distributed and go to the personal representatives of Cornelius C. Davies, who would be entitled to his personal estate according to law." The last words, we think, make it clear that the testator meant by "personal representatives" those who would be entitled to the personal estate of Cornelius by right of consanguinity; that is, who would be entitled by natural right—by relationship—by being next of kin.

But it is said that the title to the one-fifth share of Cornelius C. Davies was vested in him as much as the title to the four-fifths, and consequently that he had the right to dispose of it by will, as he did, to his wife. But John M. Davies, the original testator, disposed of the title to the one-fifth to the next of kin of Cornelius, as we have seen. How, then, could Cornelius convey it to another party? He had no power of appointment. He had only the interest and income of the one-fifth. This is as clear as language could make it. The testator manifestly intended to put so much of the share of Cornelius beyond the reach of his creditors, in case financial disaster should befall him. There could have been no other object in view in regard to the one-fifth. The testator said, in effect, in his will, come what may, so much shall be saved from the wreck of Cornelius' estate for his support, and for the benefit of his next of kin. We therefore, in answer to the questions propounded by the executors for our advice, say that the personal representatives of Cornelius C. Davies are his next of kin; and that the property in question should be delivered to the defendants who are the heirs at law of John M. Davies and the next of kin of Cornelius C. Davies.

PARDEE and LOOMIS, JJ., concurred.

CARPENTER, J., (*dissenting.*) The testator disposed of the residue of his property as follows: "*Seventh.* It is my will and I hereby direct that all the rest, residue, and remainder of my estate, real and personal, and effects whatsoever, shall be divided in equal portions among my children who shall survive me, and the children of such of them as shall die leaving children, if any, so that each of my children who survive me shall have an equal portion of my estate if all shall survive me, or if any shall have died before my decease without leaving a child or children; and so that, if any of my children shall have died before my decease leaving a child or children, the child or children of each and every one who shall have died before my decease shall take the share which the father or mother would have taken under this my will, if such father or mother had survived me."

Clearly, the leading thought and intent in this section is that his children shall share his property equally. There is no intimation of a contrary intention. He is careful to provide that the issue of each child dying before his own decease shall take the share which the parent would have taken if living. He first divides the property among his children "in equal portions;" and then, to emphasize that intent, he repeats: "So that each of my children who survive me shall have an equal portion of my estate."

It will be observed that the gift to each and every one of his children is in precisely the same language. There is no distinction. If one takes a fee, all take a fee, so far as this section is concerned. That will be admitted. The court cannot construe the same language as meaning one thing in respect to one child, and something different in respect to another. If, therefore, such a construction is to prevail, it must be on account of some other portion of the will which requires it.

The ninth section is as follows: "It is my will, and I hereby direct, that four-fifths of the share of any and every of my sons shall be paid to him as soon as it can be conveniently done after my decease. And as to the remaining one-fifth, it is my will, and I hereby direct, that the same be invested in bonds and mortgages, or, if it shall be thought best by my executrix and executors, in real estate, and kept invested for his use during his life, and that the interest and income therefrom shall be paid to him during his life, and that on his death the same shall be distributed or go to his personal representatives who would be entitled to his personal estate according to law." The tenth section makes a similar provision for the shares of the daughters, except that the proportions are reversed, one-fifth being payable presently to each daughter, and four-fifths invested for her use during life, and at her decease, and not before, "the said four-fifths of her share shall go to her child or children, if she shall leave any surviving her, share and share alike, if more than one, and so that the children of any deceased child shall receive the share that the parent would have been entitled to if living; and, if not,—that is, if she shall leave no child nor descendant,—shall be distributed as her personal estate according to law, or as she shall by her will direct and appoint." And in case any one of his daughters should die after his own decease, and before the payment to her of said one-fifth, or before said four-fifths shall have been invested for her as directed, then the direction is that "so much of such one-fifth or increase as shall not have been actually paid to her, or so much of the amount herein directed to be invested as shall not have been actually invested for her use, shall go and be distributed as the personal estate of such daughter, as in case of intestacy, according to the provisions of the statutes of the state of New York regulating the distribution of the personal estates of intestates, *to the absolute exclusion of any right, claim, or interest therein, or in any part thereof, of any husband, as her administrator or otherwise.*"

It will be found that the portion given to each daughter in the seventh section is spoken of as "her share" in his estate no less than seven times in the tenth section. She has the beneficial use of the whole share during her life, the power of disposing of it by will is expressly given her, and, in case she makes no will, it is to be disposed of as her personal estate. Under such a will I think it will be admitted that each daughter, in effect, takes a fee in the whole portion given to her by the seventh section.

I fail to discover enough in the difference between the ninth and tenth sections to convince me that the testator intended to deal less favorably with the sons than with the daughters. That difference may be accounted for mainly, if not entirely, by his extreme anxiety that each daughter, when married, should take her share as her sole and separate estate, and have the power of disposing of it to the "absolute exclusion" of any right in the husband. In case she fails to dispose of it, the provision that it shall be distributed as her personal estate is significant. He thereby recognizes not only that the property vests in the daughter, but also that it is hers, and not her husband's. No part of the will indicates any want of confidence in the sons. Two of them are made executors, and in the twelfth section the testator speaks as follows: "It is my desire that my three sons should carry on business together in copartnership, believing that they are well constituted with the blessing of God to make a strong and prosperous firm, and in connection with my present partner and friend, Mr. Gopsil, and that they should continue the name of the old firm of John M. Davies & Co."

The suggestion that he intended to place one-fifth of each son's share beyond the hazards of business is hardly in harmony with other parts of the will. It may be so, but he has not said so, and no such reason for withholding payment of the one-fifth is apparent either on the face of the will or in the attending circumstances. Besides, if it had been his intention to give but a life-estate to his sons in any portion of his property, we should expect

to find, in a will so intelligently drawn as this is, that intention clearly expressed. We should not expect to find it only by implication, and a rather weak implication at that. Moreover, that construction partially defeats the leading intention of the will by effecting an ultimate unequal distribution of the property. But the ninth section, aside from the argument drawn from the tenth, may be fairly construed as I contend it should be. Its object is not to devise or bequeath property, but to fix a time for the payment of legacies already given. Hence the testator speaks of "the share of any and every of my sons." Four-fifths of that share is payable at his decease, and on the death of the legatee the other fifth is not in terms given to his personal representatives, but "shall be distributed or go to" them. They are to take, not as purchasers, for that would make the ninth section to some extent repugnant to the seventh. That would limit a remainder upon a fee. That is allowable in a will, the remainder taking effect as an executory devise, when such an intention is clearly expressed. If doubtful, and the language will admit of another rational construction, the latter should be preferred as the true one.

Sometimes the gift of a remainder after a fee will be regarded as repugnant and void. There is not necessarily any repugnancy here, and I contend that the will should not be so construed as to make one; neither should it be so construed as to reduce an estate previously given in fee to a life-estate, unless such an intention is clear, and I think no such intention appears in this case. There is no gift or devise in this section except by implication, and such implication need not be resorted to in order to discover the testator's intention, as that intention is reasonably clear without it. Bearing in mind that the testator is simply providing for the payment of a portion of a legacy previously given, at the death of the legatee, there is no difficulty in preceiving that by "personal representatives" he meant those who should represent or succeed the son in the ownership of the property. That construction avoids repugnancy, does not reduce a fee to a life-estate, and gives effect to the testator's intention.

I am aware that there are decisions in England and in this country which hold that a gift to personal representatives is a gift to the next of kin. I have no occasion to controvert that rule; but like all other arbitrary rules it should be sparingly used, and never when it tends to defeat the intention of the testator. But as I construe this will the rule has no application to this case, as here is no gift to personal representatives, but a time is named when a portion of a gift previously given is payable; and, as that time is after the death of the legatee, the testator naturally speaks of those who succeed to his rights in property wholly personal as personal representatives.

In this opinion GRANGER, J., concurred.

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BORDER STATE PERPETUAL BUILDING ASS'N OF BALTIMORE CITY v.  
HILLEARY and Wife.

(Court of Appeals of Maryland. December 2, 1887.)

USURY—RENEWAL OF MORTGAGE—REBATE OF USURIOUS INTEREST PAID.

The Maryland act of 1876 (Code, art. 36, § 6) provides that usurious interest shall not be recovered back after the debt has been paid, unless it has been by renewal, in part or whole, of the original debt. Complainant being the owner of four shares in the defendant company, borrowed their par value from it, and with his wife gave a mortgage as security for \$1,040. After paying at least one-half of this amount, he retired two shares of stock and gave a new mortgage for \$520. The defendant at the time gave him a check for that amount, which he indorsed to it, and it was placed to the credit of the company; no money coming to complainant, who paid interest and dues until he had paid in all more than \$1,040, with interest. He demanded a release of the mortgage, but defendant refused; claiming he still

owed the company. *Held*, that the second mortgage was a part of the old debt, and complainants were entitled to a rebate for the usurious interest on the first mortgage.

**Appeal from circuit court of Baltimore city.**

James A. Hilleary and wife filed a bill against the Border State Building Association of Baltimore City, defendant, to compel the release of the mortgage. From the order in favor of the complainants defendant *James McColgan*, for appellant. *James H. Barnes*, for appellee.

**ROBINSON, J.** This is a bill filed for the release of a mortgage. These are these: The appellant association advanced to the appellee Hilleary the par value of four shares of its stock held by him, and, to secure the payment of the money thus advanced, Hilleary and his wife executed for the association a mortgage. Hilleary, from time to time, continued to make weekly payments of interest and dues, according to the terms of the mortgage, until the whole sum thus paid by him amounted to one-half of the mortgage. Such being the case, and not wishing to continue the payment of interest on the whole debt of \$1,040, the secretary of the association advised him to have the mortgage released, and to retire two of the four shares, and give a new mortgage on the same property for \$520; being the par value of the original mortgage, and being, also, the par value of the two retired shares. Accordingly the mortgage was released, two of the four shares retired, and a new mortgage for the payment of \$520 was executed. At the same time, a check for \$520 was drawn by the association payable to the order of Hilleary, but this check was indorsed by him, and then deposited in the association in bank to its credit; so, not one dollar was at that time paid to Hilleary. After its execution, he continued to pay the interest on the second mortgage until the amount paid by him, added to the amount made on the original mortgage, exceeded the mortgage debt of \$1,040, interest thereon. Application was then made to the association to release the second mortgage, but this was refused, on the ground that there was still a debt due on it by the appellees.

The auditor's account shows that the entire sum paid by Hilleary on the first and second mortgages exceeds the \$1,040 advanced to him with interest. The association contends that the first mortgage was paid and released at the time of the execution of the second, and that Hilleary is not, therefore, entitled to a rebate of the usurious interest paid by him on the first mortgage; and, further, that the second mortgage for the payment of \$520 was a new loan of that amount by the association to him. Now, if this be true, the original mortgage debt was in fact paid, then the appellees are not entitled to a rebate for usurious interest, because the act of 1876, c. 358, provides that no recovery shall be had of usurious interest after the debt has been paid. The proof, however, does not sustain the appellant's contention. On the contrary, it shows that, although the original mortgage was in fact released, half of it had been paid, and that the second mortgage, instead of being a new loan, to secure a new loan of \$520, was in effect a mortgage to secure the balance due on the first, and based, too, on the remaining share of stock in the association of Hilleary, the par value of which was \$520. When the act of 1876, c. 358, of the payment of the debt, it means, as was said in *Hayes' Case*, 61 Md. 300, "a bona fide, and not a sham, payment." The mere fact of handing the check to Hilleary for \$520, and taking it back in the next breath, and depositing it in bank to the credit of the association, is not a loan of money to him. The object of this formal ceremony was, no doubt, to give to the transaction the appearance of a new loan. The effect of it, however, was merely to restate the mortgage indebtedness from \$1,040, as it stood when the first mortgage was made, to \$520, for which the second mortgage was given. It was, therefore, a part of the same old debt. This being so, the appellee Hilleary is entitled to a rebate of the usurious interest paid on the first mortgage.

a rebate for the usurious interest paid on the first mortgage, because the act of 1876 allows one to recover all usury paid, so long as any part of the debt remains unpaid. As the auditor's account shows that Hilleary has in fact overpaid the original mortgage debt of \$1,040, and interest thereon, the order below must be affirmed. Order affirmed.

GEISER v. NORTHAMPTON CO.

(*Supreme Court of Pennsylvania.* October 3, 1887.)

DISTRICT ATTORNEY—SCOPE OF DUTIES—QUESTION OF LAW.

Plaintiff was district attorney of the defendant county. It was suspected that there were falsifications and irregularities in the books of the late county treasurer, and the court ordered all county officials to deliver to the district attorney any and all books which he desired for the purpose of an investigation. A number of books were removed to his office, and an examination lasting three weeks was had. He claimed extra pay for his services, and for the use of his office, as being outside the scope of his duties. *Held*, that this was a question of law, and that plaintiff was not entitled to recover.

Error to court of common pleas, Northampton county.

*Assumpsit* by George W. Geiser against the county of Northampton to recover the value of certain professional services rendered by plaintiff for defendant. Upon the trial, the court entered a compulsory nonsuit, which they subsequently refused to take off; ALBRIGHT, P. J., filing the following opinion, wherein the facts are fully stated:

"At the time the services for which plaintiff seeks to recover compensation were rendered he was the district attorney of Northampton county. It appears that at April sessions, 1886, the court instructed the grand jurors concerning their powers and duties to make presentments of offenses of public notoriety, and within their (the jurors') knowledge, and that the court especially directed attention to alleged falsifications or other irregularities in the accounts of a late treasurer of the county. The jurors were instructed that if they found sufficient grounds they could make a presentment. When it is within the knowledge of the grand jurors that an offense has been committed within the county which has not been prosecuted, they may make a presentment of that fact to the court, whereupon, when deemed proper, the prosecuting officer prepares a bill of indictment, and sends it to the grand jury.

"Exactly what action the grand jury took does not appear in the case. I infer that the jurors decided to investigate said treasurer's accounts with a view of making a presentment if sufficient cause became apparent. To ascertain the state of accounts, an examination of the books was made. It can also be inferred that a presentment was made after the investigation, (although that has not been shown distinctly,) and that at a subsequent term bills of indictment against the late treasurer (and perhaps against other parties) were laid before the grand jury, and returned by that body ignored. What was done in that regard is not material to the decision of the question arising in this case.

"It does appear that the grand inquest took cognizance of the matter, and that an investigation was made with a view to further action by that body. To facilitate said inquiry, the court on April 14, 1886, ordered the county commissioners, county treasurer and all other county officials to deliver to George W. Geiser, Esq., district attorney, any and all books and accounts which he may desire for the purpose of an investigation into the accounts of the late county treasurer, Sidney Kessler, and that he be permitted to remove the same to such place as he may direct for the purpose of such examination.' On April 16, 1886, the plaintiff, as district attorney, presented his petition to the court of common pleas representing that, in order that the investigation might be thoroughly and satisfactorily made, it was necessary to have certain

books which were in said late treasurer's hands, and which the latter to give up. What was done pursuant to said petition was not shown but it seems there was some contest in which the plaintiff and particularly appointed counsel for the commissioners acted upon the side of the petitioner. A number of books (public records, it may be assumed) were moved from the public offices in the court-house to the plaintiff's law-office, and there an examination of them by the plaintiff and an expert accountant was made, occupying about three weeks. For services in that investigation, including said action in the court of common pleas, and for the use of a law-office, and for light furnished, the plaintiff seeks to recover in this action. It is claimed that it can be found from the evidence that plaintiff's services in the examination of said accounts (during three weeks) were worth \$100 to \$125 a week; that his services in the court of common pleas were worth about \$100, and that the office-room and light furnished were worth about \$3 a day.

"If there is any evidence upon which the jury, under the law, could find for the plaintiff for any part of his claim, then he had a right to have his case submitted to the jury. At the time of the trial the court was of opinion that, upon the case presented by the plaintiff, he was not entitled to recover, and entered a nonsuit on defendant's motion. If that action was proper, the nonsuit must be taken off.

"Whether certain acts done by one who is a public officer are within the scope or line of duty of said office or not, whether or not they are within the law is manifestly a question of law, and must be decided by the court. It has been an error to have asked the jury to find whether or not all or some of the several things done by the plaintiff, and claimed for, came within the scope of his duty as district attorney. The powers, duties, and compensation of a district attorney are prescribed by law,—what they are is peculiarly a question of law. The statute provides what fees the district attorney shall receive. These fees are the compensation attached by law to the office, the same as the pay was in the form of an annual salary. Beyond said fees he cannot claim, directly or indirectly, requital for official services. Const. Pa. Art. 3, § 5; *Wayne Co. v. Waller*, 7 Wkly. Notes Cas. 379; *Bussier v. Pray*, 100 Pa. 447; *Irwin v. Commissioners*, 1 Serg. & R. 503; *Commissioners v. Patterson*, 2 Rawle, 106. 'If the fixed compensation is more than the services are worth, the party must pay it; if less, the officer must be content with it. Neither can resort to any other rule than the written law. It falls to the jury of almost every man to require the services of public officers. It is of great importance, therefore, that every man should know what he has to pay for, if it is left to the parties to agree upon the compensation, a door is opened for perpetual litigation. \* \* \* It is impossible for human wisdom to foresee every service which will arise. This must have been known to the legislature, and therefore in framing the table they have taken care to make what on the whole will render offices sufficiently lucrative, although in some services there may be no compensation at all. \* \* \* The officer is supposed, on the whole, to receive a reasonable payment for each service, although for many he receives nothing. It appears to me, therefore, that the fee-bill was intended to enumerate all the services for which the officer is entitled to pay; and, if so, the law will imply no promise to pay for other services.' Chief Justice TILGHMAN in *Irwin v. Commissioners*. Every officer accepts his office with its incidents, and its legal emolument and legal expenses, and inconveniences. He has no right to claim compensation for his county, under color of his office, anything not given him by law. *Commissioners v. Patterson, supra*.

"The learned counsel representing the plaintiff concede that the plaintiff, for official services, can recover nothing except the fees fixed by law. [There is no claim in this action for fees given by the fee-bill.] But they insist

what the plaintiff seeks to recover compensation for was outside of his duties as a public officer, as said services in the court of common pleas, the supervising of the action of the messenger appointed to procure information in various quarters in the aid of the investigation, the examination of the accounts by the plaintiff, and office-room and light. Bearing in mind what was sought to be accomplished, and what was actually done to bring about the desired end, the conclusion is irresistible that the plaintiff was required, in the discharge of his official duty, to do all that he did, or that he should not have done it at all, at least upon the theory that the county should pay for it.

"There is no need to explain what the powers of the grand jury in the premises were. If it were necessary to do so, a reference to the charge of Judge KING in the case of *Board of Health*, 1 Whart. Crim. Law, § 548, note *j*; and the opinion of Judge PAXSON in *Re Memorial of the Citizens' Ass'n*, 8 Phila. 478, would be sufficient.

"The grand inquest, in taking cognizance of the matter to which the plaintiff's services related, were acting in the line of their duties as a branch of the criminal court; their actions and everything that was done in respect to it was in the administration of justice in the criminal courts, and everything that was required to be done by an attorney at law in the commonwealth's behalf (in the way of prosecuting, or laying the ground for a prosecution) devolved upon the plaintiff as the district attorney of the county. If any other attorney had rendered services in the furtherance of prosecutions, whether proposed or already started, he would simply have been acting in the stead of the district attorney, and could not have been paid out of the county treasury. The situation is such that if the plaintiff acted at all he was promoting the prosecution. This stamped every act of his as official. The services rendered by the plaintiff, as shown by the evidence in this case, involved great labor and sacrifice of time, and it is greatly to his credit that he made these extraordinary efforts. But plainly it was all in the line of his duty as district attorney. The object in view was to indict the ex-treasurer, (and perhaps other officers,) and every act of the plaintiff for which payment is now demanded was done to effect that purpose. The district attorney was seeking evidence to indict and to convict. He sought for it in the books of the treasurer, and probably other official books and papers, and in the results of the labors of the special messenger. To obtain access to certain books, he invoked the aid of the court of common pleas. To make more convenient and effective the examination of the books, he had them taken to his own office. Instead of relying upon the expert accountant alone, he gave his own attention to the work. It was an instance of a district attorney giving great and perhaps unusual attention to the preparation of a criminal case. The use of plaintiff's law-office and light was involved in the method he adopted to discharge his public duties. It differed only in degree from the use of office-room in any other criminal case prepared by the district attorney at his private office.

"Upon the facts which could have been found from plaintiff's evidence, he was not entitled to recover."

Whereupon plaintiff took this writ.

*Emmens & Walter*, for plaintiff in error.

The motion for nonsuit admits the truth of plaintiff's testimony. *Miller v. Bealer*, 100 Pa. St. 583. These services were not within the scope of plaintiff's public duties. *Pike Co. v. Rowland*, 94 Pa. St. 246; *Lancaster Co. v. Brinthal*, 29 Pa. St. 88; *U. S. v. Brindle*, 119 U. S. 688, 4 Sup. Ct. Rep. 180; *Shrope v. Northampton Co.*, 1 Lehigh Valley L. Rep. 197; *Allegheny Co. v. Watt*, 3 Pa. St. 462. The county is liable for necessary expenses in the proper administration of laws. *Lancaster Co. v. Brinthal*, *supra*; *Allegheny Co. v. Watt*, *supra*; *McCalmont v. County of Allegheny*, 29 Pa. St. 417.

*C. Albert Sandt*, for defendant in error.

A contract to perform the duties of an office is implied by the party accepting it. *Com. v. Evans*, 74 Pa. St. 124. The duties of a public office are defined by law. *Close v. County of Berks*, 2 Woodward, 453. Whether or not certain duties are within his official line is a question of law. *County of Cranford v. Nash*, 99 Pa. St. 253; *Wayne Co. v. Waller*, 7 Wkly. Notes Cas. 379; *Bussler v. Pray*, 7 Serg. & R. 449; *Irwin v. Commissioner*, 1 Serg. & R. 505.

STERRETT, J. An examination of the evidence fails to disclose anything that would have warranted a verdict in favor of plaintiff for any portion of the claim in suit. On the contrary, it is very evident the meritorious services shown to have been performed by him were within the scope of his duty as district attorney of the county. Whether they were or not was a question of law for the court, and not one of fact for the jury. In taking this view of the case presented by plaintiff's evidence, the court below was clearly right, for reasons given at length in the opinion of the learned judge who presided at the trial. Judgment affirmed.

STRYKER and others v. Ross.

(*Supreme Court of Pennsylvania*. October 3, 1887.)

EVIDENCE—PREVIOUS AWARD OF ARBITRATORS.

It is reversible error to permit a witness to state to the jury the result of a previous award of arbitrators in the same case.

Error to court of common pleas, Huntingdon county.

Trespass *quare clausum fregit* by John Ross against H. M. Stryker, John Edmiston, Isaac M. Neff, and Henry A. Neff. Plea, not guilty.

In 1852, Edwin V. Wingert was the owner of lots of ground Nos. 114, 115, 116, and 117, in the borough of Petersburg. Lot No. 117 was bounded by King street on the east, and by a 12-foot alley on the south. Wingert had built a brick store-room on the eastern end of lot No. 117, and in the year 1852 built a frame or plank warehouse on Shaver's creek on the western end of the lot. The warehouse was used for the purpose of storing grain, salt, and other merchandise. Samuel Myton occupied the store-room as the tenant of Wingert. On the western part of the lot he built a fence 16 or 18 feet east of the warehouse, and left an open way between the warehouse and the fence so that wagons could be conveniently driven in and unloaded at the east front of the warehouse. It was opened and intended only for the trade of the warehouse. This approach to the warehouse, about 16 or 18 feet wide, so remained until 1863. In that year, lot No. 117, with other lots, were levied upon by the sheriff as the property of E. V. Wingert, and on the fifteenth of August, 1863, conveyed by the sheriff to John Scott, Esq., who by his deed dated the first day of October, 1863, conveyed the same to J. Clark Walker. The lot 117 is on the corner of a 12-foot alley, which bounded it on the south. Cresswell became the owner of the lot on King street, opposite and south of lot No. 117, and on the south-west corner of the alley and King street. Cresswell also owned other lots south of this lot, and had, like Wingert, a warehouse on Shaver's creek, and had an approach also, but a wider one, at the western end of his lots for the accommodation of his trade.

When Walker, in 1863, became the owner of lot No. 117, the 12-foot alley on the south was for the accommodation of the trade to their several warehouses, widened by Cresswell giving 12 feet and Walker giving 3 feet, so as to widen the way with the 12-foot alley in the town plan, to their warehouses, 27 feet. Walker at the same time, so as to make sufficient turning room for teams coming from King street to his warehouse, widened the approach on the eastern side of the warehouse by taking down the fence built by Win-

gert, and dividing the lot (No. 117), by setting the fence erected by Wingert back about 19 feet further east, 73 feet west from King street, and erected the sheds (now occupied and owned by the defendants in the case) open towards the warehouse, and open at both ends, and connected the eastern line of the sheds by a fence from the northern and southern ends of the eastern line of the sheds, so as to inclose the western end of this part of the lot. This was nearly an equal division, by a north and south line, of lot No. 117. The brick store building fronting on King street, on the eastern end of the lot, Walker converted into a dwelling and rented it to his tenant. The sheds and the open space he used in connection with his warehouse. The sheds, open space, and warehouse constitute the western half of Walker's division of lot No. 117, and have been held and occupied in that way by Walker and his assigns from 1866 to this time.

In 1875 Walker made an assignment for the benefit of creditors. His real estate, however, was not sold by his assignee. Upon a *fi. fa.* No. 95, April term, 1875, at the suit of Nancy Stewart, and a waiver of inquisition, *inter alia*, the sheriff made the following levies and returns of sale, to-wit: "Also part of lot No. 117 in the plan of said borough, [Petersburg,] having a brick dwelling-house and other buildings thereon erected; said lot being situated on the west side of King street and having thereon also a frame dwelling-house. Sold April 14, 1875, to George B. Orlady, for \$1,875." This was followed by a deed poll dated the twenty-first day of April, 1875. (This is the eastern half of Walker's division.) "Also part of lot No. 117 in the plan of said borough, having a plank warehouse thereon. Sold April 14, 1875, to Theodore H. Cremer, for \$950." This sale was consummated by a deed poll dated twenty-first of April, 1875. (This is the western half of Walker's division.) In this way the title of J. C. Walker to the two half lots constituting lot No. 117 was sold, the eastern half with a brick and frame house thereon to George B. Orlady, and the western half with the plank warehouse, sheds, and open way to Theodore H. Cremer.

When Orlady and Cremer each took possession of their half lots, the eastern line of the sheds, with a fence running north and one running south, at 73 feet from King street, on a line with the eastern line of the sheds, was the division line between their respective half lots. Orlady fenced and inclosed the other sides of his half lot, and rented to his tenants. Cremer on the twenty-first of December, 1877, conveyed his (western) half lot to Susan Walker, and she rented to the defendants, the Grange Association. They took immediate possession of the warehouse, sheds, and open way, and have used the sheds and open way in connection with the warehouse, and have been in the exclusive possession of the same, ever since, under Mrs. Walker's lease to them, and by virtue of Mrs. Walker's conveyance to William W. Stryker, in trust for the Grange Association, dated sixteenth of February, 1882. This division line of the lot was recognized by George B. Orlady, the then owner of one-half, and Mrs. Walker, the owner of the other half, and on the trial the defendants offered to show the same, but the offer was rejected by the court. (Third specification of error.)

On the sixteenth day of December, 1878, George B. Orlady conveyed to Dr. Henry Orlady the same half lot and title of Walker that he had purchased at sheriff's sale. On the eighteenth of February, 1881, Dr. Henry Orlady made his deed of assignment, for the benefit of creditors, to George B. Orlady and Isaac M. Neff, his assignees. On the twenty-eighth of November, 1881, the assignees of Dr. Henry Orlady conveyed to Mrs. Martha Slack part of lot No. "117 from the north line of brick house to north line of lot having thereon a frame dwelling-house;" and by deed dated the same day they conveyed to John Ross (the plaintiff) "a part or parcel of lot numbered 117 in the recorded plan of said borough of Petersburg fronting on the west side of King street, and extending back at right angles thereto along an alley on the southern side

to an alley, having thereon erected a two-story brick dwelling-house, etc.; 'to hold the same, and its appurtenances and privileges, as fully as the same was enjoyed by H. Orlady and his assigns.'"

On Saturday, the thirteenth day of May, 1882, John Ross, the plaintiff, went with three or four employes, and commenced to erect a shed from the fence at the end of his line and possession, 73 feet from King street, west to a point 12 feet east of the warehouse, thence north, in a line parallel with the warehouse, 34 feet 8 inches, and from the end of this line east about 25 feet, to the sheds of defendants, and put up a partition in the sheds, running to a point at the western end of the division line between Mrs. Slack and John Ross. While this was in progress, John Hoffman, the chief clerk and agent of the Grange Association, appeared on the scene, and told Ross and his employes not to trespass, that the property belonged to the corporation, and that, "if they would put them up, we would cut them down; and they went on and put them up. "While the work at this erection of sheds was going on, John Ross had some coal hauled and deposited on the grounds. This was on Saturday. Ross had proceeded so far as to put in the posts for the sheds, had boarded up the sides, put in the partition above mentioned, had hauled some coal on the ground, but there was no roof on the sheds. On the following Monday morning about daylight the defendants, members of the Grange Association, cut down and demolished the posts and boards nailed thereon by Ross and his employes, shoveled the coal Ross had put on the ground into his sheds; and as to the posts and boards used by Ross in the erection of these sheds, they "trundled them into the highway."

On the trial, defendants offered to show—*First*. That at the public sale at which John Ross bid off his piece of ground the agent and lessee of Mrs. Walker gave notice that she claimed all the ground in lot No. 117, from Shaver's creek to the eastern line of the sheds. *Second*. By George B. Orlady, that when he owned the lot he claimed only to run 73 feet west from King street, and that Mrs. Walker, the adjoining western owner, claimed by the same line. *Third*. By same witness, that when he owned the property he fenced up that line, or so much thereof as was not inclosed by the sheds, and that Mrs. Walker, the adjoining western owner, and he, recognized that as their division line, and that the fence so stood at the time of the assignee's sale to John Ross. *Fourth*. By the same witness, and one of the assignees of Henry Orlady, and who delivered the deed, that at the time of the delivery of the deed, he informed Ross that he only proposed to sell to him 73 feet, from King street down to the sheds; that Mrs. Walker claimed, and was in possession by her tenants, of the western part of the lot and the sheds; and that if he was not willing to take the deed with that understanding, he would put it up again for sale; and that a map was exhibited, showing the amount of ground he was willing to convey, and would convey, and that with this understanding Ross accepted the deed; and, further, that he stated the same thing to David Barrick, who bought the property for John Ross, at the time of the sale, and previous to the confirmation. These four several offers were excluded by the court, and constitute the first, second, third, and fourth specifications of error.

Under objections from the defendants, the court permitted the witness on the stand to state that Ross, who entered the rule to arbitrate, had been successful before the arbitrators. This constitutes the fifth specification of error.

The court charged the jury: "Now you have the evidence of Mr. Ross and others, from the time of his purchase, he claims that he was in possession and using that (the part upon which he attempted to build his sheds) in connection with his brick building, and storing property thereon." (Eighth specification of error.)

"The borough of Petersburg was incorporated nearly one hundred years ago. \* \* \* Of course, many changes, material changes, have occurred in

the borough since, which did not appear on the plan of the borough since. No doubt, there are many lanes and streets which did not appear upon the plan of the borough. In this case, the western boundary of Mr. Ross' lot is termed an alley. That alley does not appear on the public plan of the borough, and it is not contended in this case that the alley there, about which there has been so much controversy and testimony, was ever laid out by public authority; nor would it be really necessary, so far as the rights of the parties in this case are concerned, that it should have been laid out by the authority of the officers, because parties owning property have a right to establish lines on the property themselves in a proper way." (Seventh specification of error.)

Verdict for plaintiff, \$10.65, and judgment thereon, whereupon defendants took this writ.

*R. B. Petriken and M. M. McNeil*, for plaintiffs in error.

Adjoining owners can establish lines by consent on the ground, and the declarations or acts of either of the parties, if dead, would be evidence for or against a purchaser from either; *a fortiori* is it evidence where the parties are living. *Kerr v. Wright*, 37 Pa. St. 196; *Hagey v. Detweiler*, 35 Pa. St. 409; *Mills v. Buchanan*, 14 Pa. St. 62; *Alden v. Grove*, 18 Pa. St. 377; *Kellum v. Smith*, 65 Pa. St. 86; *Craft v. Yeane*, 66 Pa. St. 211. A levy, obscure in its terms, may be explained by parol. *Scott v. Sheakley*, 3 Watts, 50; *Iron-Works' Appeal*, 77 Pa. St. 103; *Hoffman v. Danner*, 14 Pa. St. 25. It was clear error to permit the witness to refer to the decision of the arbitrators. *Shaeffer v. Kreitzer*, 6 Bin. 430; *Humphreys v. Kelly*, 4 Rawle, 305; *Hyslop v. Crozier*, 1 Miles, 267.

*Brown, Bailey & Brown*, for defendant in error.

It was certainly competent, by cross-examination, to correct the impression left by the witness as to the result of the arbitration, which was all that was done. Plaintiff having the legal and rightful title, the constructive possession was in him. *Norris' Appeal*, 64 Pa. St. 275.

STERRETT, J. If it were not for the ruling complained of in the fifth specification of error, this judgment should be affirmed. Counsel for plaintiff below, on cross-examination of defendant's witness, put a question calculated to elicit the fact that the arbitrators in this case awarded in favor of his client. This was objected to, but the witness answered, saying: "At the time of this conversation, Ross had won this suit before the arbitrators." The learned judge then refused the request of defendant's counsel to strike out the question and answer as improper and irrelevant; and thereupon exception was taken. This may appear to be a trivial matter on which to reverse an otherwise sustainable judgment; but, if we adhere to the ruling in *Shaeffer v. Kreitzer*, 6 Bin. 430, and *Humphrey v. Kelly*, 4 Rawle, 305, we must hold it was error. In the latter case the court below, under exception, permitted plaintiff to read part of the docket entries, which showed that the defendant below has appealed from the award of arbitrators. In the opinion reversing the judgment, this court said: "It is impossible not to see that the drift of the evidence was to give the plaintiff the benefit of whatever impression might be made on the minds of the jurors by the fact that the cause had once been determined in his favor by judges of the party's own choosing. This may have been a substantial injury, and defendant ought not to have been exposed to the danger of it." This reasoning is equally applicable to the present case; and for the error into which the court was doubtless inadvertently led the judgment must be reversed.

It is unnecessary to specially notice the remaining specifications, further than to say that there is no error in either of them that would warrant a re-

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versal of the judgment. The case depended mainly on questions which were exclusively for the jury.

Judgment reversed, and a *venire facias de novo* awarded.

### LEWIS and others, Receivers, etc., v. SEIFERT.

(*Supreme Court of Pennsylvania. October 3, 1887.*)

1. **MASTER AND SERVANT—RISKS OF EMPLOYMENT—NEGLIGENCE OF FELLOW-SERVANTS.**  
Each person who enters the services of another takes on himself all the risks of the employment in which he engages, and the negligent acts of fellow-workmen in the general course of his employment are within the contemplation of the master.
2. **SAME—WHO ARE FELLOW-SERVANTS.**  
To constitute fellow-servants, the employees need not be at the same place in the same particular work. It is sufficient that they are in the service of the same master, engaged in the same common work, and performing services for the same general purpose. The rule is the same, although the injured may be inferior in grade, and is subject to the direction and control of a superior, whose act caused the injury, provided they are co-operating in a common object.<sup>1</sup>
3. **SAME—TRAIN DISPATCHER, A "VICE-PRINCIPAL."**  
A train dispatcher, vested with the power and authority of moving and changing the schedule time, or making new schedules, as regards the running of trains, is a "vice-principal," and not a fellow-employee. In case of an injury resulting to an employee in consequence of his negligence, the company is liable.
4. **SAME—DUTIES OF MASTER—LIABILITY FOR ACTS OF AGENT.**  
The master owes to every employee the duty to provide a reasonably safe place in which to work, and reasonably safe instruments, tools, and machinery. Such duties are delegated to an agent, the latter stands in the place of the master, who is responsible for his agent's acts.
5. **SAME.**  
Where a master or superior places the entire charge of his business in the hands of an agent or subordinate, and exercises no oversight of his own, the master is liable for the negligence of such subordinate.
6. **SAME—RAILROAD COMPANY—DUTY TO EMPLOYEES.**  
It is the duty of a railroad company to frame and promulgate safe schedules for the moving of its trains as will afford reasonable safety to employees engaged in moving them; and for a failure to perform this duty the company is responsible to any person injured, whether a passenger or employee.
7. **SAME.**  
Where a schedule for the moving of trains is departed from, such departure is issued by the company as will afford reasonable protection to employees in the running of its trains.
8. **EVIDENCE—EXPERTS—RAILROAD MEN.**  
Practical railroad men called as experts may give evidence as to the proper methods of passing trains on a single-track road.

Error to court of common pleas, Northampton county.

Case by Charles Seifert against Edwin M. Lewis, Franklin B. Stephen A. Caldwell, receivers of the Philadelphia & Reading Railroad Company, to recover damages for injuries received in a collision on the Reading Railroad.

<sup>1</sup>In the absence of statute, the negligence of a co-servant is one of the risks incident to the employment assumed by an employee, and for which the master is not liable. *Railway Co.*, 14 Fed. Rep. 564. The exemption of the master from liability resulting to a servant from such negligence is held to continue, though the employee may be the superior in rank of the injured one in the same general service, unless he occupies the place of vice-principal. *Railway Co. v. Adams*, 101 U. S. 157, 187. But in the United States courts the master has been held liable for injuries incurred by an employee through the negligent exercise of authority conferred on him by a co-employee. *Mason v. Machine-Works*, 28 Fed. Rep. 228. As to the liability of a master for the negligence of his servants, see *Reddon v. Railroad Co.*, (Utah,) 15 Pac. Rep. 282, and note; *W. v. Railway Co.*, 32 Fed. Rep. 278; *Theleman v. Moeller*, (Iowa,) 34 N. W.

Pennsylvania branch of the company's railroad. The facts are fully stated in the opinion.

Upon the trial, before REEDER, J., witnesses for the plaintiff were asked:

"*Question.* Suppose a passenger train was running upon a single-track railroad south, behind time, with right of way to proceed, and that upon the same road there was coming north a freight train, and the freight train had received special orders to proceed to a certain siding to meet and pass a passenger train, and that the passenger train passed the last telegraph office at which they could receive notice of the intended passing of the freight train without receiving orders that they would pass the freight train at the siding; state whether or not in your judgment that is good railroading or bad railroading? Objected to as incompetent and irrelevant. Objection overruled. Exception." Sixth assignment of error.

"*Question.* As a railroad man, state what, in your opinion, would have been the proper method to pass the passenger train which on the tenth of February was running south under the conductorship of Edward Hamman, and the freight train running north under McGargle; what, in your judgment, would have been the proper proceeding to have passed your two trains in safety,—where should Mr. Edward Hamman, the conductor of the passenger train, have received his notice? Objected to as incompetent and irrelevant. Objection overruled. Exception." Seventh assignment of error.

"*Question.* Suppose a case where a passenger train on the North Pennsylvania Railroad was running south towards Philadelphia, and it had started out of South Bethlehem 30 minutes late,—they had orders to proceed south to Souderton,—and suppose at the same time there was a freight coming up from Philadelphia that had reached a station called 'Perkasie,' and that at Perkasie the freight train received orders to proceed to Rockhill, which is between Perkasie and South Bethlehem; state whether or not, in your judgment, it was good railroading or bad railroading to let those two trains approach under those circumstances? Objected to as incompetent and irrelevant. Objection overruled. Exception." Eighth assignment of error.

Verdict for plaintiff, \$5,000, and judgment thereon. Whereupon defendants took this writ.

*R. E. Wright's Sons and William Mutchler*, for plaintiffs in error.

Whenever the negligent act of the agent which the injured servant complains of is one which, when he entered the employment, he understood would be performed by an agent, and not by the master personally, and it was an act which the master did not owe to the employe to perform personally, such act, and the risk of its being negligently performed, is one of the risks the employe assumed when he entered the master's service. Employes standing in that relation are fellow-servants. The question of grade and authority is of no importance. *Coal Co. v. Jones*, 86 Pa. St. 432; *Waddell v. Simson*, 17 Wkly. Notes Cas. 456, 4 Atl. Rep. 725; *Campbell v. Railroad Co.*, 17 Wkly. Notes Cas. 73, 2 Atl. Rep. 489; *Canal Co. v. Carroll*, 89 Pa. St. 374; *Bridge Co. v. Newberry*, 96 Pa. St. 246; *Railroad Co. v. Bell*, 112 Pa. St. 400, 4 Atl. Rep. 50; *Baird v. Pettit*, 70 Pa. St. 477; *Oil Co. v. Gilson*, 68 Pa. St. 147; *Weger v. Railroad Co.*, 55 Pa. St. 460; *Caldwell v. Brown*, 53 Pa. St. 458; *Ryan v. Railroad Co.*, 23 Pa. St. 384; *Tube Works v. Bedell*, 96 Pa. St. 175. In all the cases in which this court held the master liable for an injury to one servant by the negligence of another, the negligent act related to some duty which the master owed the servant. *Mullan v. Steam-Ship Co.*, 78 Pa. St. 26; *Baird v. Pettit*, 70 Pa. St. 477; *Tissue v. Railroad Co.*, 112 Pa. St. 97, 3 Atl. Rep. 667; *Iron & Steel Co. v. Davis*, 17 Wkly. Notes Cas. 533, 4 Atl. Rep. 513; *Railroad Co. v. Bell*, 17 Wkly. Notes Cas. 457, 4 Atl. Rep. 50. The master may delegate to servants the management of his business in all matters, except those which relate to duties which he personally owes to the

employees, and he is not liable to his servants for the negligence of such an agent, except where the negligence relates to the duties which the master owes the servant. As to all other matters the agent is the fellow-servant of the employe, and the employe assumes the risk of his negligence. *Howard v. Railroad Co.*, 24 Amer. & Eng. R. Cas. 448; *Kirk v. Railroad Co.*, 25 Amer. & Eng. R. Cas. 507; *Robertson v. Railroad Co.*, 8 Amer. & Eng. R. Cas. 175; *Blessing v. Railway Co.*, 15 Amer. & Eng. R. Cas. 298; *Darrigan v. Railroad Co.*, 23 Amer. & Eng. R. Cas. 447. When the master turns over the entire management of his business or a department to another, exercising and reserving no control or supervision himself, and by so doing delegates to another the performance of those duties which the master personally owes to the servant, or which, from the nature of the business, the employe had a right to presume the master would himself perform, in such a case such an agent does become a vice-principal as to such duties, and if in performing those duties the agent is negligent, it becomes the negligence of the master. If, however, the negligence relates to acts which the master was *not* bound to perform personally, or which, from the nature of the business, the servant could not reasonably expect he would perform personally, as to such acts the agent is not a vice-principal, but a fellow-servant. *Patters. Ry. Accident Law*, 320 *et seq.*; *Farwell v. Railroad Corp.*, 4 Metc. 48, note in 25 Amer. & Eng. R. Cas. 521; *Robertson v. Railroad Co.*, 8 Amer. & Eng. R. Cas. 175; *Chapman v. Railway Co.*, 55 N. Y. 579; *Hofnagle v. Railroad Co.*, Id. 608. It was error to admit the expert testimony. *Ferguson v. Hubbell*, 97 N. Y. 507; *Nowell v. Wright*, 3 Allen, 166; *Emerson v. Gas-Light Co.*, Id. 411; *Raymond v. City of Lowell*, 6 Cush. 524; *Simons v. Steam-Boat Co.*, 97 Mass. 362; *Foster v. Collner*, 107 Pa. St. 313. It was error to permit the jury to speculate as to what additional precautions might have been taken, and then pronounce it negligence not to have taken them, when it is the undisputed evidence that, if the orders that Sellers gave had been obeyed by those to whom they were given, there could have been no accident. *Railway Co. v. Taylor*, 15 Wkly. Notes Cas. 87; *Railway Co. v. Gallagher*, 16 Wkly. Notes Cas. 413; *Railroad Co. v. Hope*, 80 Pa. St. 373; *Hoag v. Railroad Co.*, 85 Pa. St. 293.

*William C. Shipman and Robert E. James*, for defendant in error.

A servant, by implication, contracts to bear the ordinary and usual risks of his employment; but the master must furnish suitable instrumentalities to carry on the work. These include safe machinery, competent co-laborers, suitable place for work, and the giving of proper directions, and taking due precautions in the use of them. These are the personal duties which the master cannot delegate. But where a master delegates the whole or a particular branch of his business to his servant, the latter becomes the representative of the master and is called a "vice-principal." *Railway Co. v. Bresmer*, 97 Pa. St. 103; *Railroad Co. v. Keenan*, 103 Pa. St. 124; *Tissus v. Railroad Co.*, 112 Pa. St. 91, 3 Atl. Rep. 667; *Holden v. Railroad Co.*, 129 Mass. 268; *Patters. Ry. Accident Law*, § 307 *et seq.* If a master is engaged in a complex business that requires definite regulations for the safety and protection of his employes, a failure to adopt proper rules, as well as laxity in their enforcement, is negligence *per se*; and the establishment of defective and improper rules is such negligence as renders the master responsible for all injuries resulting therefrom. *Wood, Mast. & Serv.* § 403; *Slater v. Jewett*, 85 N. Y. 61. A servant in control of the whole business, or a branch of it, is a vice-principal, and not a fellow-servant. *Patterson v. Railroad Co.*, 76 Pa. St. 389; *Mullan v. Steam-Ship Co.*, 78 Pa. St. 25; *Railroad Co. v. Bell*, 112 Pa. St. 400, 4 Atl. Rep. 50; *Coal Co. v. Jones*, 86 Pa. St. 439; *Patters. Ry. Accident Law*, § 302. A train dispatcher is a vice-principal. *Darrigan v. Railroad Co.*, 52 Conn. 285; *Flike v. Railway Co.*, 53 N. Y. 549; *Railway Co. v. Henderson*, 5

Amer. & Eng. R. Cas. 529; *McKinne v. Railroad Co.*, 21 Amer. & Eng. R. Cas. 539, 17 Amer. & Eng. R. Cas. 589; *Phillips v. Railroad Co.*, 23 Amer. & Eng. R. Cas. 453, 64 Wis. 475, 25 N. W. Rep. 544; *Washburn v. Railroad Co.*, 3 Head, 638. The expert testimony was admissible. 1 Greenl. Ev. § 440; *Laros v. Com.*, 84 Pa. St. 200; *Yardley v. Cuthbertson*, 16 Wkly. Notes Cas. 461, 1 Atl. Rep. 765.

PAXSON, J. It is clear that, if this railroad accident was the result of the negligence of the station agent at Rockhill, the plaintiff cannot recover, for the reason that said station agent and the plaintiff were engaged admittedly in the same common employment. Seifert, the plaintiff, was the engineer of No. 71 freight train, and was injured by No. 8 passenger train colliding with it just as it was entering the switch at Rockhill to allow No. 8 to pass. Roth, the station agent, had been ordered by wire to "stop and hold No. 8 express at Rockhill until No. 71 local freight arrives." When he received the order, he proceeded to flag No. 8 with the red signal. This was all he was required to do by the rules of the company in obedience to the telegram. This fully appears by the testimony of Mr. Sellers, the train dispatcher, who sent the telegram, and who was called as a witness by the defendant company. We must look elsewhere for a solution of this difficulty. It is equally clear that, had no order been sent from Philadelphia, there would have been no accident. In the absence of special orders, No. 71 would, under the rules of the company, have taken the siding at Perkasio, and have waited until No. 8 passed. The accident was the direct result of the order from the office in Philadelphia to the conductor and engineer of 71, which was as follows: "You will meet and pass No. 8 express at Rockhill." It remains to be seen whether the defendant company is responsible to the plaintiff below for the injuries he received in consequence of this order.

The facts briefly stated are as follows: No. 71 local freight train, with the plaintiff below on board as engineer, left Philadelphia at 3:30 A. M. for South Bethlehem, and arrived at Perkasio, two miles and a half south of Rockhill. This portion of the road at that time had but a single track. When No. 71 arrived at Perkasio it was behind time, and it was the duty of the conductor to do one of two things, viz., either to take the long siding at Sellersville, or wire to Philadelphia for orders. He chose the latter course. He went into the office at Perkasio, called up the Philadelphia office by telegraph, and asked for orders for No. 71. The Perkasio operator was asked by Philadelphia how soon No. 71 would be ready to leave, and the answer was wired back, "In a few minutes." Then, at 8:55 A. M., the operator at Philadelphia sent the following telegram to the agent at Rockhill: "*Agent, Rockhill*: Stop and hold No. 8 express at Rockhill until No. 71 local arrives there. [Signed] W. BERTOLLOTTE." Bertolotte was the train dispatcher at Philadelphia, and had full authority to start out and control the trains, even to the suspension of the regular schedules. The telegram was signed by Sellers, his assistant, for Bertolotte, but that is immaterial. Sellers had the same power as Bertolotte in the absence of the latter. No. 71 was going north. No. 8 express passenger train should have left South Bethlehem at 8:30 A. M. It was delayed for connections, and did not leave until about 9. It was behind time, as before observed, and, having the right of way, ran at a high rate of speed. It does not appear that any attempt was made to notify No. 8 of the whereabouts of No. 71, until the order to start the latter train had been given. Then an attempt was made to intercept it by calling up the operator along the line above Rockhill, but met with no response. It was alleged the wires were not working above Rockhill, and there was a dense fog along the line between that place and Bethlehem, but none in Philadelphia. No. 8, having the right of way, and no warning of danger, kept on at a speed of from 30 to 35 miles an hour, until it reached Rockhill. The fog prevented the danger signal there

from being seen, and No. 8 struck No. 71 just as the latter was entering the switch. When No. 71 arrived at Rockhill the engineer and conductor thereof observed the signal board at the telegraph office turned in their favor as a signal to enter the siding. As the engine slackened its speed the conductor jumped off, and inquired of the operator how No. 8 was. He was informed that it had left Quakertown four minutes ago. The distance between the two places was only two or three miles. The conductor then told his brakeman to go and flag No. 8. It was too late. Before the brakeman could proceed any distance the collision occurred.

It will be seen that each of these two trains, running in opposite directions, had the right of way. The train dispatcher in Philadelphia doubtless expected that No. 71 would be safe on the siding at Rockhill before No. 8 should arrive there. And so it would had it started at once upon receiving its order. It will be remembered that before issuing the order to 71, the dispatcher asked how soon it would be ready to start. The reply was, "In a few minutes." With the knowledge that 71 could not start immediately, the order was given to proceed. No time was limited. In point of fact No. 71 did not move for about 20 minutes. The delay was in part caused by the pulling out of a draw-head. No. 71 did not ask for fresh orders before starting, nor was it bound to. It had told its dispatcher it would be ready to start in a few minutes, and it did so. A "few minutes" is an indefinite period of time, by far too uncertain for railroad purposes. Just here is the pinch of the case. If Bertolotte had ordered No. 71 to proceed in five minutes, or, if not ready by that time, to take the siding, there would have been no collision. But he left the whole matter indefinite, depending upon what the conductor of 71 might regard as a "few minutes," when a delay of a single minute might involve life or death. In every view which we can take of this case, we regard this order as an act of negligence, and the proximate cause of the collision.

This involves the further question whether the company defendant is responsible for the negligence of its train dispatcher. Upon this point the authorities are numerous, and far from uniform. A volume might be written upon it and not exhaust the subject. I prefer to state our conclusions without elaborating them to any considerable extent. The precise question is whether Sellers, the train dispatcher, was a fellow-workman with the plaintiff, within the meaning of that rule of law which holds that the master is not responsible for an injury received by an employe caused by the negligence of a co-employe or fellow-workman. That rule rests upon the sound principle that each one who enters upon the service of another takes on himself all the ordinary risks of the employment in which he engages, and that the negligent acts of his fellow-workmen in the general course of his employment are within the ordinary risks. *Coal Co. v. Jones*, 86 Pa. St. 433. To constitute fellow-servants the employes need not be at the same time engaged in the same particular work. It is sufficient if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purpose. The rule is the same, although the one injured may be inferior in grade, and is subject to the direction and control of the superior whose act caused the injury, provided they are both co-operating to effect the same common object. *Bridge Co. v. Newberry*, 96 Pa. St. 246. Thus we have repeatedly held that a "mining boss," under the act of March 3, 1870, is a fellow-workman with the miners, and that the mine-owners are not responsible for his negligence. *Canal Co. v. Carroll*, 89 Pa. St. 374. This, however, is in part owing to the fact that the duty of appointing a mining boss is imposed upon the mine-owners by the act of assembly, hence the responsibility of the latter would seem to cease when they had exercised due care in the selection of that person. Be that as it may, it is well settled that mere difference in rank or grade does not change the rule.

But there are some duties which the master owes to the servant, and from

which he cannot relieve himself, except by performance. Thus, the master owes to every employe the duty of providing a reasonably safe place in which to work, and reasonably safe instruments, tools, and machinery with which to work. This is a direct, personal, and absolute obligation, and the master may delegate these duties to an agent, and such agent stands in the place of his principal, and the latter is responsible for the acts of such agent. And where the master or superior places the entire charge of his business, or a distinct branch of it, in the hands of an agent or subordinate, exercising no discretion or oversight of his own, the master is held liable for the negligence of such agent or subordinate. *Mullan v. Steam-Ship Co.*, 78 Pa. St. 25; *Railroad Co. v. Bell*, 112 Pa. St. 400, 4 Atl. Rep. 50. It is very plain that it was the duty of the defendant company, as between said company and its employes, to provide a reasonably good and safe road, and reasonably safe and good cars, locomotives, and machinery, for operating its road. It is equally clear that it was its duty to frame and promulgate such rules and schedules for the moving of its trains as would afford reasonable safety to the operatives who were engaged in moving them. This is a direct, positive duty, which the company owed its employes, and for the failure to perform which it would be responsible to any person injured as a consequence thereof, whether such person be a passenger or an employe. It would be a monstrous doctrine to hold that a railroad company could frame such schedules as would inevitably, or even probably, result in collisions and loss of life. This is a personal, positive duty, and, while a corporation is compelled to act through agents, yet the agents, in performing duties of this character, stand in the place of and represent the principal. In other words, they are vice-principals.

If it be the duty to provide schedules for the moving of its trains which shall be reasonably safe, it follows logically that, when the schedules are departed from, when trains are sent out without a schedule, such orders should be issued by the company as will afford reasonable protection to the employes engaged in the running of such trains. I am not speaking now of collisions caused by a disobedience of orders on the part of conductors and engineers, but of collisions or other accidents the result of obeying such orders. At the time of the collision referred to, Wellington Bertolotte was the general dispatcher of the defendant company, and from his office in Philadelphia had the general power and authority of moving the trains. In this he was not interfered with by the company, or any one else. For the purpose of sending out the trains, he wielded all the power of the company. He could send a train out on schedule time, or he could hold it back. He could change the schedule time, or make new schedules, as the exigency of the case required. He could send a train out without schedule, and direct its movements from his office in Philadelphia. When he issued an order, the train was bound to move as he directed. The engineer and conductor had but one duty, and that was obedience.

In *Slater v. Jewett*, 85 N. Y. 61, the late Chief Justice FOLGER thus clearly stated the duties of railroads in this particular: "It is urged, and with reason, that clearly arranging and promulgating the general time-table of a great railway is the duty and the act of the master of it, and that, when there is a variation from the general time-table for a special occasion and purpose, it is as much the duty and act of the master, and he is as much required to perform it; that it is the duty and act of the master to see and know that his general time-table is brought to the knowledge of his servants, who are to square their action to it; that the same is his duty and act as to a variation from it, which is but a special time-table; and therefore whoever he uses to bring those time-tables to the notice of his servants, he puts that person to do an act in his stead, inasmuch as the responsibility is upon him to see and know that it is done, and done effectually; and that if, instead of doing it in

person, he chooses to do it through an agent, that agent *pro hac vice* is the master, and he, the master, is responsible for a negligent act therein of that agent, whereby a fellow-servant of theirs is harmed. This rule has been laid down in repeated cases in this court."

It is true, the order in this case was sent by John J. Sellers; but Sellers was the assistant of Bertolotte, and in his absence was clothed with all his powers. For the purposes of this case, Sellers was Bertolotte and Bertolotte was the company. The distinction between a general dispatcher—one who has the absolute control of all the trains upon the road—and the conductor or engineer of a train is manifest. The latter have the duty of obedience. Their business is to run their trains under orders from the dispatcher, and if an employe is injured as the result of their negligence, the company is not liable. They are in the same common employment, and are laboring together to the same end, under orders from superior authority. The argument for the plaintiff in error, if carried to its logical conclusion, would wholly obliterate all distinction between railroad employes, from the president down, as they may all be said to be, in one sense, in the same common employment, and paid by the same corporation. While the cases are not uniform upon this subject, the weight of authority is with the foregoing views. In addition to the authorities cited, we may refer to *Flike v. Railroad Co.*, 53 N. Y. 549; *Railway Co. v. Henderson*, 5 Amer. & Eng. R. Cas. 529; *McKinne v. Railroad Co.*, 21 Amer. & Eng. R. Cas. 539; *McKune v. Railroad Co.*, 17 Amer. & Eng. R. Cas. 589; *Phillips v. Railroad Co.*, 23 Amer. & Eng. R. Cas. 453; *Phillips v. Railway Co.*, 64 Wis. 475, 25 N. W. Rep. 544; and *Washburn v. Railroad Co.*, 3 Head, 638. Against these authorities we have only *Robertson v. Railroad Co.*, 8 Amer. & Eng. R. Cas. 175, and *Blessing v. Railroad Co.*, 77 Mo. 410, 15 Amer. & Eng. R. Cas. 298. These cases, however, do not sustain the broad principle contended for them; and if they did, we would not be disposed to adopt them in the face of so much respectable authority the other way. Aside from authority, I am of opinion that the doctrine we have announced is founded upon the better reason, and is a rule both valuable and necessary for the preservation of the lives, not only of railroad employes, but of the traveling public as well. This disposes of all that is important in the case.

The sixth, seventh, and eighth assignments refer to the questions asked of the expert witnesses. We think they were competent, under *Laros v. Com.*, 84 Pa. St. 200, and *Yardley v. Cuthbertson*, 16 Wkly. Notes Cas. 461, 1 Atl. Rep. 765. Judgment affirmed.

#### LITTLE'S APPEAL.

(*Supreme Court of Pennsylvania.* October 3, 1887.)

##### 1. WILLS—DEVISE—RULE IN SHELLEY'S CASE—INTENTION OF TESTATOR.

A gift or devise to a man during his life, and after his death to his heirs, which is the ordinary instance of the rule in *Shelley's Case*, contains evidence of testamentary intent of only a life-estate in the first taker; yet the rule applies, nevertheless.

##### 2. SAME—LEGACY, VESTED OR CONTINGENT.

Where the enjoyment of the gift over is postponed to accommodate the estate, or for the payment of debts, or to meet any other burden first imposed, and not chiefly on account of the character of the donee, it is a decisive circumstance in favor of immediate vesting.

##### 3. SAME—LEGACY—"HEIRS"—WORD OF LIMITATION.

The word "heirs," when uncontrolled by the expressed intention of the will, has the effect to vest a legacy which would otherwise be contingent. It is to be taken as a word of limitation, limiting the bequest, in case of the death of the legatee before the time fixed for payment, to his or her representatives.

##### 4. SAME.

The strong presumption arising from the use of technical words of limitation is not easily overcome. It may be rebutted only by affirmative evidence of a contrary intention, so clear as to leave no reasonable doubt.

## 5. SAME.

A testator directed the residue of his estate to be converted into cash, and applied in the first instance to the payment of debts. After all debts paid, he directed his executors "to make semi-annual distributions of whatever money may remain in their hands on the tenth day of May and the tenth day of November in each year; the said money to be divided into twenty parts, and to be distributed as follows, viz.: To A., five parts; to B., five parts; to the heirs of my brother C., five parts; to D. and his heirs, four parts,—that is, the four parts are to be paid to D. during his life-time, and after his death the same to be paid to his heirs." He further provided that the distributees should claim their shares within two years, and that the acceptance of the share was to be in full satisfaction and release of all claims by them against his estate. *Held*, that the bequest to D. in the estate of testator was vested, and that upon his death his administrator was entitled thereto.

Appeal of C. A. Little, administrator *c. t. a.* of Dr. J. R. McComb, deceased, and Jane W. McComb, sole legatee under will of said decedent, from the decree of the orphans' court, Wyoming county, distributing the funds in the hands of the executor of William B. Moneyppenny, deceased.

The auditor, Charles E. Terry, Esq., in his supplemental report, found the following facts: William B. Moneyppenny died August 24, 1884, unmarried and without issue. His will, duly admitted to probate, provides, *inter alia*, as follows:

"(7) All the rest, residue, and remainder of my property not hereinbefore mentioned, real, personal, and mixed, I direct my executors to sell and convert into money as soon as the same can be done prudently, and without loss or sacrifice, and to apply the proceeds, together with the rents and income of the said leased property in New York city, and all other income of my said estate not hereinbefore specifically bequeathed, in the following manner, to-wit: *First*. To the paying off all indebtedness that may remain against my said estate, including a mortgage given to Walter Bowne, of the city of New York, for a part of the purchase money of the said lot in the said city, it being money procured from him to pay the purchase money of said lot, although the lot was not purchased from him. *Second*. After all indebtedness is thus discharged, I direct them to make semi-annual distributions of whatever money may remain in their hands on the tenth day of May and the tenth day of November in each year; the said money to be divided into twenty parts, and to be distributed as follows, viz.: To Matilda Lutes, five parts; to Thomas J. McComb, five parts; to the heirs of my brother, Robert Moneyppenny, five parts; to Dr. J. R. McComb and his heirs, four parts,—that is, the four parts are to be paid to Dr. J. R. McComb during his life-time, and after his death the same to be paid to his heirs; to my cousin, Mary Moneyppenny, one part. All which distributive shares are to be paid without interest, and none of the said shares are in any case to bear interest. And the said semi-annual distributions are to be made so long as the term of the aforesaid renewal lease shall continue, in case it shall be renewed.

"And in case it shall be found necessary, in order to meet any portion of my said indebtedness, I hereby authorize and empower my executors to raise a sufficient sum of money by loan, and to execute such bond or bonds, mortgage or mortgages, of my said estate not hereinbefore specifically devised, as may be necessary for the said purpose, and to deliver the same. And the whole income of said estate is to be devoted to discharging any such loan before any such distribution as is above directed shall be made. No money is to be paid to any of the above-mentioned distributees without a receipt being taken from them, and a release of all claims and demands against my estate and the estate of Mary Moneyppenny, deceased. In case of the death, during the term of the said renewal lease, of any of the said distributees, the share of such decedent, if he or she be one of the heirs of my brother, Robert Moneyppenny, deceased, shall be equally divided among the surviving heirs of my said brother; if of the heirs of Dr. J. R. McComb, among the surviving heirs of the said McComb; and in case of the death of either or both Thomas J. Mc-

Comb and Matilda Lutes, their shares shall be equally divided among the surviving heirs of my brother, Robert Moneyppenny, deceased; and in case of the death of my cousin, Mary Moneyppenny, her share is to be equally divided among the remaining surviving distributees: provided, however, and I expressly direct, that the said shares of the several distributees are to be claimed by them within two years after my decease, or else to lapse into the general fund, and be distributed, according to the aforesaid proportions, to such distributees as claim their shares; and no share is to be held by my executors at any time for a longer period than two years, nor shall any legatee be at any time entitled to claim any distributive share after two years from the time it is due; but all such shares unclaimed for the space of two years after the same are due shall lapse into the general fund, and be distributed to the other distributees as aforesaid."

Item 8 is drawn in this language: "Upon the determination of the life-estates hereinbefore devised to Matilda Lutes and to Thomas J. McComb in the lands as aforesaid, and also upon the determination of the term of years in the New York city property as aforesaid, I hereby direct, authorize, and empower my executors to make sale of the said several pieces of land, and divide the proceeds equally between the heirs of my brother, Robert Moneyppenny, deceased, and Dr. J. R. McComb or his heirs; that is, one-half to the Moneyppenny heirs in equal portions among them, and the other half to Dr. J. R. McComb, or, in case of his decease, to his heirs in equal portions among them, such sales and divisions to be made as each of the said particular estates shall determine."

The tenth clause is in part as follows: "I hereby declare that it is my will and intention that each and every of the herein-contained legacies, bequests, and devises is given (is given) upon the express condition precedent that the same shall be accepted in full satisfaction and release of any right in, or claim or demand against, my own estate or the estate of Mary Moneyppenny, deceased; and in case any of them should fail to vest because of any legatee or devisee contesting this my will, or neglecting or refusing to accept the bequest or devise upon such condition, then I give, bequeath, and devise the share of such recusant to the other members of the class to which he or she may belong, to be equally divided among them, and in case such party should not be a member of any particular class, then such share to be divided generally among all the other legatees and devisees."

The codicil to the will is dated June 12, 1878, and after reciting the renewal of the lease of the New York city property for another term of 21 years, from May 1, 1879, provides as follows: "I do revoke the disposition made thereof in my said will, and in place thereof I do hereby devise the said land to my executors who shall qualify, and the survivor of them, in trust to receive the rents and profits thereof during the joint lives of Matilda Lutes and Thomas J. McComb, and the life of the survivor of them, and to pay over and divide the same among the persons, in the proportions and at the times mentioned in the second subdivision of the seventh clause of my said will; and, upon the death of the survivor of the said Matilda Lutes and Thomas J. McComb, I order and direct my executors who shall qualify, and the survivor of them, to sell the said lot of land subject to the lease thereof at public auction or private sale, on such terms as they or he shall deem discreet, and to execute valid deeds therefor to the purchaser thereof, and to divide the net proceeds of such sale equally between the persons who shall then be the nearest heirs of my deceased brother, Robert Moneyppenny, and Dr. J. R. McComb, or his heirs if he be then dead; that is, one-half to the Moneyppenny heirs in equal portions among them, and the other half to Dr. John R. McComb, or, in case he be then dead, to his heirs in equal portions among them."

Dr. J. R. McComb died in New York city on March 29, 1885, leaving to survive him three children, John R., William T., and Jane W., all of full

age, and all still living. He left a will, which was duly proved, in which he devised and bequeathed all of his property to his daughter Jane, and appointed her his executrix. Letters testamentary were granted to her by the surrogate in New York city, and afterwards ancillary letters were issued to C. A. Little, Esq., by the register of Wyoming county, Pennsylvania. The said Dr. J. R. McComb was a cousin of William B. Moneyppenny. Thomas J. McComb and Matilda Lutes are living. Benjamin M. Hall was granted letters testamentary on the estate of William B. Moneyppenny on the eighth day of September, A. D. 1884, and filed his first and partial account with the register on the sixth of December, 1884. That account was confirmed *nisi* by the orphans' court on the fourteenth of January, 1885, and, absolutely, the fifteenth of the following April. No express demand for his legacy was ever made of the executor of William B. Moneyppenny by Dr. McComb, but some correspondence passed between them, in which Dr. McComb asked for information concerning his "share," as he termed it. And no release of any rights in or claims against the estate of William B. Moneyppenny and that of Mary Moneyppenny was ever tendered Moneyppenny's executor by the said McComb. But, on the day of the audit, C. A. Little, administrator *c. t. a.* of Dr. J. R. McComb, gave to Moneyppenny's executor a writing wherein it was stated that said Little was ready to comply with the conditions mentioned in the will, upon payment to him of the legacy to Dr. J. R. McComb. On the same day, counsel for William T. McComb delivered to Mr. Hall, the executor of Moneyppenny, a deed of release executed by said McComb, drawn to comply with the condition mentioned in the seventh and tenth clauses of the Moneyppenny will.

Upon concluding the testimony, counsel for Jane W. McComb, and the administrator *c. t. a.* of Dr. J. R. McComb, contended that the whole fund for distribution belonged to them, for the following reasons: *First*, because the bequest being to Dr. McComb "*and his heirs*," or to him "*or his heirs*," the whole legacy, including the amounts of future distributions, vested in Dr. McComb at the death of the testator, Moneyppenny; *second*, because the said testator having directed the payment to Dr. McComb "*and his heirs*" of four parts, at each semi-annual distribution, and, upon the determination of the life-estates devised to Thomas J. McComb and Matilda Lutes, the payment of one-half of the net proceeds of the sale of the real estate to Dr. McComb, "*or his heirs*," the said Dr. McComb thereby acquired the absolute ownership of the whole legacy bequeathed to him and his heirs, applying, by analogy, the principle of the rule in *Shelley's Case*; and, *third*, because, irrespective of the other two reasons, Dr. McComb having survived the testator, and having also been alive at the time the executor filed his partial account, he became entitled to four parts of the sum for distribution, the moment that account was filed. The counsel for William T. and John R. McComb argued that the rule in *Shelley's Case* had no application, and that Dr. McComb, having failed in his life-time to demand his legacy, and to signify his willingness to accept the same upon the conditions imposed by the testator, died before any part of the same had vested in him, and that consequently the sum for distribution should be distributed among his three children in equal portions. The auditor then awarded the fund to C. A. Little, administrator *c. t. a.* of Dr. J. R. McComb. Exceptions to the auditor's report by J. R. and W. T. McComb having been filed, the court sustained the same, in an opinion by SITTSEB, P. J., wherein, *inter alia*, he said:

"The will does not say 'I give to Dr. J. R. McComb' anything. The gift is only *inferred* from the direction to pay; and we must look to all of the directions upon the subject of this payment, in order to determine to whom the payments were to be made; in order to infer the gift, and the nature of it. Upon this subject the will says: 'No money is to be paid to any of the above-mentioned distributees without a receipt being taken from them, and

a release of all claims and demands against my estate and the estate of Robert Moneyppenny, deceased. And in case of the death, during the term of the said renewal lease, of any of the said distributees, the share of such distributee shall be equally divided among the surviving heirs of my said brother, Robert Moneyppenny, deceased, and the heirs of Dr. J. R. McComb, among the surviving heirs of said Dr. J. R. McComb, etc. The testator provides for semi-annual distributions of a fund arising from the sale of certain property, and from the rents of real estate situated on a real estate on the corner of Greenwich and Chambers Sts., N. Y. City, which has been leased for 21 years from first of May, 1879. These semi-annual distributions are to continue during the lives of Matilda Lutes and Thos. J. Lutes, and the life of the survivor of them. The will directs among other things that the distributions are to be made as the time arrives for their being paid, and provides for the death of any of the distributees, as well as for a release of any claim or to release, etc.

"It is claimed on the part of the administrator *c. t. a.* of Dr. J. R. McComb that the words, 'to Dr. J. R. McComb and his heirs, four parts,' are to be interpreted by the expression, 'that is, the four parts are to be paid to Dr. J. R. McComb during his life-time, and after his death the same to be paid to his heirs,' and that the word 'heirs' was intended by the testator as a word of inheritance and not of purchase. We do not so interpret this will. We understand that these semi-annual payments are to be made to Dr. J. R. McComb, whether living to take them, and otherwise complies with the will by accepting and executing a release, etc., and, if he be dead, then the payments are to be made to his heirs, and by the word 'heirs' we think the testator intended to describe persons. He used the word 'heirs' as a description of persons, and he said, 'to the heirs of my brother, Robert Moneyppenny, five parts, and when he said, 'that is, the four parts are to be paid to Dr. J. R. McComb during his life-time, and after his death to his heirs,' we think he used the word 'heirs' in the same sense. We think it is evident from the whole of the will that he is simply attempting to describe the persons to whom the executors are to pay each of these semi-annual distributions, as the time arrives for their payment.

"This matter seems to be put beyond controversy by this provision in the will: 'And in case of the death, during the term of the said renewal lease, of any of the said distributees, the share of such decedent, if he or she be dead, shall be equally divided among the surviving heirs of my said brother, Robert Moneyppenny, deceased, and the heirs of Dr. J. R. McComb, among the surviving heirs of the said McComb.' If the testator intended that these persons should take as the heirs of Dr. J. R. McComb, it was useless for him to provide for survivorship among them, as they took as the heirs of Dr. J. R. McComb, they would be governed by the will, and not by Moneyppenny's, and if McComb left no will, then by the intestate laws of the state of New York. The same thought is expressed in the codicil, where he directs the sale of the New York city property, and the proceeds of such sale to be divided equally between 'the persons who shall be the nearest heirs of my deceased brother, Robert Moneyppenny, deceased, Dr. J. R. McComb, or his heirs if he be then dead; that is, one-half to the Moneyppenny heirs, and the other half to Dr. J. R. McComb, or, in case of the death of either of them, to his heirs in equal proportions among them.' There is no doubt that the share is to be paid to Dr. McComb unless he be living at the time of the distribution. If he be not living then, it is to be paid to the McComb heirs, the same as the Moneyppenny heirs, as purchasers. In *Moore v Smith*, 9 Watts 341, it is said that where there is no separate and antecedent gift, which is in the event of the direction and time for payment, the legacy is contingent. The gift is only implied from the direction to pay, it is necessarily in

from the direction, and must partake of its quality, insomuch that, if the one is future and contingent, so must the other be.' *Lamb v. Lamb*, 8 Watts, 184; *King v. King*, 1 Watts & S. 206; *Bayard v. Atkins*, 10 Pa. St. 15; *Seibert's Appeal*, 13 Pa. St. 503; *Bowman's Appeal*, 34 Pa. St. 23; *Gilliland v. Bredin*, 63 Pa. St. 397,—are other authorities bearing upon this point.

"We cannot infer a gift to Dr. McComb from a positive direction not to pay, nor from a positive direction to pay some one else. Was Dr. McComb living when, by the terms of the will, these semi-annual distributions were to commence? This fund from which the semi-annual distributions are to be made is to be devoted—'First. To the paying off all indebtedness that may remain against my said estate, including,' etc. 'Second. After all indebtedness is thus discharged, I direct them to make semi-annual distributions of whatever money may remain in their hands on the tenth day of May and the tenth day of November in each year,' etc. The auditor has not found as a fact when debts were all paid, or even when the precise amount over and above the payment of debts could be known. It appears, however, from his report first made to the court, that he was hearing proofs of claims against the estate,—some of them disputed by the executor,—on the twenty-ninth day of May, 1885, which were allowed by the auditor, and that the indebtedness was not all paid up to that date, or definitely known before that hearing. The partial account was not filed until December 6, 1884. It was simply an administration account, out of which debts as well as legacies could be and were taken. And we cannot presume that a distribution could have been made, or should have been made, on the tenth of November, 1884,—less than three months after the death. Therefore the first semi-annual distribution could not take place until the tenth of November, 1885. Dr. J. R. McComb died on the twenty-seventh of March, 1885, before the auditor held his first meeting, and before the tenth of November, 1885, and, under the views above expressed, no portion of this fund can be awarded to his administrator *c. t. a.* Dr. McComb not being alive at the time of the first semi-annual distribution, the four parts must be paid to the persons described as his heirs, viz.: Jane W. McComb, William T. McComb, and John R. McComb. \* \* \*

"Wm. T. McComb has accepted the benefits conferred upon him by the will, by executing a release of all claims, etc., against the estate of Wm. B. Money Penny and Mary Money Penny, deceased, according to the terms of the will. It does not appear that John R. McComb and Jane W. McComb have done so. Therefore their shares, as above stated, will not be paid to them by the executors until they execute the release described in the will. And the executors are to hold said shares for the period of two years from the tenth of November, 1885, unless they sooner execute said release. When such release is executed, it shall be paid to them, or to the one executing same; otherwise the share or shares shall be paid into the general fund, and be reported for future distribution."

Whereupon this appeal was taken.

*Luke A. Lockwood and W. E. & C. A. Little*, for appellants.

The words used are apt words to create a fee, and, in case of personality, to pass an absolute title. *McClure's Appeal*, 72 Pa. St. 415; *Pennock v. Eagles*, 102 Pa. St. 290; *Pyle's Appeal*, Id. 317; *King v. King*, 1 Watts & S. 205; *McGill's Appeal*, 61 Pa. St. 46; *Provenchere's Appeal*, 67 Pa. St. 463; *Crawford v. Ford*, 7 Wkly. Notes Cas. 532; *Patterson v. Hawthorne*, 12 Serg. & R. 112; *Buckley's Adm'r's v. Read*, 15 Pa. St. 83; *Eby's Appeal*, 84 Pa. St. 241; *Mull's Ex'r's v. Mull's Adm'r*, 81 Pa. St. 393; *Muhlenberg's Appeal*, 103 Pa. St. 537. If the direction to pay of itself gave but a contingent interest, yet, as the limitation over is to his "heirs," the estate is absolute. *Muhlenberg's Appeal*, *supra*; *Dickinson v. Purcis*, 8 Serg. & R. 71; *Smith's Lessee v. Folwell*, 1 Binney, 546; *Smith's Appeal*, 23 Pa. St. 9; *Biddle's Appeal*,

69 Pa. St. 190; *McGill's Appeal*, 61 Pa. St. 46; *Gibbons v. Fairlamb*, 26 Pa. St. 217. Primarily the word "heir" is a word of purchase. This is the "rule in *Shelley's Case*." *Lessee of Baughman v. Baughman*, 2 Yeates, 410; *Guthrie's Appeal*, 37 Pa. St. 913; *Price v. Taylor*, 28 Pa. St. 103; *Yarnall's Appeal*, 70 Pa. St. 335; *McKee v. McKinley*, 33 Pa. St. 92. Technical words are taken to be used according to their proper technical sense, unless other parts of the will imperatively require otherwise. *Doebler's Appeal*, 64 Pa. St. 9; *Seibert v. Wiss*, 70 Pa. St. 147; *Linn v. Alexander*, 59 Pa. St. 43; *Campbell v. Jamison*, 8 Pa. St. 498; *Criswell's Appeal*, 41 Pa. St. 288; *Physick's Appeal*, 50 Pa. St. 123; *Trust Co.'s Appeal*, 93 Pa. St. 209; *Porter's Appeal*, 94 Pa. St. 332. This case is ruled by *Cockin's Appeal*, 2 Atl. Rep. 363.

*Bisbee, Ahrens & Decker, B. W. Lewts, Piatt & Sons, and Alfred Moore*, for appellees.

The will is to be construed as a whole, and all the parts of it made consistent, if possible. 3 Jarm. Wills, 705-707; *Webb v. Hitchins*, 105 Pa. St. 91; *Hulton's Appeal*, 104 Pa. St. 359; *McKee's Appeal*, Id. 571; *Follenweiller's Appeal*, 102 Pa. St. 581; *Rewalt v. Ulrich*, 23 Pa. St. 388. This bequest is contingent. *Todd's Will*, 2 Watts & S. 145; *McClure's Appeal*, 72 Pa. St. 415; *Fairfax's Appeal*, 103 Pa. St. 166. The rule in *Shelley's Case* has no application. *Ely v. Ely*, 20 N. J. Eq. 43; *Criswell's Appeal*, 41 Pa. St. 288; *Muhlenberg's Appeal*, 103 Pa. St. 593. The word "heirs" was not used in its technical sense. *Linn v. Alexander*, 59 Pa. St. 43; *Campbell v. Jamison*, 8 Pa. St. 498; *Walker v. Dunshee*, 38 Pa. St. 431; *Gibbons v. Fairlamb*, 26 Pa. St. 217; *Follenweiller's Appeal*, *supra*; *Price v. Taylor*, 28 Pa. St. 95; *Mull's Ex'rs v. Mull's Adm'r*, 81 Pa. St. 393; *Rewalt v. Ulrich*, 23 Pa. St. 388. There was here a condition precedent which prevented the vesting of the legacy. 2 Jarm. Wills, \*2.

GREEN, J. We cannot agree with the learned court below in holding the bequest to Dr. J. R. McComb and his heirs to be a contingent bequest. The gift is absolute in terms, and would certainly have been payable to Dr. McComb had he lived until it became payable. The fact of his death before that time arrived is of no moment in determining the character of the legacy as being vested or contingent. Nor is there any merit in the contention that the gift is only to be inferred from the direction to pay, and is therefore contingent. The seventh clause of the will directs that the residue of the estate shall be converted into money, and applied, in the first instance, to the payment of debts. After all debts are paid, the testator directs his executors "to make semi-annual distributions of whatever money may remain in their hands on the tenth day of May and the tenth day of November in each year; the said money to be divided into twenty parts, and to be distributed as follows, viz.: To Matilda Lutes, five parts; to Thomas J. McComb, five parts: to the heirs of my brother, Robert Moneypenny, five parts; to Dr. J. R. McComb and his heirs, four parts,—that is, the four parts are to be paid to Dr. J. R. McComb during his life-time, and, after his death, the same to be paid to his heirs." We cannot understand that the gift to Dr. McComb is only to be inferred from the direction to pay, as was the case in *Moore v. Smith*, 9 Watts, 403, upon which the learned court below founded its deduction. Before any direction to pay appears in the foregoing words, there is altogether independently of it, *first*, a positive provision that semi-annual distributions of the entire residue shall be made; and, *secondly*, a direction equally positive that the money shall be divided into twenty parts and distributed among the persons named,—*inter alia*, four parts to Dr. J. R. McComb and his heirs. It is true, the testator adds that the four parts are to be paid to Dr. McComb during his life-time, and after his death to his heirs. This payment is not to be

made to Dr. McComb if he is alive, or upon condition, or provided that he is alive, but absolutely, and without any qualification or condition during his life. In any case of a gift or devise to a man during his life, and after his death to his heirs, which is the ordinary instance of the rule in *Shelley's Case*, there is the same evidence of testamentary intent of a life-estate only in the first taker as in the present case, yet the rule applies nevertheless. We regard the gift here as complete before, and without reference to, the payment; but even if the payment, being postponed until after the debts have been ascertained and paid, is to be regarded as something to be done in the future, it is manifest the postponement is for the mere convenience of the estate. In such case, it has been repeatedly held that the postponement does not affect the vesting of the estate, and that this is so even if there be no other gift than is contained in the direction to pay. Thus, in *McClure's Appeal*, 72 Pa. St. 414, WILLIAMS, J., said: "Though there be no other gift than in the direction to pay or distribute in future, yet if such gift or distribution appears to be postponed for the convenience of the fund or property, or where the gift is only postponed to let in some other interest, the vesting will not be deferred 'till the period in question.' \* \* \* Where the enjoyment of the gift over is postponed to accommodate the estate, or for the payment of debts, or to meet any other burden first imposed, and not chiefly on account of the character of the donee, it is regarded as a decisive circumstance in favor of immediate vesting. \* \* \* Where there is an antecedent absolute gift, independent of the direction and time of payment, the legacy is vested."

In *King v. King*, 1 Watts & S. 205, GIBSON, C. J., said: "Where the enjoyment of an entire fund is given in fractional parts, at successive periods which must eventually arrive, the distinction betwixt time annexed to payment and time annexed to the gift becomes unimportant. In such a case, it is well settled that all the interests vest together."

In the case of *Patterson v. Hawthorne*, 12 Serg. & R. 112, we held that a bequest in the following words: "At the decease of my wife, I do allow the price of my land shall be equally divided among my two sons, A. and B., and my daughters, C., D., E., and F., or their heirs, in six equal parts,"—gave vested legacies to the first takers, and, one of them having died before her mother, her share was given to her husband as her administrator.

In *Mull's Ex'rs v. Mull's Adm'r*, 81 Pa. St. 393, a testator gave the yearly interest of a sum to his wife for life, and, after her death, directed that "the principal shall be equally divided among all my children, or their legal heirs, if any of my children should die before such mentioned period doth arrive." Held, the legacies to his children were vested.

In *Muhlenberg's Appeal*, 103 Pa. St. 587, GORDON, J., said: "But then, again, we have it well established in Pennsylvania by an unbroken line of decisions that the word 'heirs,' when uncontrolled by the express intention of the will, has the effect to vest a legacy which would otherwise be contingent. In other words, it is to be taken as a word of limitation, limiting the bequest, in case of the death of the legatee before the time fixed for payment, to his or her representatives."

Other similar cases are *McGill's Appeal*, 61 Pa. St. 46; *Provenchere's Appeal*, 67 Pa. St. 463; *Eby's Appeal*, 84 Pa. St. 241.

We are equally unable to regard the word "heirs" in this clause of the will as a word of purchase. We think it must be conceded that if the will had stopped at that, the rule in *Shelley's Case* would certainly have applied, and Dr. McComb's interest would be absolute. But the court below thinks, because of the immediately following direction, that the money should be paid to Dr. McComb during his life, and to his heirs after his death, there was a clearly expressed intention that the word "heirs" should be regarded as a description of persons who therefore take, not as heirs of Dr. McComb, but independently of him as original takers under the Moneypenny will. As the

substance of the legacy is money which must be *paid* to somebody, the direction to pay to Dr. McComb during his life, and to his heirs after his death, is the appropriate form of expression for transferring or delivering the gift, and we do not think it has any significance as affecting the legal character of the gift.

Nor can we regard the provisions as to the distributees claiming their shares within two years as changing or affecting the character of the bequest to Dr. McComb and his heirs. It is a vested and an absolute gift, according to the character of the language which creates it, and, if it be not accepted or positively refused, that circumstance cannot alter its legal *status*. The only result would be that the legatee does not take it. The question does not arise here, for Dr. McComb not only never refused the legacy, but within a few months after Mr. Money Penny's death, and long before the two years had expired, wrote a very urgent letter to the executor inquiring how soon he might expect to get his share; that he was 83 years of age, weak and feeble, and had many calls for money, and his income was very limited. Most certainly this must be regarded as a claim for whatever was due him, and was a strict compliance with the will so far as this subject is concerned.

As to the condition precedent of accepting the share in full satisfaction and release of all claims against the decedent's estate and the estate of Mary Money Penny, we must assume that Dr. McComb would have complied with this requirement, because, knowing the condition prescribed in the will, he claimed his share under it. If he had not done this, it would not have been assumed against him, because he died within the 10 years, and also before the share had become payable. Moreover, his administrator offered a literal compliance with this condition of the will. Nothing is left of this subject except the argument that, because there is such a condition in the will, the gift to Dr. McComb is not an absolute and vested legacy, but the effect of the condition is simply to defeat the estate. If it is not complied with, it does not change the legal character of the gift.

So, also, as to the contention that in case of the death of any of the distributees during the time of the renewal lease, if it be an heir of Dr. McComb, his share shall be divided among the surviving heirs. We cannot possibly see how this provision alters the character of the gift. It is only "heirs," and heirs of Dr. McComb, who take in any event, and, because it is always *his* heirs who are to take, the quality of the gift is the same whether they be one or many. The taking must be through him, and the ultimate takers must be his "heirs," and for that reason his interest is absolute. In *Phystick's Appeal*, 50 Pa. St. 128, we said: "The strong presumption arising from the use of technical words of limitation is not easily overcome. It may be rebutted, but it can be by nothing short of affirmative evidence of a contrary intent, so clear as to leave no reasonable doubt." To the same effect is *Criswell's Appeal*, 41 Pa. St. 288. *Cockin's Appeal*, 2 Atl. Rep. 363, is still more in point. The words of the will were: "I also bequeath the balance of my estate, real and personal, to my three nieces, [naming them,] share and share alike, during their lives, and at their deaths to go to their heirs in equal amounts, to all heirs living at the time of their deaths. I also decree that no part of my real estate shall be sold during the lives of my nieces, but at their deaths can be sold in order to make distribution to heirs." Held that, under this language in a will, the nieces took a fee-simple in the real estate, and one-third each of the personal estate absolutely. Here there is a restriction to such of the "heirs" as should be living at the time of the deaths of the niece, and hence the devise over is not to "heirs" generally; yet we held the estate of the first taker was a fee.

Item 10 of the will is also urged as containing a defeating clause to the general operation of the word "heirs" as a limitation, in the event of a failure to vest because of any legatee contesting the will or refusing to accept.

But the alternative in such case is simply to give the share of the recusant to the other member of the same class, to-wit, "heirs," and hence the course of descent is not changed.

Upon the whole case we see no reason to depart from the construction always given in ordinary cases of gifts to one and his heirs, and hence we feel obliged to reverse the decree of the court below, and adopt the distribution made by the auditor. Decree reversed, at the cost of the appellees, and it is ordered that the fund in the hands of the accountant be distributed to C. A. Little, administrator *c. t. a.* of Dr. J. R. McComb, in accordance with the supplemental report of the auditor.

### MAYNARD, Ex'r, v. LUMBERMAN'S NAT. BANK.

(*Supreme Court of Pennsylvania.* October 3, 1887.)

#### 1. TRIAL—EVIDENCE—PROVINCE OF JURY—BINDING INSTRUCTIONS.

Where there are disputed facts, or facts from which others may or may not be inferred, it is the duty of the court to submit them all to the jury without instruction as to what inferences they should accept or reject; but, when no reasonable construction of the evidence would entitle defendant to a verdict, the court may properly give binding instructions in favor of plaintiff.

#### 2. SAME—BOND OF INDEMNITY—LIABILITY.

A., being indebted to B., a bank, of which C. was an active director, assigned to C. certain shares of the stock of B., in consideration of which C. agreed "to indemnify him from his liability" aforesaid. The stock, afterwards transferred to C. on the books of the bank, was subsequently sold by him for more than enough to pay A.'s indebtedness. A. was insolvent when his indebtedness matured, and no part of it was ever paid to B. In an action brought by B. against C. to recover the amount of A.'s indebtedness, the court instructed the jury, upon the above facts, to render a verdict in favor of plaintiff. *Held* that, while it would have been as well to have submitted the case to the jury on all the evidence, yet as, if the jury had given the evidence proper consideration, the result should have been the same, there was no error in the direction.

Error to court of common pleas, Lycoming county.

*Assumpsit*, by the Lumberman's National Bank of Williamsport, Pennsylvania, against Guy W. Maynard, executor of John W. Maynard, deceased, to recover the amount of a certain note of \$2,000 made by G. W. Sands & Co. to the order of Herdic & Gibson, and by them indorsed. The facts are fully stated in the opinion. Verdict for plaintiff, \$2,785.80, and judgment thereon, whereupon defendant took this writ.

*Lloyds, Linn & Crocker*, for plaintiff in error.

The evidence in the case should have been submitted to the jury without instruction as to what inference they should accept or reject. *Wenrich v. Hefner*, 38 Pa. St. 207; *Abraham v. Mitchell*, 112 Pa. St. 230, 3 Atl. Rep. 830; *Neslie v. Railway Co.*, 113 Pa. St. 300, 6 Atl. Rep. 72; *Madara v. Eversole*, 62 Pa. St. 160; *Bark v. Donaldson*, 6 Pa. St. 179; *Garrett v. Gonter*, 42 Pa. St. 143.

*R. P. Allen, J. A. Beeber, and John G. Reading, Jr.*, for defendant in error.

Where there are no facts in dispute the court may give a peremptory instruction. *Johnston v. Gray*, 16 Serg. & R. 361, *Koons v. Steele*, 19 Pa. St. 204; *McCracken v. Roberts*, Id. 391; *Phillips v. Zerbe, etc., Co.*, 25 Pa. St. 56; *Graff v. Railroad Co.*, 31 Pa. St. 489; *Gardner v. McLallen*, 4 Wkly. Notes Cas. 435; *Railroad Co. v. Clarke*, 29 Pa. St. 146; *Prichett v. Cook*, 62 Pa. St. 193. The officers and directors of a corporate body are trustees for the stockholders, and cannot secure to themselves advantages not common to the latter. *Bank v. Dorney*, 53 Cal. 466; *Koehler v. Iron Co.*, 2 Black, 715; *Bain v. Brown*, 56 N. Y. 285; *Ball, Banks*, 58; *Coal Co. v. Parish*, 42 Md. 598; *Sellers v. Iron Co.*, 13 Fed. Rep. 20; *Tayl. Priv. Corp.* § 628; *Mor. Priv. Corp.* § 517.

**STERRETT, J.** On January 7, 1878, Charles E. Gibson, as a member of the firm Herdic & Gibson, was indebted to the Lumberman's National Bank, defendant in error, on a promissory note for \$2,000 made by G. W. Sands to the order of and indorsed by Herdic & Gibson, and duly protested before for non-payment. Gibson's liability to the bank for amount of note, interest, and costs of protest was thus absolutely fixed. At and for a long time thereafter, John W. Maynard, plaintiff in error, an active director of the bank, received from Gibson 20 shares of capital stock of the bank of the par value of \$100 each, for and in consideration of which he agreed "to indemnify him from his liability as indorser of the dishonored note. The stock, afterwards transferred to Maynard's books of the bank, was subsequently sold by him for \$2,500. When the note was protested, the makers and indorsers were, and ever since have been, solvent, and no part of the note has, in fact, been paid to the bank, and other facts are clearly and conclusively established by the evidence. The declaration, reciting at length the foregoing facts, substantially that Maynard received the stock from Gibson as director, officer, and agent of the bank, as security to it for the payment of the note; and, when the note was dishonored, the consideration therefor was received by him to the use of the bank, in payment of the note, and should have been so applied; that although the bank was bound to so apply the money he received, or pay the same to the holder of the note, he neglected and refused to do so, though often requested to do so, etc.

The defendant below offered no evidence, and that of plaintiff was contradicted. On defendant's behalf, the court was asked to say that the whole of the evidence, defendant is entitled to a verdict. On the other side, the court was requested to instruct the jury "that, under all the evidence, plaintiff is entitled to recover sufficient of the proceeds of the sale of 20 shares of stock, and of the dividends received by Maynard on same, to cover the debt, interest, and costs of the G. W. Sands & Co. note, indorsed by Herdic & Gibson, falling due January 6, 1878, for \$2,000, to cover the debt and interest of said note." Defendant's point was refused, and, pursuant to instructions of the court, a verdict was rendered in favor of the bank. The point that was refused, and portions of the general verdict are assigned for error; but the controlling question is whether, upon the evidence directly proved, and others reasonably and necessarily inferable therefrom, the bank was entitled to recover.

While, as has been stated, nearly all the material averments of the complaint are clearly established by the evidence, there is no direct and positive evidence that Maynard, in receiving the stock from Gibson, acted as agent of the bank for the purpose of securing payment of the note owned and held by him in his relation to the bank, and all other facts directly established by the evidence, warrant the inference that he did. Indeed, it is impossible to say that any other inference could have been reasonably drawn by the jury from the undisputed facts in the case. Where there are disputed facts, or where others may or may not be inferred, it is the duty of the court to submit them all to the jury without instruction as to what inferences they should accept or reject, (*Wenrich v. Heffner*, 38 Pa. 207;) but, when no such construction of the evidence would entitle defendant to a verdict, the court may properly give binding instructions in favor of the plaintiff, (*Roberts v. Roberts*, 19 Pa. St. 391.) In this case, it would perhaps have been better to have submitted the case to the jury on all the evidence, but it was prepared to say there was error in directing a verdict for plaintiff. If the case had been submitted, and all the evidence, and the jury had given proper consideration, the result should have been the same. Judgment affirmed.

## QUINN v. COMMONWEALTH.

*(Supreme Court of Pennsylvania. October 3, 1887.)*

## CRIMINAL PRACTICE—INDICTMENT—ELECTION BETWEEN COUNTS—EVIDENCE.

Upon the trial of an indictment for forcible entry and detainer, the bill containing three counts, and the commonwealth electing to go to trial on the second and third counts, evidence which would be admissible only upon a trial on the first count is irrelevant, and should be excluded. GORDON, C. J., dissenting.

Error to quarter sessions, Northumberland county.

Indictment against James Quinn and others for forcible entry and detainer. The indictment contained three counts. The district attorney elected to go to trial on the second and third counts. The charge was that defendant and others forcibly entered and detained a certain island in the west branch of the Susquehanna river, containing 5 acres and 45 perches, being the first island below Chillisquaque creek.

Upon the trial, defendant offered to read in evidence deed from John Penn, Jr., and John Penn to John Lowden, for the purpose of showing that this was the same deed recited in the indictment. To this the commonwealth objected, because in the second and third counts there is no reference to this title, and the deed is therefore irrelevant. Objection sustained. Evidence excluded. Exception. (First assignment of error.)

Defendant also proposed to read in evidence a copy of the *caveat* or answer made by the prosecutor to the application of defendant for a warrant to survey the island in dispute, to show that the title set up by the prosecutor was not for the island in dispute, but for another close by. Objected to because the title is not in question, and also because the proposed evidence is immaterial. Objection sustained. Evidence excluded. Exception. (Second assignment of error.)

Commonwealth's counsel offered to show by the prosecutor that the next day after he (witness) had led Quinn, the defendant, down to the edge of the island, and who refused to go, that witness went to Northumberland, and made an affidavit, upon which the warrant of arrest was issued for the forcible entry and detainer; that he went back to the island, found Quinn there, and a number of others, who violently resisted the arrest, both himself and his men showing weapons and pistols, and that he violently resisted the constable in making the arrest. This was offered for the purpose of showing the intent of the defendant, and to interpret his conduct when witness was upon the island on the previous occasion referred to, and to show that he would have resisted, and that he intended to keep the island by force; also as explanatory of the conduct of the defendant, and to show the motive which actuated him the day before. Counsel for defendant objects—*First*. If the facts are as stated in the offer, that the defendant and those with him resisted the arrest, that is an offense by itself, and all the other parties who did so are liable to be indicted for resisting an officer of the law. *Second*. The testimony offered is no evidence by which to interpret the previous conduct of the defendant, because evidence of the facts as they existed at the time is the best evidence as to what took place, and this cannot be given in evidence as an interpretation of his intention or acts the day before. The facts of the occurrence of the day before must be by themselves evidence as to the force that was then used. *Third*. Such acts as took place at the time that the warrant was executed, if they amount to resisting an officer, constitute an offense by themselves, but do not constitute any part for which the prosecution in this case was commenced. *Per Curiam*. "The commonwealth has shown that on some day last winter a year ago the prosecutor went upon the island in question, and found the defendant and seven or eight men there; that the defendant, upon request, refused to go off, and that the prosecutor did not put him off, because he could not do so without using force himself and injuring him. It

is now proposed to show what took place the next day, after the arrest was issued. I am of opinion that the evidence as to the forcible detention of the property must be confined to what took place previous to the commencement of the proceedings; and that any force or threats made after the proceedings were commenced,—that is, at the time the officer went there to arrest the defendant,—are not evidence of previous forcible entry or detention. I am of the opinion that the commonwealth may show that when the prosecutor and officers went there they found the same men there that were there the day before at the time of the alleged forcible detainer, and what they did to them in the way of arms, and how they prepared to resist an arrest. This, to show the defendant's acts and intentions at the time of the forcible detainer. So far the commonwealth may go." Both parties except. (Third assignment of error.)

Commonwealth's counsel offered to show by John A. Gunty, a witness on the stand, that he bought sand from Mr. Kneass; that he hauled it off the island himself, and paid Mr. Kneass for it; that when the contractors were building the road over there came there to buy sand, he referred them to Mr. Kneass; that afterwards there was a bill sent to him for colliery sand sold in that way; that he collected the same from the contractors, and paid the money over to Mr. Kneass. This for the purpose of showing possession of these premises in Mr. Kneass. Defendant's counsel objected to the evidence as contained in the offer, as not being evidence of ownership or possession, or anything else; Mr. Kneass having already testified that he never exercised any acts of ownership over the island in question, by cultivating it, or anything else on the premises for a period of over 30 years. The evidence is irrelevant and incompetent for the purpose. *Per Curiam*, much of the offer as tends to show that the prosecutor, Kneass, used force for the purpose of getting and selling sand every year, as testified by the witness, is omitted. So much of the offer as merely proposes to show that witness retained contractors as to where they could get sand, and that he afterwards collected a bill for sand from said contractors for Kneass, is rejected as incompetent." Both parties except. (Fourth assignment of error.)

The commonwealth's counsel offer to show by the tax-books, and assessments of taxes upon a piece of land in Point township, Northampton county, in possession and ownership of the Jenkins family, and to find down with assessments in the name of Col. Alfred Kneass, the proof for this day. This for the purpose of showing that taxes were assessed on the heirs, and that they paid them on this island, from that day to the present. Defendant's counsel object, because the assessments are not evidence of ownership or possession, and are therefore irrelevant, and cannot aid the commonwealth in showing title or possession to the land in question in this case. The objections are overruled. Evidence admitted. Exception. (Fifth assignment of error.)

Defendant requested the court to charge: "*Fifth*. In the second count of the indictment the commonwealth does not aver a title in Alfred Kneass, the prosecutor. The only allegation is a naked possession, which is insufficient in law to sustain a verdict of guilty, and an award of restitution, and the supreme court of Pennsylvania in the case of *Burd v. Com.*, 6 Pa. 252. Therefore the verdict should be not guilty." *Per Curiam*, we affirm this point. If there is a conviction, the question of an award of restitution may then arise." "*Sixth*. The third count of the indictment charges that the prosecutor as tenant by the curtesy, referring to an estate in acres and 45 perches. According to the evidence in the case, the prosecutor, Alfred Kneass never had the actual possession of the island in dispute, and cannot acquire a title to the same; that in the absence of a title in the prosecutor, after his death the husband cannot become tenant by the curtesy, and for this reason there can be no conviction on this count." *Per Curiam*. "

is not affirmed. See general charge." "*Seventh*. If the jury believe from all the evidence in the case that Alfred Kneass, the prosecutor, was many years ago in the actual possession of the island in dispute, and left it without leaving some evidence upon the premises which would indicate or give notice of his intention to return, abandonment would be presumed, according to the doctrine laid down by the supreme court in *Burke v. Hammond*, 76 Pa. St. 172, and the verdict of the jury should be not guilty; that the occasional taking of sand would amount to the casual observer to a mere trespass, nor would the payment of taxes be such evidence." *Per Curtam*. "This is so; but still I refer the jury to what I have stated in the general charge as to the evidence of possession in the prosecutor." (Sixth, seventh and eighth assignments of error.)

Verdict "guilty in manner and form as \* \* \* indicated in the second and third counts of the indictment;" whereupon defendant took this writ.

*S. B. Boyer*, for plaintiff in error.

An occasional invasion would amount to a mere trespass, and the payment of taxes without such acts of dominion as indicated in that case would not raise a presumption of ownership. *Burke v. Hammond*, 76 Pa. St. 172. There can be no award of restitution upon an allegation of mere naked possession. *Burd v. Com.*, 6 Serg. & R. 252; *Com. v. Toram*, 2 Pars. Eq. Cas. 411.

*P. A. Mahon*, Dist. Atty., *J. Merrill Linn*, and *John H. Vincent*, for defendant in error.

In an indictment for forcible entry, neither the right nor the right of possession comes in question, but the possession only, and the force. *Pennsylvania v. Robison*, Add. 15; Whart. Crim. Law, § 2044. Even when the entry is lawful, it must not be made with a strong hand; if unlawful, it must not be made at all. *Id.* 2033.

**STERRETT, J.** The commonwealth elected to go to trial on the second and third counts of the indictment drawn under the twenty-first and twenty-second sections of our Penal Code. Evidence tending to sustain the material averments of each count was adduced, and submitted to the jury under instructions which appear to be substantially correct. The result was a verdict of guilty on each count, and judgment thereon. If the commonwealth had elected to proceed on the first count, the deed referred to in the first specification might have been relevant, but, as the issue was presented on the remaining counts, it was rightly excluded as irrelevant. The defendant was permitted to show, if he could, that the island in dispute, and described in the indictment, is not the island mentioned by the commonwealth's witnesses. On that branch of the case he had no right to anything more. The paper referred to in the second specification was also rightly excluded as irrelevant and incompetent. The evidence referred to in the third, fourth, and fifth specifications was not incompetent or irrelevant for the purposes for which it was received. It had some bearing on the questions of fact involved in the issue, viz., whether the prosecutor had such possession of the island in question as the law recognized as sufficient, and whether he was put out or kept out of possession by force, threats, or menacing conduct of defendant. In connection with other testimony in the case, the evidence complained of was not improper for the consideration of the jury. There is no error in either of the answers to defendant's points referred to in the sixth, seventh, and eighth specifications, respectively. As explained and qualified by reference to the general charge, the answers complained of were neither erroneous nor misleading. The remaining specifications of error are not sustained. The evidence presented questions of fact which it was the exclusive province of the

jury to consider and determine; and, having found the defendant guilty on the second and third counts, there was no error in awarding restitution of the possession illegally taken and withheld. Sentence affirmed.

GORDON, C. J., dissents.

### COUNTY OF CAMERON v. SHIPPEN TP. SCHOOL-DIST.

(*Supreme Court of Pennsylvania.* October 3, 1887.)

SCHOOLS AND SCHOOL-DISTRICTS—SCHOOL TAXES ON UNSEATED LANDS—COUNTY TREASURER'S COMMISSIONS FOR COLLECTING.

School taxes upon unseated lands are to be collected by the counties as trustees for the several school-districts, and the treasurer is entitled to receive for his services on behalf of the county "a certain amount per cent. on all moneys received and paid out by him."

Error to court of common pleas, Cameron county.

*Assumpsit* by the school-district of the township of Shippen against the county of Cameron.

The case was tried before MAYER, P. J., without a jury, under the act of April 23, 1874. The court found the following facts: "In the year 1880, as appears by the report of the county auditors, there was allowed to the then treasurer of the county the sum of \$201.82; in the year 1882, as appears by the same report, there was allowed the sum of \$155.62; and in the year 1884 the auditors' report shows there was allowed the sum of \$230.73. These several items, amounting in the aggregate to the sum of \$594.24, were allowed to the county treasurer as commissions on school taxes collected by them on unseated lands in the township of Shippen. These commissions were settled by the county treasurer at the annual settlement made by the county auditors in the years 1880, 1882, and 1884. From these settlements by the county auditors no appeal was taken. The question to be decided is whether there is any law or statute authorizing the allowance of this commission to county treasurer for the collection of school taxes on unseated lands." The court found that there was no such authority, and gave judgment for the plaintiff for \$684.80, whereupon defendant took this writ.

*Newton & Green*, for plaintiff in error.

The act of April 15, 1834, (Purd. Dig. 390, pl. 23,) entitles the county treasurer to receive a certain amount per cent. on all moneys received and paid by him. *Tycoming Co. v. Huling*, 1 Pittsb. Leg. J. 456; *Potter Co. v. Oswayo Tp.*, 47 Pa. St. 163. In collecting school taxes, the county treasurer is acting on behalf of the county.

*J. C. Johnson*, for defendant in error.

The full amount of the school tax must be paid to the district treasurer. *School-District v. County of Columbia*, 2 Leg. Chron. 33.

GORDON, J. "The question," says the learned judge of the court below, "is whether there is any law or statute authorizing the allowance of this commission to the county treasurer for the collection of school taxes on unseated lands." We think the question here put is of easy solution. As the treasurer is, by the act of 1834, entitled to receive for his services on behalf of the county "a certain amount per cent. on all moneys received and paid out by him," and as by the act of May 8, 1854, the unseated school taxes are to be collected by the county as trustee for the several school-districts, and can be paid out only on orders drawn by the commissioners, it is certain that, so far as the treasurer is concerned, he collects those funds for the county, and is therefore entitled to his compensation, and can lawfully be compelled to pay

over only the amount he has collected, less his percentage. So, therefore, this balance is just what the county received for the school-district, and this was all it, as trustee for the district, was bound to account for. It was not bound to pay out money that it did not receive. The act of assembly never contemplated either a gift by the treasurer of his services, or by the county of its money, for the benefit of the school-district. Judgment of the common pleas is now reversed.

### FREY and another, Ex'rs, v. HEYDT.

(Supreme Court of Pennsylvania. October 3, 1887.)

#### 1. DESCENT AND DISTRIBUTION—ADVANCEMENT—INTENT.

Advancement is a question of intent. That intent must be proven to have existed at the time of the transaction, and by the contemporary acts and declarations of the parties.

#### 2. SAME—DECLARATIONS.

A. gave to B. an absolute obligation for the payment of a sum of money. In a suit brought thereon by the executors of B., after her death, A. contended that the amount thereof was an advancement to his wife. A. paid interest on the obligation for some time, and offered to pay it on two occasions. On the trial, the court permitted proof of the declarations of B., made three weeks prior to the execution of the note, that the money was an advancement to A.'s wife. Held that, as the declarations were not contemporaneous with the giving of the obligation, this was error.

Error to court of common pleas, Berks county.

Debt, by Isaac Frey and Jeremiah Disroff, executors of Sarah Boyer, deceased, against David Heydt.

About April 1, 1880, defendant executed and delivered to plaintiff's testatrix a sealed note in the following form:

"APRIL 1, 1880.

"One year after date I promise to pay to order of Sarah Boyer, (widow,) the sum of eight hundred and fifty dollars, with five per cent. interest, without defalcation, for value received.

DAVID HEYDT. [Seal.]"

Heydt, the maker, paid interest on the said indebtedness for two years; memoranda of which payments are indorsed thereon. Sarah Boyer died August 26, 1884, leaving a last will, wherein she nominated the plaintiffs in error her executors. Payment being refused, the said executors brought an action upon the said note. On the trial, the defendant offered to vary and contradict the terms of the said note by parol evidence of alleged declarations of the said Sarah Boyer, made, not at the time of the execution of the note, but three weeks before, and of other declarations made by her during several years after such execution. Four sons of the defendant were called to testify to these declarations. One of them, John Heydt, testified that Mrs. Boyer sent him with \$850 to his mother, the wife of the defendant in error, directing him to deliver it to her as an advancement, saying, however, that the defendant in error was to give his note for the interest, and that after Mrs. Boyer's death the principal should belong to Mrs. Heydt as part of her inheritance; and that the money was delivered accordingly. These alleged declarations of Mrs. Boyer were made, and the money was delivered, three weeks before the time of the execution of the note. No evidence whatever was offered by the defendant of anything said or done at the time of the execution of the note, but three other sons of the defendant were called, all of whom testified to alleged declarations made by Mrs. Boyer, long after the execution of the note, that the \$850 were to be an inheritance, etc. The plaintiffs objected to the admission of this testimony, and requested the court to instruct the jury to find for the plaintiffs. The court overruled the objection to the testimony, and negatived the plaintiffs' point. Verdict for defendant, and judgment thereon; whereupon plaintiffs took this writ.

*Henry C. G. Reber and Cyrus G. Derr, for plaintiffs in error.*

The evidence was inadmissible because the declarations were not contemporaneously with the execution of the note. *Rearick's Ex'r's* 15 Pa. St. 66; *Stine v. Sherk*, 1 Watts & S. 202; *Merkel's Appeal* 343.

*Jeff. Snyder, George F. Baer, and Ermentrout & Ruhl, for defendant in error.*

The intention of the decedent, as evidenced by her declarations (which are clearly admissible,) was to make this an advancement. *Merkel's Appeal* 89 Pa. St. 343; *Weaver's Appeal*, 63 Pa. St. 309; *Lyon v. Bank* 283.

GREEN, J. The instrument in suit is an absolute obligation of the decedent to pay \$850 to Sarah Boyer at one year after date, with interest at 6 per cent. Sarah Boyer was the defendant's mother-in-law. Interest was paid on the single bill for two years; once he offered to pay the whole amount of the debt to Mrs. Boyer, and at another time he sent the amount of the debt to his son to pay it off. In the court below, the defendant was permitted to prove, by the declarations of Mrs. Boyer, that the money was given to the defendant's wife as an advancement, and was never intended to be repaid. It is accepted that the interest was to be paid whenever Mrs. Boyer desired. It is also accepted that the whole character of the obligation was altered by the declarations. It is also accepted that the declarations had been made at the time the instrument was executed. It is also accepted that the declarations have been brought within the decisions which hold that an apparent advancement may be converted into an advancement by proof of what was said and done at the time of the transaction. But there were no such acts or declarations in evidence in this case. No proof whatever was introduced to show that the money was said or took place when the single bill was signed. It was, however, actively proved by the defendant's chief witness, who brought the instrument to the court, that Mrs. Boyer, and left it with Mrs. Heydt, that the instrument was signed by the decedent, and that, although he wrote the paper, he was not present when it was signed. It was not until three or four weeks after the money was paid to Mrs. Heydt that she told her son the note was signed, and that was the only means he had of knowing that it had been signed at all.

It will be seen at once that, if this absolute obligation is to be supported by every particle of its obligatory force by means of parol testimony, and if, in every meaning, it must be done in the entire absence of any proof whatever that the obligation occurred at the time of its execution. There is no room for any suggestion of fraud, mistake, imposition, or any breach of faith in using it. It is not aware of any decision of this or any other court which has permitted a contract in writing to be destroyed by parol proof of a different intention in such circumstances as these. Our own cases are very numerous and authoritative in which we have refused to allow it. It seems, however, to be supported by the fact that because it is a question of advancement, a more lax doctrine is applied. It is apparent that the parol proof may be given, no matter when the facts or circumstances are ascertained. But we do not so understand the authorities. In *Merkel's Appeal*, 89 Pa. St. 340, we said: "Advancement is a question of intention. It must be proven to have existed at the time of the transaction. It is not the contemporaneous acts and declarations of the parties. Verbal declarations of a parent that money for which he held a note or bond against a child was intended as an advancement are insufficient to establish it as such. It must be shown to be a part of the *res gesta*, and accompany the acts done at the time." The difficulty with the present case is that there is no proof of any contemporaneous acts or declarations. We do not and cannot know what was done when the obligation in this case was signed. A previous pur-

the money as an advancement may have been changed. The legal inference is that it was changed because the obligation when executed is absolute, and that paper is the final expression of the intent of the parties. Against this final expression of the mutual intent of the parties, there is absolutely no testimony such as we can allow to prevail, for, there being no evidence as to what was done or said when the obligation was executed, the subsequent declarations are incompetent. It is only when they conform to acts and declarations which were contemporaneous that they are admissible. *Merkel's Appeal, supra*. Of just such proof, we said in *Rearick's Ex'rs v. Rearick*, 15 Pa. St. 66: "As to the subsequent declarations of the testator, it has already been intimated, their competency is altogether dependent on the efficacy of the first conversation as instruments of proof. The former are receivable only as corroborative of the latter, and, these being excluded, there remains nothing upon which those can be supported."

So far as the subsequent acts are concerned, the case is entirely against the defendant upon his own testimony. He paid interest on the bond, for two years, and offered to pay the principal on two different occasions, thus recognizing the obligation as a debt, and not as an advancement. But the question here is as to the efficacy of the parol proof to change the character of the contract, and we are clearly of opinion it was not sufficient without a radical departure from the entire current of our decisions. We are not willing to take such a step. Our constant experience warns us of the danger of transgressing the limits we have defined for the admission of parol testimony to change or destroy written instruments. We prefer to abide in the course indicated in all our recent decisions, believing it to be the path of safety and of wisdom.

We are of opinion that the parol proof admitted in this case was incompetent, and should have been rejected, and that the jury should have been instructed to return a verdict for the plaintiff. Judgment reversed, and *verdict de novo* awarded.

### LYNN v. FREEMANSBURG BUILDING & LOAN ASS'N.

(*Supreme Court of Pennsylvania. October 3, 1887.*)

#### 1. BUILDING AND LOAN ASSOCIATIONS—VALIDITY OF BY-LAW IMPOSING FINES.

Building associations incorporated under the general Pennsylvania law of 1859, having no special power to impose fines, can do so only in the exercise of their general right to enact suitable by-laws for their government. The validity of a by-law imposing fines enacted by such a building association depends upon whether the fines imposed are or are not reasonable.

#### 2. SAME—REASONABLENESS OF BY-LAW.

A by-law providing that every stockholder neglecting to pay his monthly dues and interest "shall forfeit and pay the additional sum of ten cents monthly on each and every dollar due by him," gives a right to impose a fine that is cumulative, *i. e.*, to be imposed upon the aggregate amount of all money due at the end of each month, no matter for what cause, and, as such, it is oppressive, extortionate, and unreasonable, and therefore invalid.

#### 3. SAME—STATUTE REGULATING.

The sixth section of the Pennsylvania act of April 10, 1879, (P. L. 17,) providing that the fines or penalties imposed by building associations for non-payment of dues, interest, etc., "shall not exceed two per cent. per month on all arrearages," does not apply to associations incorporated prior to the passage of that act who have not accepted the provisions thereof.

#### 4. SAME—ESTOPPEL BY PAYMENT OF ILLEGAL FINE.

A stockholder in a building association gave it a mortgage to secure certain loans to him, for which his stock was also deposited as collateral. Being threatened with forfeiture of his stock under the by-laws, he subsequently paid the association a sum necessary to square his accounts, and pay all his dues, interest, and fines. This money was applied in part to the payment of the fines claimed to be due under the by-laws. Subsequently the stockholder again became in default. The association having forfeited his stock, and proceeded by *scire facias* on the mortgage, *held* that,

as the fines imposed were illegal and void, the stockholder was not estopped from demanding that the sum paid by him, and applied to the mortgage, should be credited on the amount due on the mortgage.

Error to court of common pleas, Northampton county.

*Scire facias sur mortgage* by the Freemansburg Building & Loan Association against Josephus Lynn.

By agreement of the parties, the case was heard without a jury by LEE, P. J., who found the following facts:

"The Freemansburg Building & Loan Association, plaintiff, was incorporated on November 20, 1872, under act April 12, 1859, (P. L. October, 1874, the defendant became a member of the association by buying for five shares of its capital stock, second series, and in October subscribed for twenty additional shares in the third series, but subsequently withdrew six of these last-mentioned shares, which left the owner of nineteen shares.

"The by-laws of the association provide, *inter alia*, as follows: 'Each stockholder for each share held by him must pay into the treasury at each monthly meeting the sum of one dollar, which are called his monthly dues, until the value of the whole stock shall be sufficient to divide to each stockholder the sum of \$200. The holder of each share of stock is entitled to a loan from the association of \$200. These loans must be made in open market to the highest bidder, but no loan can be accepted at less than ten per cent premium. When a loan is effected, the borrower receives the amount of the bid, less the premium, but he must give his obligation for the full amount and must pay interest on the same monthly. To secure the repayment of the loan, with interest, the borrower is required to give a satisfactory mortgage, and, in addition, for every loan of \$200 he must transfer to the association as collateral security. Article 7, § 1, of the by-laws of the association, provides as follows: 'Each and every stockholder or trustee who shall neglect or refuse to pay his monthly dues or interest as the same shall become due and payable, shall forfeit and pay the sum of ten cents monthly on each and every dollar due him.' Article 8 of the by-laws, provides as follows: 'Each stockholder or trustee, failing to pay his certificate of stock, shall be considered as obligating himself principally his monthly dues, fines, and interest, and in all respects shall comply with the requisitions of the constitution and by-laws and the regulations of the board of directors.' Article 9 of the by-laws provides as follows: 'Any stockholder who shall receive a loan may repay the same at any time, and, in case of the death of the borrower thereof before the expiration of the eighth year after the organization of the corporation, there shall be refunded to such stockholder one-eighth of the premiums paid for every year of the said eight years then unexpired.'

"The defendant, as the owner of nineteen shares of stock, being entitled to borrow from the association \$3,800, at different times bid out small loans aggregating that amount, at an average premium of 22 9-19 per cent, to secure the payment of which, with interest, he assigned his stock as collateral security, and also gave the mortgage in suit, which is dated December 28, 1891. The mortgage calls for the payment of \$5,000, but the correct sum is \$3,800. After giving the mortgage the defendant frequently defaulted in the payment of both his monthly dues and interest, in consequence of which he was

with a fine of ten cents monthly on each dollar of his indebtedness at the time the fines were imposed. To illustrate: Defendant's monthly dues and interest amounted to \$38. In February, 1879, he defaulted. By adding the ten per cent. we have his total indebtedness for that month, \$41.80. He defaulted again the next month, making his total indebtedness, including the fine for February, \$79.80. To get at the amount of his fines for March, ten per cent, on the \$79.80 was calculated, and so on to the end of the chapter. An account of these fines was kept, not only on the books of the association, but also in a book furnished to the defendant for his information.

"The defendant, from time to time, made payments on account of his dues, interest, and fines, but notwithstanding these payments he was on May 22, 1882, indebted to the association, as shown by the books, in the following sums: Dues, \$302; interest, \$302; fines, \$360.13,—total, \$964.13. In addition to these sums the defendant was then indebted on protested checks given for fines and dues, for which he had received credit, in a sum sufficient to increase his indebtedness for fines, dues, and interest to considerably more than \$1,000. On the said twenty-second day of May the defendant, under the threat that his mortgage would be foreclosed, paid \$1,000. A few days afterwards he paid in addition a sum sufficient to cancel his entire indebtedness to the association for fines, dues, and interest. These payments were made by the defendant voluntarily, with a full knowledge of the facts, and for the purpose of squaring his accounts with the association, and they were so applied. After thus squaring his accounts the defendant continued to be a member of the association, sometimes paying his dues and interest, and sometimes defaulting as before, until February 14, 1885, when his stock was declared forfeited at a meeting of the board of directors, the defendant having neglected to pay his monthly dues and fines for the space of six months prior to the date last mentioned.

"Between May 22, 1882, and February 14, 1885, the defendant became indebted to the association for dues, interest, and fines in the following sums: Dues, \$627; interest, \$627; fines, \$1,536.38,—total, \$2,800.38. During the same period he made payments, as appears from the books of the association, as follows: Dues, \$335; interest, \$335; fines, \$442.59,—total, \$1,112.59. Included in this last sum are a number of checks aggregating \$202.18, which the plaintiff alleges were not paid, but the evidence as to these checks is not sufficiently clear to permit of their adjustment in the present suit. Since suit brought the defendant has paid to the association \$175.37, which the association has never appropriated, although still holding the money. Defendant now asks to have this money appropriated to the payment of the mortgage. The defendant has received from the association, as the net proceeds of his mortgage, \$2,946, and \$150 when he withdrew his six shares; total, \$3,096. He has paid to the association the following sums: Dues, \$1,878; interest, \$1,551.50; fines, \$950.31; since suit brought, \$175.37,—total, \$4,555.18."

Plaintiff requested the court, *inter alia*, to find, substantially, the following conclusions of law: (1) That the payment of fines by the defendant prior to May 22, 1882, were not usurious; (2) that these payments having been made by the defendant voluntarily for the purpose of paying the fines then assessed against him, and having been so accepted by the association, and applied to that particular purpose, and no other, such payments are irrevocable, and defendant cannot now reappropriate the payments himself or have it done by the court; (3) that as the fines since May 22, 1882, were levied according to the charter and by-laws of the association, with defendant's knowledge and assent, and he has made a payment on account thereof, he is therefore estopped from now disturbing said payments, or objecting to the mode of assessing the fines.

Defendant presented, substantially, the following points to the court: (1) That the evidence shows that at the time the suit was brought the defendant

had paid dues, interest, and legal fines in excess of the amount which was required, and the finding of the court must be in favor of the defendant; (2) that whenever default was made by the defendant at any time in the payment of dues or interest, or both, the only fine which the association could legally inflict was 10 cents upon each dollar of the sum so remaining unpaid, and that any fine inflicted in excess of that amount was illegal and void, and that no payment or alleged settlement of the defendant would legalize any fine illegally inflicted, or deprive him of the right to have payments made by him appropriated to the payment of dues, interest, and legal fines only.

The court affirmed all of plaintiff's points, and refused all of the defendant's points, and then calculated the amount due on the mortgage, as follows: "Charge the defendant with \$2,257, which is the difference between \$3,800, the original amount of the mortgage, and \$1,543, which is the amount of dues and interest paid by the defendant up to and including the settlement of May 22, 1882. Also with dues and interest, at the rate of \$38 per month, from May 22, 1882, up to February 14, 1885, when defendant's stock was forfeited, less \$670 paid on account of dues and interest during this period. Also with interest on \$2,257 from February 14, 1885, to this date, crediting the following payments: May 9, 1885, \$49.25; June 24, 1885, \$41.53; July 27, 1885, \$45.13; August 26, 1885, \$39.46. The balance will be the amount for which judgment should be entered against the defendant." Whereupon defendant took this writ.

*Edward J. Fox and Edward J. Fox, Jr., for plaintiff in error.*

The fines imposed were grossly oppressive, and will be relieved against. Story, Eq. Jur. §§ 1316, 1317, 1319, 1320; *Streep v. Williams*, 43 Pa. St. 450. The equitable principle not to enforce either penalty or forfeiture has been frequently applied to building association cases. End. Bldg. Ass'ns, §§ 410-417; *Loan Ass'n v. Hanlen*, 7 Luz. Leg. Reg. 165. The legislature evidently intended that section 6 of the act of April 10, 1879, should apply to all associations, whether incorporated before or after the passage of the act. House Journal 1879, p. 256; Senate Journal 1879, p. 539. There is no estoppel here. Bisp. Eq. §§ 280, 282, 285; Story, Eq. Jur. § 1543; *Hays v. Heidelberg*, 9 Pa. St. 203; *Newman v. Edwards*, 34 Pa. St. 32; *Duncan's Appeal*, 43 Pa. St. 67; *Van Rensselaer v. Kearney*, 11 How. 297; *Wilson v. Leinbach*, 6 Wkly. Notes Cas. 483; *Walter v. Breisch*, 86 Pa. St. 457.

*O. H. Meyers and B. F. Fackenthall, for defendant in error.*

The payments were voluntary, and cannot be recovered back. *Bank v. Dershan*, 15 Wkly. Notes Cas. 541; *Wolbach v. Building Ass'n*, 84 Pa. St. 211; *Ditzler v. Building Ass'n*, 39 Leg. Int. 383. They were made under a mutual mistake in the legal construction of an agreement innocently made by both parties, and they therefore cannot be recovered back. *Powell v. Smith*, L. R. 14 Eq. 85; *Good v. Herr*, 7 Watts & S. 253; *Meckley's Estate*, 20 Pa. St. 478; *Peters v. Florence*, 38 Pa. St. 194; *Loan Ass'n v. Groesbeck*, 41 Leg. Int. 16; *Selden v. Building Ass'n*, \*81 Pa. St. 336. The by-law permits cumulative fines. *Building Ass'n v. Schuller*, 3 Wkly. Notes Cas. 431; *Building Ass'n v. George*, Id. 239; *Building Ass'n v. Taylor*, 15 Phila. 246.

GREEN, J. We are clearly of opinion that the literal meaning of the by-laws of this plaintiff, which imposes fines upon members for non-payment of dues or interest, is that the fine of 10 per cent. is imposed upon the aggregate amount of all money due at the end of each month, no matter for what cause. This would include fines previously imposed, as well as the amount previously owing for dues and interest. The question then arises whether such a by-law is a valid exercise of the legislating power of the association. It is not claimed that the general law of 1859, under which the plaintiff was incorporated, confers any special power to impose fines, and hence we assume that the

right to enact the by-law in question is merely the general right which all corporations possess of enacting suitable by-laws for their government. The provision of the sixth section of the act of 1859 that no premiums, fines, or interest on such premiums that may accrue according to the provisions of the act shall be deemed usurious, must be held, so far as fines are concerned, to be limited to such fines as are imposed under by-laws which are lawful.

Is, then, the by-law in question a valid by-law? That depends upon a consideration of its meaning and effect. We have stated the meaning of this by-law to be that the fine is imposed each month upon the whole amount due at the end of each month, no matter for what cause. The words are: "Each and every stockholder or trustee who shall neglect or refuse to pay his monthly dues or interest as often as the same shall become due and payable shall forfeit and pay the additional sum of ten cents monthly on each and every dollar due by him." It is clear the ten cents penalty or forfeiture is to be paid *monthly*. This being so, it is to be repeated every month during which the amount due remains unpaid. The effect of this would be that if at the end of December in any year the member was indebted \$50 to the association, and remained so throughout the year following, he would then owe as a fine twelve times the original penalty on that one default; in other words, 120 per cent. upon the principal sum for which default was made. In addition to this, he would also owe the full interest he might be paying on the amount expressed in his obligation, no matter how usurious that interest might be. Still further, as the balance is to be struck at the end of each month, the member would owe at that time all that he owed at the end of the preceding month, and, in addition thereto, the interest and penalty, for the current month, besides the dues, and the account would be made up by charging him with 10 per cent. upon the principal, the interest, and the fine due at the end of the preceding month, and adding them to the dues and interest for the current month. If another default was then made, the same process would be repeated at the end of each succeeding month during the continuance of the defaults. It is needless to enter into a detailed computation to show what the aggregate result of such a process would be in any given case. That it is unreasonable, extortionate, and oppressive to the last degree must be at once conceded. If the monthly penalty were 100 per cent. instead of 10 it would only be a difference in degree, not in character. Of course, if there is an unlimited right to impose, by means of a by-law, any amount of fine or penalty which the association may please to ordain, and the law is powerless to interfere, the results must be accepted, no matter how unjust or oppressive they may be. But we do not so understand the law upon this subject. The fines in this case were imposed by means of a corporate by-law. While it may be conceded that as between a corporation and one of its members a somewhat different rule would prevail from that which would be applicable as between the corporation and strangers, yet there is a limit of authority, even when corporators only are affected.

We have not been referred to any case in which an unlimited authority to impose fines by a building association has been declared by any court. A number of decisions adverse to such a right have been made by courts of last resort, though none by this court, the direct question having, apparently, never been before us. The legislature of Pennsylvania by the sixth section of the act of April 10, 1879, (P. L. 17,) enacted that "fines or penalties for the non-payment of installments of dues, interest, bonus, or premiums shall not exceed two per centum per month on all arrearages." If this plaintiff were subject to this law, the question would be settled at once, and all of the fines in excess of 2 per cent. per month would be undoubtedly illegal. But the plaintiff was chartered under the act of 1859, and it is admitted, or at least found by the court below, and the findings not challenged, that it has never accepted the provisions of the act of 1879, and therefore is not subject to it.

We do not, however, see that this circumstance is very material, because there is no previous statutory authority to exact any specified fine, and the open question we are considering is, what is the law in the absence of such authority? It is very clear now, and since 1879, that the policy of the law in this commonwealth is that building associations shall not exact oppressive and extortionate fines from their defaulting members, and we feel amply justified in deciding, as we now do, that a fair inference flows from this legislation that fines in excess of 2 per cent. per month are oppressive and unreasonable, by policy of law. That policy is put in the form of explicit statutory mandate as to all associations which are subject to the operations of the act of 1879, whether by subsequent incorporation, or by previous incorporation and subsequent acceptance.

As to the time anterior to the statute, we feel no hesitancy in saying that a monthly penalty of 10 per cent., repeated by arithmetical progression with each succeeding default, was clearly oppressive, extortionate, and unreasonable, by policy of law, and by the teachings of the enlightened conscience of man. The effect of such a taint upon a by-law is to render it void, and hence we are not called upon to fix upon any rate of fine which would have been reasonable, and hold the by-law good for that rate, and void only as to the excess. The taint is fatal to its validity, and it is therefore without any force. The purpose of the fine is merely to enforce the payment of the dues and interest, and, as this is only an obligation for the payment of money, the extortionate character of the penalty becomes the more conspicuous in proportion to the amount by which it exceeds the ordinary rate allowed by law, and by general consent, for the use of money. No sound reason can be advanced for the necessity of exacting so gross a penalty for a mere omission to pay a debt.

The question has been before other courts than ours, and has been adjudged in accordance with the principles stated. Thus, in Ohio, the legislature of the state expressly authorized building and loan associations to levy and collect from their members "such sums of money, by rate of stated dues, fines, \* \* \* as the corporation by its laws may adopt." Here would seem to be an unlimited authority to the associations to impose any amount of fines they might see fit; but the supreme court of Ohio said, in a case arising under its provisions: "It is to be regretted that the legislature was not more specific in making the grant of power thus intended to be conferred. \* \* \* That there are limits, however, beyond which the corporation by its by-laws cannot go, is undoubted. (1) The amount of the fine must be reasonable; (2) it can be imposed only by way of punishment for some delinquency in the performance of a duty which the member may owe to the corporation by reason of his membership; (3) it is unreasonable, and therefore we assume that the legislature did not intend that more than one fine should be imposed for the same delinquency." *Hagerman v. Building Ass'n*, 25 Ohio St. 186; *Building Ass'n v. Gallagher*, Id. 208.

In *Endlich on Building Associations*, § 412, the writer says: "But the courts have been unanimous in discountenancing a repeated imposition of the same fine increased every time, upon the principle of arithmetical progression. Thus, where the fine upon each share's dues in arrear was for the first month 12 cents, for the second month 37 cents, for the third month 75 cents, and for the fourth month \$1.25, and for every following month 50 cents more than the amounts charged in the preceding one, the rate was held to be unreasonable and exorbitant;" citing *Building Ass'n v. Gallier*, cited by BIRDSEYE, J., in *Loan Ass'n v. Webster*, 25 Barb. 263. Mr. Endlich, in section 413 of his excellent work, says: "The proper measure of fines is the real damage the building association sustains from the failure of a member to pay his dues, which damage is really equal to interest upon the amount, together with the proportion coming to it from the then attainable premiums upon the sale of money. The fine should be slightly in excess of this, so as to make it more

profitable to the member to pay promptly than to lag behind. \* \* \* A fine of from one to two per cent. per month would in nearly all cases be sufficient and just,"—citing *Loan Ass'n v. Thomson*, 52 Ga. 427. While we express no binding opinion upon this subject, as it is not necessarily before us, there is much good sense in the suggestion, and the amount of the reasonable fine intimated in such cases seems to accord very closely with the amount fixed by our own law of 1879.

The argument that only one fine could be imposed, because the legislature could not be presumed to have intended to authorize more than one, is not applicable in the present case, because we are construing, not a legislative enactment, which must be enforced as far as may be, but a by-law of a corporation which is plainly in violation of the principles we have stated, and therefore of no effect whatever. In Maryland, the same ruling appears to have been made, in the cases of *Shannon v. Building Ass'n*, 36 Md. 383, and *Building Ass'n v. Lewin*, 38 Md. 445. The general rule that by-laws of corporations must be reasonable, and must not be oppressive, on peril of invalidity, is such familiar doctrine that a citation of authorities in support of it is unnecessary. In *Endlich on Building Associations*, at section 271, it is said: "And all by-laws, to be binding, must be in conformity (1) with existing and supreme laws; \* \* \* (2) with the charter, its letter and spirit; (3) with reason and equity." Ang. & A. Corp. § 347. The same rule exists as to ordinances of municipal governments, as was held in *Kneedler v. Borough of Norritown*, 100 Pa. St. 368.

For the reasons we have stated we hold that the by-law of the plaintiff imposing the 10 per cent. penalty in question is unreasonable and oppressive, and therefore invalid and of no effect.

It is argued, however, that the fines, or some of them, were voluntarily paid by the defendant, and therefore cannot be recovered back. This is not an action to recover back the illegal fines, but a *scire facias* by the association on the mortgage given by the defendant, and the question is, for what amount shall judgment be entered? or, rather, how much is legally due on the mortgage? There is a clear distinction between a suit to recover back moneys which have been paid by mistake, either of law or fact, and interposing as a defense such payments as could not have been recovered on account of their illegality. In the latter class of cases the payments, as a rule, are credited on the amount legally due. This is always done in cases of usurious payments where the obligation is still outstanding. We can see no difference in principle between that class and the present. While it may be true that the fines are no part of the mortgage debt, it is also true that they are moneys paid by defendant to plaintiff in consequence of a relation of debtor and creditor existing between them, and, if the creditor has no right to receive them as fines, they have no right to receive them in any other capacity than as creditor. Being received by a creditor, it is obvious the moneys thus paid must be applied to whatever was legally due. Even if the question depended upon whether the defendants made the payments distinctively as for fines, the evidence is not at all clear that such was the fact. A gross sum was paid, of which the fines were a part, but no specific receipt was given, and the credits entered on the account were in aggregate sums. But we think this feature of the case quite immaterial, since the payments, so far as the fines are concerned, were for illegal demands which the plaintiff could not claim, and having received them, cannot, either in law or in conscience, retain them. The question in this proceeding is only how much is legally due upon the obligation in suit, and, in determining that question, credit should be given for all moneys claimed and received as fines.

Judgment reversed, and record remitted, with directions that the amount due, if any, upon the mortgage in suit, be determined in accordance with the foregoing opinion.

## HOOP v. ANDERSON.

(Supreme Court of Pennsylvania. October 3, 1887.)

## TRIAL—QUESTION OF FACT FOR JURY.

Upon the audit of the accounts of A. and B., road commissioners, A. was entitled to certain credits, for which B. obtained credit in his account upon his promise to repay the same to A. A. afterwards brought suit against B. to recover the amount of these credits, B. having failed to repay him. Upon the trial, A. testified as above, and B. contradicted his testimony entirely. *Held*, that the question was one of fact for the jury, and was properly submitted to them.

Error to court of common pleas, McKean county.

*Assumpsit* by A. Anderson against James Hoop.

The following facts appeared on the trial, before OLMSTED, P. J.:

The plaintiff, defendant, and Thomas L. Kane acted as state road commissioners under the provisions of an act of the general assembly entitled "An act appointing commissioners to lay out a state road from Kane to La Fayette, in McKean county, approved the eighteenth day of December, A. D. 1873." Pamph. Laws 1874, p. 456; Appendix, 1873. By this act they were jointly charged with the duty of viewing, laying out, and constructing a state road from Kane station, on the Philadelphia & Erie Railroad, to La Fayette, in La Fayette township, McKean county, with power to levy and assess a tax of 10 mills on the dollar on all property in the townships through which the road should pass, to-wit, the townships of Wetmore, Hamlin, and La Fayette, and collect the same as county taxes are collected by law. Before entering upon the duties of their office, the said commissioners were required to give bond, with at least one surety, conditioned for the faithful application of all moneys received by them, and for the faithful discharge of all the duties of their office, to be approved by the court. By the eighth section of the act it was provided "that said commissioners shall annually settle their accounts with the auditors of McKean county, and shall be allowed a reasonable compensation, not to exceed two dollars and fifty cents per day each, for the time they shall be engaged in laying out, opening, and making said road." Thomas L. Kane, under the provisions of the act, had been appointed by the court to supply a vacancy caused by the declination of F. W. Mease, one of the persons named in the act. The said commissioners acted for the full term of six years, as limited in the last section, levied a tax annually on the property of the said township, and annually settled their accounts with the county auditors. James Hoop had acted for the commissioners in collecting the tax duplicates of La Fayette township, but had nothing to do individually with the taxes of the other townships, and was only chargeable jointly with his co-commissioners, and the accounts were audited between the commissioners jointly and the state road fund. When the county auditors were settling the accounts of public officers in 1880, the commissioners, Anderson and Hoop, received notice from them to settle their final accounts as state-road commissioners. The day before the final settlement was made, they went to the house of William S. Oviatt, Esq., (whom the said commissioners had employed as a clerk,) to make up an account for the auditors. Thomas L. Kane was not present. It did not appear that he took any part in settling the account with the auditors. Gen. Kane and Esquire Oviatt had died before the trial. This final settlement was entered in the auditors' report for the year 1880, and no appeal was ever taken therefrom.

The plaintiff's claim against the defendant in this suit was for six items, for which the commissioners obtained credit in that settlement, amounting to \$365.16. The ground upon which Anderson claimed to recover these items from Hoop was that the latter admitted at the meeting at the house of Esquire Oviatt that he had enough of state-road money in his hands to pay these items and his own charges against the fund, and promised Anderson that, if the

claim was allowed by the auditors, he would pay him the sum of the several items after he went home, as he did not have the money with him. The plaintiff's evidence was the act of assembly, Anderson's testimony to this admission, and promise on the part of Hoop, and the auditors' report. The defendant denied the admission and promise, and testified that he had only about \$200 of the road money in his hands at that time.

The defendant's counsel objected to the plaintiff's offer to testify to the alleged admission and promise on the part of defendant as incompetent. The objection was overruled. Exception. (First assignment of error.)

The plaintiff's counsel offered in evidence the auditors' report, for the purpose of showing that the items testified to by Mr. Anderson were allowed as credits the next day after the agreement with Mr. Hoop; to show that there was a balance found due the fund of \$202.40; and also for the purpose of corroborating Mr. Anderson's testimony. Admitted, under objections, read, and bill sealed. (Second assignment of error.)

Defendant requested the court to charge:

"*First.* That an agreement of the character alleged by the plaintiff, made before the accounts were audited, and in contemplation of the audit, and the claims of the commissioners depending largely on the representations they might make, thus influencing the action of the commissioners who were parties to it, and made in the absence of and without the concurrence of the third commissioner, is against public policy, and cannot be enforced." *Answer.* "We cannot affirm this point. We answer it in the negative."

"*Second.* The auditors' report placed in evidence by plaintiff shows that the account of the commissioners with the funds were duly audited by the county auditors, under the provisions of the act of assembly, and that the plaintiff, as one of the commissioners, obtained credit for the items against the fund, for which he now claims to recover from his co-commissioners, and, being thus used to reduce the fund in the hands of the commissioners, he cannot again recover on the alleged promise. In this respect the audit is binding on the plaintiff in this action." *Answer.* "We answer this point in the negative,—at least, the conclusion of the point."

"*Third.* The settlement made by the auditors has to be taken as conclusive evidence of the state of the accounts, and no action can be maintained for an amount existing previous to it, founded on items presumed to have entered into and been merged in it." *Answer of the Court.* "As a general proposition this point is correct, but we cannot affirm it so far as to say that it concludes the plaintiff, and prevents his recovering in this action."

"*Sixth.* That these state-road commissioners are joint debtors to the fund for any amount in their hands. Their accounts with each other are to be settled on the principles of a copartnership, and neither can maintain an action of *assumpsit* against his co-commissioner until the accounts with them [him] have been settled, and a balance struck. There is no allegation that one of the commissioners, General T. L. Kane, participated in or had any knowledge of the alleged settlement between Anderson and Hoop, and the plaintiff cannot recover in this form of action." *Answer of the Court.* "We cannot affirm this point by saying that the plaintiff is not entitled to recover in this case on account of the law as stated in this point."

"*Seventh.* If the 6th point is refused, we ask the court to charge that the alleged promise to pay the plaintiff the amount of his claim cannot support this action, unless the jury are satisfied from the weight of the evidence that all the accounts between the plaintiff and defendant as road commissioners were settled, and a balance struck between them." *Answer of the Court.* "We cannot affirm this point."

"*Tenth.* Under the pleadings and evidence, as a matter of law, the plaintiff cannot recover, and the verdict should be for the defendant." After reading this point to the jury, the court said: "We assume that the declaration is

with the common counts in the case, and we answer this point in the affirmative, but call the attention of the jury in the general charge to them on the question of fact, which we consider important in the case, - which, as we think, the case depends."

Verdict and judgment for plaintiff, \$456.83; whereupon defendant moves for this writ.

*B. D. Hamlin and Sterrett & Rose*, for plaintiff in error.

The contract claimed under is against public policy. *Bowers v. Pa. St. 74; Myers v. Hodges*, 2 Watts, 381; *Story*, Ag. §§ 210, 211; 1 Jur. §§ 315, 316; *Pickett v. School-District*, 25 Wis. 551, 3 Amer. *Wormley v. Wormley*, 8 Wheat. 421; *Chamberlain v. McClurg*, 8 Pa. St. 31; *Negley v. Lindsay*, 67 Pa. St. 217. Plaintiff's claim was settled and extinguished by the county auditors. *Siggins v. Com.*, 85 Pa. St. 27; *Ampton Co. v. Yohe*, 24 Pa. St. 305; *Northumberland Co. v. Watts & S.* 542; *Brown v. White Deer Tp.*, 27 Pa. St. 109; *Blair v. Allegheny Co.*, 51 Pa. St. 160; *Potter Co. v. Oswayo Tp.*, 47 Pa. St. 100. *Assumpsit* cannot be maintained under the facts in this case. *Johnson*, 1 Bin. 191; *Andrews v. Allen*, 9 Serg. & R. 241; *Killam v. Killam*, 4 Watts & S. 16.

*W. B. Chapman and T. A. Morrison*, for defendant in error.

If the defendant had the money in his hands, and promised to pay the plaintiff when they returned home from the auditors' settlement, he did not come within the statute of frauds. *Townsend v. Long*, 143; *Justice v. Tallman*, 86 Pa. St. 147. If the defendant did not have the money, but represented to the plaintiff that he did, and induced the plaintiff to settle with the auditors as if he had been paid, the defendant is estopped by his own declaration from denying in this case that he had the money. *Dock v. Boyd*, 93 Pa. St. 92. A moral obligation is sufficient to support an assumption to pay a debt barred by a report of auditors which was properly filed, and had become a judgment, which no appeal was taken. *Stebbins v. County of Crawford*, 289, and cases there cited.

GORDON, J. There is not a legal proposition in this case that requires the court's consideration. The whole matter was for the jury, and the court was concerned, the case was properly submitted. And the plaintiff below, swore to enough to make out his case. According to the report, the defendant Hoop had money sufficient, and more than sufficient, to pay the debt in controversy; but, alleging that he had not the amount with him, he proposed that the plaintiff should submit his claim to the auditors, and that he should be credited to the commission, and when they got home he should submit his claim; and Anderson did so submit his claim; it was credited accordingly, and the plaintiff as Hoop was the person who was accountable for the money, he thought it was a credit through Anderson of some \$335 which otherwise would have been in the auditors' account as a debit against him. It was, in fact, the plaintiff's consent of so much money loaned to apply on the account against him, and the transaction as simple as this, public policy has nothing to do. Hoop, "your account is found by the accounting officers to be correct, and over to me, that I may use it as a credit, and I will be your debtor for the amount." How is it possible that public policy can be involved in a case such as this; and why should not the defendant pay as he contracted? He must needs pay at all events; if not as for a debt of his own, then as for one that otherwise would have been audited against him. So, then, the plaintiff undertook to pay, not his own debt, but that of some other person, and posterous, for, if he made the assumption at all, he assumed to pay

Anderson had advanced for his benefit, and which, even as collector, he justly owed Anderson. It is true that Hoop swore to a very different state of facts than those detailed by Anderson, but, as the jury did not believe him, he has that body to blame for his mishap rather than the court. The judgment is affirmed.

### TOWNSHIP OF SHIPPEN v. BURLINGAME.

(*Supreme Court of Pennsylvania.* October 3, 1887.)

#### APPEAL—TIME OF TAKING—TOWNSHIP OFFICERS—ACCOUNTS OF SUPERVISORS—AUDITOR'S SETTLEMENTS.

The accounts of the supervisors of Shippen township, Cameron county, for the year ending March, 1885, were settled by the auditors, whose report thereof was entered in the township book under date of April 13, 1885. This report, without date, was published in two of the county papers, issued April 16th. On May 8th a copy was filed in the office of the clerk of the quarter sessions, and on the following day with the township clerk. On May 8th a citizen and tax-payer of the township appealed on its behalf from the decision of the auditors. *Held*, that this appeal was within the time prescribed by law, and that, in the absence of clear and satisfactory evidence of fraud or mistake, the date affixed to such reports should be regarded as conclusive in determining whether an appeal is in time or not.

Error to court of common pleas, Cameron county.

Appeal from the settlement by the township auditors of the accounts of H. D. Burlingame, supervisor of Shippen township. In the issue which was framed, Burlingame (appellee) was plaintiff, and appellant defendant. A rule to strike off the appeal was made absolute, and defendant took this writ. The facts are stated in the opinion.

*Newton & Green*, for plaintiff in error.

A party cannot be deprived of his right of appeal by the willful or accidental act or omission of a justice of the peace, when he is ready and willing to comply with all the legal prerequisites to an appeal. *Louderback v. Boyd*, 1 Ashm. 380; *Read v. Dickinson*, 2 Ashm. 224; *Snyder v. Snyder*, 7 Phila. 391; *Keley v. Gilmore*, 1 Wkly. Notes Cas. 73; *McIlhane v. Holland*, 111 Pa. St. 634, 5 Atl. Rep. 731. Records import absolute verity. *Adams v. Betz*, 1 Watts, 425; *Duff v. Wynkoop*, 74 Pa. St. 300; *Rice v. Constein*, 89 Pa. St. 477. A party is estopped by what he has alleged or admitted of record. *Rauck v. Becker*, 12 Serg. & R. 426; *Taylor v. Parkhurst*, 1 Pa. St. 200; *Spaulding v. Eimers*, 3 Pittsb. 306; *Anderson's Appeal*, 4 Yeates, 35; *Greeley v. Thomas*, 56 Pa. St. 35. "A supervisor has no other mode of settling his accounts, as such, but before the township auditors, and by appeal from their decision." *Dyer v. Covington Tp.*, 28 Pa. St. 186. "He cannot maintain a common-law action against the township." *Brown v. White Deer Tp.*, 27 Pa. St. 109. "Their settlement is conclusive except on appeal." *Porter v. School Directors*, 18 Pa. St. 144; *Short v. Gilson*, 107 Pa. St. 815.

*J. C. Johnson*, for defendant in error.

A writ of error does not lie in this case. Act May 22, 1822, (Purd. Dig. 702-704); *Gangewere's Appeal*, 61 Pa. St. 342; *Ruhlman v. Com.*, 5 Bin. 24; *Murphy v. Flood*, 2 Grant, Cas. 411; *Miller v. Sprecher*, 2 Yeates, 162; *Lindsey v. Malone*, 23 Pa. St. 24; *Brown v. Ridgway*, 10 Pa. St. 42; *Banning v. Taylor*, 24 Pa. St. 289. There was no exception taken in the court below, and it cannot now be raised. *Rank v. Rank*, 5 Pa. St. 215; *Dawson v. Robinson*, 3 Wkly. Notes Cas. 449; *Yeager v. Fuss*, 9 Wkly. Notes Cas. 557; *Wright v. Wood*, 23 Pa. St. 120; *Kenmerer v. Edelman*, Id. 143; *Railroad Co. v. Conway*, 112 Pa. St. 511, 4 Atl. Rep. 362; *Dorman v. Turnpike Co.*, 3 Watts, 126; *Williams v. Elliott*, 4 Penny. 424. The appeal was taken 43 days after the account was settled; that is, 13 days too late. Purd. Dig. 1641, pl. 42. These papers are not required to be recorded, and are at best only public and official

writings, and may be explained. *Chapman Tp. v. Herrold*, 58 Pa. St. 106; *Thompson v. Chase*, 2 Grant, Cas. 367; *Thorne v. Insurance Co.*, 80 Pa. St. 15; *Lowry v. McMillan*, 8 Pa. St. 157.

**STERRETT, J.** The account of defendant in error as one of the supervisors of Shippen township for the year ending March, 1885, was settled by the township auditors, and their report thereof entered in the township book under date of April 13, 1885. The report, without date, was published in two of the county papers issued on the sixteenth of same month. On May 8th a copy thereof was filed in the office of the clerk of quarter sessions, and on the following day a similar copy of the account, sworn to by the supervisors, was filed with the township clerk. On the day the report was filed in the court of quarter sessions, George Edwards, a citizen and tax-payer of the township, on its behalf, appealed from the decision of the auditors to the court of common pleas, and, in November following, the court directed an issue to determine the disputed facts. Plaintiff below thereupon moved for a rule to show cause why the appeal should not be stricken off. Pending the rule, he also filed a declaration, embodying a copy of the auditor's report, and concluding thus: "This report was dated April 13, 1885. Sworn to on May 8, 1885, and filed with quarter sessions clerk." It was not even alleged that these dates are erroneous, or that the report had been made before it purports to have been. Depositions having been taken for the purpose of showing that the settlement had been concluded by the auditors, and entered in the township book more than 30 days before the appeal was taken, the rule was made absolute, and the appeal stricken from the record. It is contended there was error in thus summarily disposing of the appeal, and we think there was.

The evidence upon which the court appears to have acted was insufficient to justify the conclusion that the report of the township auditors was not finally concluded and adopted by them on the day it bears date. It is not inconsistent with the fact that the account of defendant in error was submitted to the auditors in March, 1885, and by them held under advisement until the day the report bears date. There is nothing to show that the date appended to the report was unauthorized by the auditors, or that their authority in the premises had been previously exhausted. In the absence of clear and satisfactory evidence of fraud or mistake, the date affixed to such reports should be regarded as conclusive in determining whether an appeal is in time or not. If it were otherwise, tax-payers and other interested parties might often be misled to their injury.

The order of court striking off the appeal is reversed and vacated, appeal reinstated, and *procedendo* awarded.

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**SHIPPEN TP. v. LEWIS.**

(*Supreme Court of Pennsylvania*. October 3, 1887.)

Error to court of common pleas, Cameron county.

*Newton & Green*, for plaintiff in error. *J. C. Johnson*, for defendant in error.

**STERRETT, J.** The question presented by this record is substantially the same as that just disposed of in *Township of Shippen v. Burlingame*, ante, 547, (No. 134, July term, 1886.) For reasons given in opinion filed in that case the assignments of error are sustained. The order of court striking off the appeal is reversed and vacated, appeal reinstated, and *procedendo* awarded.

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**COOPER v. SHAEFFER, Adm'r.**

(*Supreme Court of Pennsylvania*. October 3, 1887.)

**1. INSURANCE—LIFE—BY CREDITOR—WAGERING POLICY.**

Where the disposition between the amount of a policy taken out by a creditor on the life of his debtor and the debt thereby secured is very great, as where the insurance is \$3,000, and the debt \$100, it is the duty of the court to declare the transaction a wager as matter of law.

## 2. SAME—EXTENT OF CREDITOR'S INTEREST.

A policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt, with interest, and the amount of premiums, with interest thereon, during the expectancy of the life insured, according to the Carlisle tables.

Error to court of common pleas, Lebanon county; MCPHERSON, Judge.

Case by Allen Shaeffer, administrator of Daniel Weaver, deceased, against Jacob C. Cooper, to recover the excess of a policy of insurance on the life of said Daniel Weaver, assigned to defendant's assignor as security for a debt, on the ground that the transaction was a wager. The facts as they appeared on the trial are sufficiently stated in the opinion. Verdict for plaintiff, \$1,100.04, and judgment thereon; whereupon defendant took this writ.

*J. P. S. Gobin*, for plaintiff in error.

The holder of the policy had an insurable interest. The question of disproportion is for the jury, and not the court. *Grant's Adm'rs v. Kline*, 19 Wkly. Notes Cas. 260. A man may insure his life for the benefit of another, or may protect a creditor by assigning to him a policy originally taken out by himself on his own life. *Insurance Co. v. France*, 94 U. S. 561; *Insurance Co. v. Schaeffer*, Id. 457.

*Bassler Boyer*, for defendant in error.

The disproportion between the policy and the debt secured is in itself evidence of a speculative or gambling transaction. *Cammack v. Lewis*, 15 Wall. 643; *Gilbert v. Moose*, 104 Pa. St. 74; *Corson's Appeal*, 113 Pa. St. 438; 6 Atl. Rep. 213; *Downey v. Hoffer*, 16 Wkly. Notes Cas. 185; *Dalby v. Insurance Co.*, 15 C. B. 365; *Insurance Co. v. Shaeffer*, 94 U. S. 457; *Scott v. Dickson*, 107 Pa. St. 6; *Grant's Adm'rs v. Kline*, 19 Wkly. Notes Cas. 260, 9 Atl. Rep. 150.

STERRETT, J. It is conceded that the policy of \$3,000 on the life of Weaver was taken out and immediately assigned to Blouch for the purpose of securing a debt of \$100, due by the former to the latter. Subsequently one-half interest in the policy was assigned by Blouch to plaintiff in error, but Weaver was not in any manner a party to that transaction. On the death of Weaver the insurance company, recognizing its liability for the amount insured, paid \$1,800 thereof to Cooper, and the residue to Blouch. In view of the undisputed facts, the learned judge of the common pleas held that the disproportion between the insurance, \$3,000, and the debt, \$100, was so great as to require him to say, as matter of law, that the transaction was a wager, and that the assignees of the policy had no right to retain more of the insurance money received by them than the amount of the debt, plus the premiums paid and interest thereon. In this he was clearly right. The disproportion is so great as to make the insurance a palpable wager, and no court should hesitate to declare it so as matter of law. It has heretofore been correctly said that the sum insured must not be disproportionate to the interest the holder of the policy has in the life of the insured, but we have never found it necessary to adopt any rule by which such disproportionate interest may be determined. Speaking for himself, our Brother PAXSON, in *Grant's Adm'rs v. Kline*, 19 Wkly. Notes Cas. 260, 9 Atl. Rep. 150, suggests that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt with interest, and the amount of premiums with interest thereon, during the expectancy of the life insured, according to the Carlisle tables. This appears to be a just and practicable rule.

It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wagering policies; but, as is said in *Corson's Appeal*, 113 Pa. St. 438, 445, 6 Atl. Rep. 213: "In all cases there must be a reasonable ground, founded on the relations of

the parties to each other, either pecuniary, or by blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are therefore, independently of any statute on the subject, condemned as against public policy." But, in such a case as the one before us, where the disproportion is so great, there can be no doubt as to the character of the transaction. There is no merit in either of the specifications of error. Judgment affirmed.

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**SELLERS and Wife v. HEINBAUGH and others.**

(*Supreme Court of Pennsylvania. October 17, 1887.*)

**1. HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—NOTE FOR MONEY BORROWED TO MAKE REPAIRS.**

A married woman is not liable upon a bond or note given by her for money borrowed for repairs to her separate estate, and actually applied to that purpose.<sup>1</sup>

**2. SAME—SURETIES—SUBROGATION.**

The sureties upon such a note, having paid the same, are merely subrogated to the rights of the holder, and are not, therefore, entitled to recover from the married woman the amount thus paid out by them.

Error to common pleas, Somerset county.

*Assumpsit* by David Heinbaugh, Andrew Coughenour, and Jonas Meyers, against William H. Sellers, and Maggie Sellers, his wife, to recover the amount paid out by plaintiffs upon a judgment note of defendants upon which the plaintiffs had been sureties.

On the trial before BAER, P. J., the jury rendered the following special verdict: "The jury find the facts in this case to be that Maggie Sellers, wife of W. H. Sellers, the defendant, owned a one-half interest in a grist-mill, the dam and race of which were out of repair, and the mill so constructed that the miller could not make good flour; that she borrowed five hundred dollars from John Blubaugh on her note, with her husband joining, and with the plaintiffs as her bail on the note; that Blubaugh loaned the money on the strength and faith of the bail, and not on any contemplated repair or improvement of her property; that her purpose in borrowing the money was to procure it to improve and repair the race, dam, and mill, and that the money was expended in making the improvements and repairs, and that the same were necessary to be made, and the repairs made at her direction; that the note was a judgment note, and was entered of record, and a *fi. fa.* issued thereon; that thereupon she applied to the court, and obtained a rule to show cause why the writ should not be stayed as to her, and her name stricken from the record of the judgment; which rule was, on ground of coverture, made absolute; and they further find that, after the improvements had been made, the plaintiffs paid the note and judgment, part thereof to the sheriff, and part to David Vought, the executor of John Blubaugh, deceased; that the jury are ignorant, in point of law, on which side they ought, on these facts, to find the issue; that if upon the whole matter the court should be of opinion that the issue is proven for the plaintiffs, they find for the plaintiffs, and assess the damages at the sum of \$631.96; but, if the court are of an opposite opinion, then we find for the defendants."

The court directed judgment to be entered on the special verdict for plaintiffs. Defendants then took this writ.

<sup>1</sup>As to the validity of the contracts of a married woman in the different states, see *Sellmeyer v. Welch*, (Ark.) 1 S. W. Rep. 777, and note; *Brown v. Bowen*, (Mo.) 2 S. W. Rep. 398; *Farrand v. Beshoar*, (Colo.) 12 Pac. Rep. 196.

*W. H. Koontz and Dennis Meyers*, for plaintiffs in error.

It has never yet been decided that a married woman can borrow money for the improvement of her estate, either without note or with a note, with or without bail, to the lender, and her estate be held liable for the same. On the contrary, it has been expressly ruled to the contrary. *Bear's Adm'r v. Bear*, 33 Pa. St. 525; *Brunner's Appeal*, 47 Pa. St. 73; *Lippincott v. Leeds*, 77 Pa. St. 422; *Heugh v. Jones*, 32 Pa. St. 432; *Schlosser's Appeal*, 58 Pa. St. 493; *Grosser v. Hornung*, 10 Wkly. Notes Cas. 463.

*Coffroth & Ruppel*, for defendants in error.

There was a time since the enactment of the married woman's act of eleventh April, 1848, when it was doubted whether a married woman could be held liable for improvements or repairs to her separate real estate; but this doubt has long since been banished, and it is as authoritatively settled as any question can well be, that she is liable. *Heugh v. Jones*, 32 Pa. St. 432; *Murray v. Keyes*, 85 Pa. St. 384; *Lippincott v. Hopkins*, 57 Pa. St. 328; *Finley's Appeal*, 67 Pa. St. 453; *Lippincott v. Leeds*, 77 Pa. St. 420; *Kuhns v. Turney*, 87 Pa. St. 497; *Appeal of Savings Bank*, 95 Pa. St. 329. A reasonable extension of this ruling would entitle plaintiffs to recover.

GREEN, J. That a married woman is liable for repairs to her separate estate, made at her request, and necessary for its preservation and enjoyment, is well settled. It is sufficient to refer to *Lippincott v. Hopkins*, 57 Pa. St. 328; *Lippincott v. Leeds*, 77 Pa. St. 420. It is equally well settled that her bond or note given for borrowed money is void. Even her judgment given for the purchase money of real estate can only be enforced against her as to the particular property purchased. *Patterson v. Robinson*, 25 Pa. St. 81, and *Ramborger's Adm'r v. Ingraham*, 38 Pa. St. 147. That even the land can be held in such case rests, not upon the act of 1848, but upon the principle that a conveyance to a *feme covert*, and her confession of judgment for the purchase money, are, taken together, a substantial conveyance upon condition of the payment of the price, and therefore she will not be allowed to retain both the price and the land. We are now asked to go a step further, and hold that when a married woman borrows money upon her contract obligation, for the purpose of improving her separate estate, and actually so applies it, she may be held liable for its repayment. We decline to take this step. Even were we so inclined, the cases of *Bear's Adm'r v. Bear*, 33 Pa. St. 525, and *Brunner's Appeal*, 47 Pa. St. 67, are directly in the way. In the case in hand Mrs. Sellers, one of the plaintiffs in error, borrowed the money from Blubaugh, and gave a judgment note therefor, with the defendants in error as her bail. The special verdict informs us that Blubaugh loaned the money upon the strength and faith of the bail, and not on any contemplated repair or improvement of the property; that Mrs. Sellers' purpose in borrowing the money was to enable her to improve and repair her separate real estate, and that such repairs were necessary to be made; and that the money was actually applied to this purpose by her direction. In *Heugh v. Jones*, 32 Pa. St. 432, it was said that a married woman's separate estate might "possibly" be liable for debts contracted for the improvement of her separate estate, when the money is so applied. This point, however, was not then decided, and has not been decided since, excepting in so far as it has been covered by the later cases above mentioned.

When the judgment in this case was entered, Mrs. Sellers' name was, upon her application, stricken out of the record of the judgment and execution issued thereon, upon the ground of coverture. The bail then paid the money, and commenced this proceeding to recover it from her. It is plain that Blubaugh could not have recovered against Mrs. Sellers. As between them, it was a mere loan of money upon the faith of the bail. He gave no credit to

Mrs. Sellers, her improvements, or her property. A bill for necessities for the support of Mrs. Sellers and her family could not be recovered in such circumstances. Are the sureties in any better position than the lender? We think not. They are subrogated to his rights, nothing more. The fact, if it be so, that they became bail upon the representations of Mrs. Sellers that the money was to be applied to the repairs, was not found by the jury in their special verdict, and our judgment must be based upon the facts they have found, and not upon those they have omitted to find.

Nor would Blubaugh have any equity to be subrogated to the rights of the mechanics or material-men who made the repairs. As before observed, he loaned his money on the strength of the bail. Mrs. Sellers could have rendered herself and her property liable for the repairs to the mechanics or material-men with whom she contracted. She could also have mortgaged her estate, with the consent of her husband, to raise the money to pay them. The power to borrow money upon a mere personal obligation, therefore, is not necessary for the use, enjoyment, and repair of the separate property; and because it is not necessary, and is not given by statute, we must reverse this judgment.

Judgment reversed, and *venire facias de novo* awarded.

#### RICHARDS and another v. ALLEN.

(*Supreme Court of Pennsylvania. October 3, 1887.*)

#### PARTNERSHIP—RIGHTS OF FIRM AND PRIVATE CREDITORS—LEVY OF INDIVIDUAL JUDGMENT.

A constable levied executions, issued against the individual members of a firm, upon the firm property. Before sale the sheriff levied an execution on the firm property, issued on a judgment against the firm. *Held*, that the sale under the constable's writ only passed the interest of the individuals in the firm, and the sale under the sheriff's writ passed the firm property; and the vendees under the constable's sale would only be entitled to relief after the satisfaction of the execution levied by the sheriff.<sup>1</sup>

Error to court of common pleas, Warren county.

GORDON, J. We may admit for the purposes of this case, however doubtful the proposition, that a constable may levy an execution which he holds against an individual member of a firm on his interest in the goods and assets of the partnership; yet, even with this admission, the case in hand is by no means determined in favor of the plaintiffs in error. The constable's levies were necessarily confined to the property of the individuals against whom they were issued, *qua* individuals, and his seizure of the goods of the firm was a trespass, and legally void. A partnership is a distinct entity, and the joint effects belong to it, and not to the several partners. *Doner v. Stauffer*, 1 Pen. & W. 198. It follows that the levies on the goods of the firm of Sargent & Holt for the several debts of the individual members of that firm created no lien upon those goods, and were, in fact, as nugatory as though levied upon the property of a stranger. Admittedly, had the sale been on but one of the writs, the purchaser would have taken no right in the firm assets, but only the right to compel an account with the continuing partner; and such, also, is the purport of the first section of the act of the eighth of April, 1873. If, however, a levy on the interest of a single partner would have created no lien on the goods in controversy, we cannot see how a levy on the individual interests of both could alter the legal aspect of affairs, for in either case those interests were several, and the firm rights remained unaffected. The action of the constable did not deprive the partnership of the control of its own goods. The several partners still continued to be the agents

<sup>1</sup>See *Powers v. Powers*, (Wis.) 35 N. W. Rep. 53.

of the firm; and it would not be proper to say that a sale by both or either of them, as such, would not have passed a good title to a purchaser of those goods, regardless of the levies. But the sheriff's levy, made by virtue of an execution issued on a judgment against the partnership, was a lien on the goods themselves, and his sale was not the disposition of a mere right in the firm, but of the property itself, and therefore vested in his vendee the absolute ownership thereof; leaving to the constable's vendees the right to have so much of the proceeds of the sale as remained after the satisfaction of the sheriff's writ. Had there been no levy by the sheriff on the property in question until after the sale to the plaintiffs, their case would have been different. In that event, the interest of both parties having been disposed of, there would thereafter have been no partnership in existence; hence no firm goods on which to levy. *Doner v. Stauffer, supra.*

The equities of partnership creditors depend on the equities of the partners, and as long as a partner continues to have an interest in the partnership, so long do the equities of the firm creditors continue; but when the rights of all the partners have been disposed of, either by judicial or private sale, neither partnership nor partnership rights remain, and consequently they (the creditors) have no longer anything to which they can look for a satisfaction of their claims except individual responsibility. But as a levy on the right of a partner neither divests that right nor dissolves the partnership, clearly the power of the firm to dispose of its own goods is not thereby affected, and, as a consequence, the equities of firm creditors remain. That the judgment was executed by the firm subsequently to the levies by the constable, even though the debt for which it was given was contracted after those levies, is not of material consequence. It was nevertheless a debt of the firm for the payment of which the goods might have been assigned, or converted into cash, and, as the levies by the constable created no lien, the property was entirely free for seizure on the execution against the partnership. The judgment is affirmed.

### RUFF'S APPEAL.

(*Supreme Court of Pennsylvania.* October 24, 1887.)

#### 1. BANKRUPTCY—SUIT BETWEEN ASSIGNEE AND ADVERSE CLAIMANT—LIMITATION—PLEA OF, BY AMENDED ANSWER.

Rev. St. U. S. p. 975, § 5057, provides that no suit in equity shall be maintained between an assignee in bankruptcy and one claiming an adverse interest in any property, or right to property, transferable to or vested in the assignee, unless brought within two years from the time the cause of action accrued for or against such assignee. The defendant sold some land, and received half the purchase money, but the vendee refused to pay the balance when due, and four years later went into bankruptcy. Four years after his appointment his assignee sued for specific performance. *Held*, that the act of congress was an adequate reply to such a bill, and conclusive, unless the assignee can relieve himself by showing circumstances preventing its application to him, and an amendment of defendant's answer setting up this defense should have been allowed.

#### 2. EQUITY—LACHES—SPECIFIC PERFORMANCE.

Defendant, being a part owner, sold an undivided and undetermined one-tenth interest in certain coal land, to one who paid one-half the purchase money, but refused to pay the balance, and did nothing for eight years, when his assignee sued for specific performance. A railroad had been built, and coal mines opened on some of the lands, which had greatly enhanced in value. *Held*, that neither the circumstances of the case, nor the conduct of the purchaser, was such as to entitle plaintiff to relief in equity.

Appeal from decree of court of common pleas, Westmoreland county.  
Bill for specific performance. The opinion states the facts.

*Land & Keenan and Marchaud & Garther*, for appellant.

Unless the terms of the contract are clear, specific performance will not be decreed. Story, Eq. Jur. § 767; *Hammer v. McElowney*, 46 Pa. St. 884.

Nor when the evidence is uncertain. *Fussell v. Rhodes*, 2 Phila. 165. The right to amend is no longer discretionary. Act March 21, 1806; *Young v. Com.*, 6 Bin. 88; *Franklin v. Mackey*, 16 Serg. & B. 117. A party may amend as often as necessary. *Hamilton v. Hamilton's Ex'rs*, 18 Pa. St. 20. *Neely's Appeal*, 85 Pa. St. 387. Equity always refuses aid to stale demands. *Smith v. Clay*, Ambler, 645; 2 Story, Eq. 1520; *Boone v. Chiles*, 10 Pet. 177. Statute of limitations may be raised any time before judgment. *Upton v. McLaughlin*, 105 U. S. 640; *Retzer v. Wood*, 109 U. S. 185, 3 Sup. Ct. Rep. 164; *Bailey's Assignee v. Glover*, 21 Wall. 342; *Wiswall v. Campbell*, 93 U. S. 347; *Rosenthal v. Walker's Assignee*, 111 U. S. 395, 4 Sup. Ct. Rep. 382.

*Moorhead & Head*, for appellee.

Nothing in equity rules gave the defendant the right to amend. Rule 53 Eq. Prac.; Act May 4, 1864, (P. L. 775.) The amendment was properly denied. *Everhart's Appeal*, 106 Pa. St. 349; *Cook v. Bee*, 2 Tenn. Ch. 344. It will not be permitted to amend, and set up new defense at the hearing. *Campion v. Kelle*, 14 N. J. Eq. 229; *Upton v. McLaughlin*, 105 U. S. 640. This being an express trust, section 5057, Rev. St. U. S., does not apply. *Banks v. Ogden*, 2 Wall. 57; *Seymour v. Freer*, 8 Wall. 202; *Boone v. Chiles*, 10 Pet. 177.

WILLIAMS, J. The contract, the specific execution of which is sought by this bill, was made on February 6, 1872. It provided for the sale by Ruff to J. L. Dillinger of the one-tenth part of about 1,000 acres of land and coal privileges, of which Ruff was part owner, in Derry township, and the valley of the Big Sewickley, in Westmoreland county, for \$10,000. Of the purchase money, one-half was to be paid in notes at ninety days and four months, "and the balance in two equal annual payments from the first day of March, 1872." The notes for the first payment were given and have been paid. The other payments have not been made, but Dillinger neglected and declined to make them, alleging, in substance, that there was not enough of value in the purchase to justify it. Four years after the last payment fell due Dillinger became a bankrupt, and in 1880 obtained an absolute discharge from all debts which he owed on the seventeenth April, 1878, which included the one-half of the purchase money due on this contract, and the interest thereon. The assignee in bankruptcy some four years after his appointment filed this bill, asking specific execution of the contract of 1872 in accordance with his version of it. The defendant below sought to avail himself of the protection provided by the act of congress of March 2, 1867, which declares that "no suit at law or equity shall be maintained in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or right of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee." The court was of opinion that the defendant was not entitled to the benefit of this act without setting it up specially in his answer as a bar to the plaintiff's action. The defendant then asked leave to amend his answer by incorporating into it a paragraph for this purpose, but leave was not granted. In this the court erred. The act of congress is a proper and adequate reply to the plaintiff's bill, and, unless he can relieve himself from its operation by showing such circumstances as will prevent its application to him, it is a conclusive one. This we understand to be the rule as laid down in the cases cited.

But we are not disposed to put our disposition of this case upon the act of congress alone. After a careful examination of the contract, the report of the master, and the evidence, we are satisfied that the case presented is not one that entitles the plaintiff to the intervention of a chancellor. The contract is for an undivided one-tenth part of "lands and coal privileges," of

which Ruff was part owner, situated in Derry township, and the valley of the Big Sewickley, and amounting to 1,000 acres. It describes no particular tract or coal privilege. The plaintiff endeavored to show that a tract called the "Bennett Tract" was one of those in contemplation of the parties, but the fair balance of the testimony is against him on this question. For eight years after the last payment fell due the vendee neither performed on his part nor asked performance. One-half of the purchase money, according to the plain terms of the contract, is yet unpaid, except as it has been paid by the plaintiff's discharge as a bankrupt. Meantime the whole situation has greatly changed. A railroad has been built, which brings these lands into reach of the market, and greatly enhances their value. Coal has been opened on some of them. Some of them have been sold. The plaintiff, having laid by for years while these things have been going on, now asks to have the benefit of a contract, which he declined to perform for years after it was made. These are not the circumstances nor is the conduct on the part of a purchaser such as is calculated to move the conscience of a chancellor. The plaintiff below should be left to his remedies at law.

And now, October 7, 1887, the decree of the court of common pleas of Westmoreland county, directing specific execution of the contract set out in the plaintiff's bill, and the payment of \$9,057.11, with interest thereon and costs, is reversed, and the plaintiff's bill is dismissed, at costs of appellee.

#### KLINGER and others v. BICKET and others.

(*Supreme Court of Pennsylvania.* October 31, 1887.)

#### 1. CONSTITUTIONAL LAW—SPECIAL LAWS REGULATING TOWNS AND BOROUGH—BUILDING ORDINANCES.

Const. Pa. art. 10, § 7, prohibits the legislature from passing any local or special law regulating the affairs of towns or boroughs. Brightly, *Purd.* Dig. 164, provides for the incorporation of boroughs, their powers and duties, including regulating the erection of frame buildings. The council of a borough prohibited the erection of wooden buildings within a certain prescribed district, and provided that persons violating the ordinance should remove the building, or pay the costs of removal. *Held*, that an ordinance of a borough was not a law within the meaning of the constitution, and the council had the power to pass the ordinance in question.

#### 2. SAME—DUE PROCESS OF LAW.

Const. U. S. art. 14, § 1, provides that no state shall deprive any person of property without due process of law. *Held*, that an ordinance prohibiting the erection of frame buildings within certain limits of a borough did not violate this section.

#### 3. MUNICIPAL CORPORATIONS—UNLAWFUL ERECTION OF BUILDING—TEARING DOWN.

Plaintiff, in violation of an ordinance prohibiting the erection of a frame building, being warned by the council of a borough not to put it up, began to do so, and the high constable and defendants pulled it down, under the order of the council. *Held*, that the act of defendants was lawful, and no action lies against them.

Error to court of common pleas, Butler county

*Leo. McQuiston, Clarence Walker, W. A. Forquer, and F. M. Eastman*, for plaintiffs in error.

Corporate offices of boroughs may remove nuisances. 1 *Purd.* Dig. 210; 1 *Dill. Mun. Corp.* 375, 379; *Downing v. McFadden*, 18 Pa. St. 339. The town council were authorized to prevent the erection of wooden buildings, (Act June 8, 1885; P. L. 55;) and their acts will not be interfered with, unless unreasonable, (1 *Dill. Mun. Corp.* 383.)

*McCandless, Thompson & Son*, for defendants in error.

The borough has no power to pull down a building erected in violation of an ordinance. *Kneidler v. Norristown*, 100 Pa. St. 368. A wooden building, though erected in violation of an ordinance, is not *per se* a nuisance.

*Fields v. Stokley*, 11 Wkly. Notes Cas. 344. Where the penalty for the erection of a building is a fine, its destruction is a wanton act. *Verder v. Ellsworth*, 10 Atl. Rep. 89; Sedg. St. & Const. Law, 465. The legislature can only delegate the power which it can legally exercise. *Hadlner v. Williamsport*, 15 Wkly. Notes Cas. 138; *Durach's Appeal*, 62 Pa. St. 491; *City of Williamsport v. McFadden*, 15 Wkly. Notes Cas. 269. Where penalties are the result of disregard of notice, the specifications of the notice are strictly adhered to. *Strickland v. Ward*, 7 Term R. 631; *Mitchell v. Cowgill*, 4 Bin. 20; *Hansel v. Spoul*, 7 Watts. 297.

PAXSON, J. There are 17 assignments of error in this case. To discuss them in detail would be tedious. I can best dispose of them by indicating the principles of law involved. This was an action of trespass of *et armis quare clausum fregit*, brought by the plaintiffs below against the defendants for demolishing a frame building in the course of construction, in the borough of Butler. The plaintiffs were the owners or lessees of the building; the defendants were citizens of Butler, and justified under the authority of the town council of that borough. On the seventh day of April, 1886, in pursuance and by authority of an act of assembly entitled "A further supplement to an act regulating boroughs," approved the third day of April, 1851, the burgess and town council of the borough of Butler passed an ordinance the first section of which provides that "no person or persons shall erect, or cause to be erected, any frame or wooden dwelling-house, shop, warehouse, store, carriage-house, stable, or other frame or wooden tenement, within the following limits, viz.: Main street at the intersection of Penn street, southward to the intersection of Wayne street, and for 140 feet on either side of said Main street, from Penn to Wayne street." The second section prohibited the erection of frame buildings within other designated limits of said borough, without a permit from councils. The third section provides that "any person or persons violating the provisions of this ordinance shall be compelled to remove the structure, or pay the costs of removal by councils, with the addition of twenty per centum, and also pay a penalty of fifty dollars for every day the same shall remain standing within the limits prescribed in this ordinance," etc.

The plaintiffs were the occupiers of a frame stable situated within the prescribed limits. It had been occupied by them for several years; was situated in the closely built up portion of the borough; was used as a livery stable; and, it was alleged, was a resort of disorderly persons, and endangered property in the vicinity. On the morning of May 23, 1886, the building was destroyed by fire. The next morning the town council met, and passed the following resolution: "Resolved, that the ordinance passed the seventh day of April, 1886, be enforced to prevent the erection of frame buildings on the square bounded on the north by a ten-foot alley, east by a twenty-foot alley, south by West Jefferson street, and west by Washington street; and that the lessees and lessors of the ground inclosed within the above boundaries be notified of this action." A copy of the above resolution was served the same morning upon the plaintiffs. The same afternoon, in defiance of the ordinance of councils, and of the notice just served upon them, the plaintiffs commenced to rebuild the stable as a frame building. In the mean time the town council assembled, and passed a resolution directing the high constable to proceed at the earliest possible moment to remove the erection made by the plaintiffs. In pursuance of this direction the high constable and the *posse* summoned by him for that purpose proceeded to take down and remove the building so far as it had been rebuilt. It was for this action on the part of the borough authorities that this suit was brought. The court below held that the ordinance was invalid, and permitted the plaintiffs to recover.

No one at this day doubts the power of the legislature to prohibit the erection of wooden buildings within the limits of a city or borough. It is a po-

lice regulation demanded in many instances by the public safety. The danger of fire is much greater in the case of wooden buildings than in those of brick or stone. Upon this ground, and upon this alone, can this kind of legislation be justified. The inconvenience of the individual citizen, in such cases, must give way to the public convenience and safety. Nor can it be doubted that the legislature may confer the same power upon municipal corporations, such as cities and boroughs. They are but subdivisions of the state, created by the state for the comfort and convenience of the citizens dwelling therein. The state confers upon them a portion of its sovereignty for the purpose of enabling them to control their local affairs. All this is plain enough. The court below, however, held that the ordinance of councils was invalid because it prohibited the erection of frame buildings in only a portion of the borough; that, under the provision of the constitution prohibiting special or local legislation, it was beyond the power of the councils, as it was beyond the power of the legislature, to legislate for only a portion of the borough.

Granted the constitutional prohibition, and that under it the legislature may not pass any law "regulating the affairs of counties, townships, wards, boroughs, or school-districts," it by no means follows that where the legislature, by a general law, confers upon a borough the power of regulating its local affairs, it may not do so by ordinances that are special in their character. The object of the constitutional provision was, clearly, to prevent the legislature from interfering in local affairs by means of special legislation; and, if the town councils of cities and boroughs cannot regulate them, then they are in a bad way indeed. The principle contended for would prevent the town councils of a city or borough from passing an ordinance to pave one street, unless it also provided for the paving of all other streets within the limits of the municipality. In *Baldwin v. City of Philadelphia*, 99 Pa. St. 164, it was decided that an ordinance of the city was not a "law" within the meaning of that clause of the constitution which declares that "no law shall extend the terms of any public officer, or increase or diminish his salary or emoluments after his election or appointment." The reasoning of that case applies equally to that section of the constitution prohibiting special legislation.

Nor is the ordinance in conflict with article 14, § 1, of the constitution of the United States, which says: "Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The ordinance confiscates no man's property. It forfeits nothing. It merely prohibits the erection of buildings of a character acknowledged to be dangerous in closely built up towns. Moreover, if the ordinance had been general in its character, and had prohibited the erection of frame buildings in every part of the borough, it might have been open to the objection of being unreasonable, and therefore void. The only reason, as before stated, why such prohibition can be sustained at all is the danger from fire to surrounding buildings. Where such reason does not exist because of the rural character of a portion of the borough, it might be oppressive and unreasonable to apply such an ordinance.

We are of opinion that the ordinance in question was a lawful exercise of power by the town council of the borough of Butler. This brings us at once to the question, has the council the power to enforce its ordinance against persons who openly and defiantly violate it? We do not think the power of councils, in this respect, is limited to enforcing the payment of the fine imposed by the third section of the ordinance. That would not be an adequate remedy. A man may not construct an inflammable building in the heart of the borough, and defy the authorities by merely paying a fine. Otherwise he could preserve such building to the terror of the inhabitants. The third section contains the further provision that the person violating the ordinance

shall be compelled to remove the structure, or pay the costs of removal by council. The plaintiffs were warned by council not to put up this building. They saw proper to proceed, in defiance of the ordinance and the notice, to reconstruct it. The high constable, in obedience to the order of council, proceeded to tear it down. In this there was neither confiscation nor forfeiture. It was merely the enforcement of the law against those who defied the law. We are of opinion that the act of the defendants was lawful, and that no action lies against them for this cause.

We need not discuss the case of *Field v. Stokesley*, 99 Pa. St. 306. In that case the building had been erected in violation of a similar ordinance, and was demolished by the mayor. But there was no action by city councils. The mayor proceeded upon his own responsibility. He justified upon the ground that it was a public nuisance, and in this he succeeded. The jury found that it was such nuisance. Every frame building erected in a closely built up portion of a town, in violation of a lawful ordinance prohibiting it, may be said to be a nuisance, owing to the danger from fire. But it is not such a nuisance *per se* as would justify a private person in abating it. But when it comes to a question of the power of council to abate it, and enforce its ordinance, we have an entirely different question before us.

Of course all we have said applies only to such buildings as are erected subsequent to the passage of the ordinance. Buildings erected before are not affected by it. They are entitled to stand until such time as they come to be rebuilt by reason of decay, destruction by fire, or other cause.

What we have said covers the case fully, and renders the discussion of other points unnecessary. Judgment reversed.

#### JENKINS v. ANDERSON and others.

(Supreme Court of Pennsylvania. October 31, 1887.)

##### 1. JUDGMENT—DURATION—PRESUMPTION OF PAYMENT—QUESTION FOR JURY.

Defendant, in 1853, purchased under a written agreement an interest in a saw-mill, paying part cash, and giving his judgment notes for the balance, payable in one, two, and three years. Shortly after receiving them, plaintiff entered up judgment upon them. In 1876 plaintiff brought this *scire facias* to revive the judgment. Upon the articles of agreement in 1857, there was indorsed a payment of \$69.45. The court instructed the jury that after 20 years the presumption was that a judgment had been paid, but that, if any payment had been made during that time upon it, the presumption would be removed, and it was for them to determine whether the \$69.45 was paid upon the judgments or not. *Held*, that this question was properly left to the jury under the instruction.

##### 2. DEPOSITION—SIGNATURE OF COMMISSIONER—AMENDMENT.

A deposition, on being returned to the court, had not the word "commissioner" affixed to the name of the person taking it. It was returned to him, the word added, then sent back to the court, again filed, and notice of filing served on the other party. *Held*, that the deposition was properly admitted in evidence.

##### 3. SET-OFF AND COUNTER-CLAIM—UNSETTLED ACCOUNTS—SCIRE FACIAS TO REVIVE JUDGMENT.

Defendant, in an action of *scire facias* to revive a judgment, offered certain claims against the plaintiff, being unsettled partnership accounts, as a set-off, and the court instructed the jury that they were not available as a ground of recovery against the plaintiff in this proceeding. *Held*, that the instruction was proper.

Error to court of common pleas, Indiana county.

Plaintiff's assignor sold defendant an interest in a saw-mill in 1853, and took his judgment notes, payable in one, two, and three years, for part of the purchase money, and a house for the balance. He entered up judgment on the notes very shortly. In 1876 a *scire facias* was issued to revive the judgment on the note due in 1855, more than 20 years after the judgment. On the articles of agreement given defendant for the purchase of the saw-mill, plaintiff's assignor receipted for the conveyance of the lot, and also for the three judgment notes. On February 2, 1857, he receipted for \$69.45 on the agreement.

There was nothing to show to which of the three judgments against defendant this payment was intended to apply. Judgment was entered on the *scire facias* proceedings after default in October, 1877. The defendant in the judgments died in 1881. The judgment was opened in 1883, on motion of his administrator. The son of the payee of the judgment notes, at the time of the revival of the judgment in 1877, credited the \$69.45 on one of the other judgments, but not on the one at issue in this case, under a general direction from his father to credit that sum on the judgments. Defendant offered claims against the plaintiff arising from partnership dealings, as a set-off. The deposition of J. D. McClaran was introduced by plaintiff, which, when it was returned, failed to have the word "commissioner" signed after the name of the person by whom it was taken. It was returned to him, the word added, returned a second time to the court, filed, and notice given to the opposite party.

*Watson & Telford* and *J. M. Leech*, for plaintiff in error.

Full effect can be given to a plea of set-off in the trial of a *scire facias* to revive a judgment. *Hugg v. Brown*, 6 Whart. 474. The demand may be either legal or equitable. *Murray v. Williamson*, 3 Bin. 135; *Wolf v. Beales*, 6 Serg. & B. 244. Plaintiff had the right to apply the \$69.45 to any judgment, and, having applied it to a prior judgment, is concluded from extending it to this one. *Speck v. Com.*, 8 Watts & S. 328; *Seymour v. Sexton*, 10 Watts, 257. The presumption of payment of this judgment having arisen, plaintiff was required to show the indorsement was made with the knowledge of defendant, or before the lapse of time which raises the presumption of payment. *Cramer's Estate*, 5 Watts & S. 331.

*Samuel Cunningham* and *J. N. Banks*, for defendant in error.

In a *scire facias* to revive a judgment, defendant cannot in any case recover a balance in his favor. Act 1705, 1 Smith, Laws, 49. Unsettled partnership accounts cannot be used as a set-off. *Wharton v. Douglass*, 76 Pa. St. 273; *Stiles v. Daugherty*, 16 Leg. Int. 132; *Craig v. Rushton*, 1 Wkly. Notes Cas. 29; *Sennett v. Johnson*, 9 Pa. St. 335.

PER CURIAM. The principal question in this case was whether the presumption of payment was a defense to the plaintiff's claim upon the *scire facias* to revive. This question was left to the jury, under proper instructions. The sum of \$69.45 was paid on account of the articles of agreement, and, as an acknowledgment of an indebtedness then existing, was applicable to the entire debt. We are unable to see any error in the admission of the deposition of J. D. McClaran, nor to the rulings of the learned judge upon the questions of set-off. Judgment affirmed.

### Appeal of CLEMANS.

(*Supreme Court of Pennsylvania*. October 31, 1887.)

#### PARTITION—DECREE—RIGHTS OF TENANT BY CURTESY.

A tract of land was partitioned by order and decree of court in 1881. A motion was made by a purchaser of a purpart sold under the decree, praying that the plaintiff in the partition suit should show cause why an order directing certain interest to be paid to plaintiff under the decree, as tenant by curtesy, should not be rescinded and set aside. *Held*, that the order was consistent with the judgment, and while that stands the order would stand, and the motion was properly overruled.

Appeal from decree of court of common pleas, Washington county.

In 1876 the defendant in error filed a bill for the partition of a tract of land; claiming to have a life-interest in one-fifth part. Under judgment by consent the land was divided into three purparts. Two of these were taken by the parties to the partition, and the third was ordered sold subject to the

interest of the defendant in error, as tenant by the curtesy; and the amount to be charged was then fixed, but afterwards, March 7, 1881, it was reduced, and put at \$2,551.19, to be paid in the manner set out in the order of sale. May 5, 1884, the plaintiff in error, who had in the mean time purchased the purpart, sold subject to the curtesy charge, prayed for a rule on the defendant in error to show cause why the decree whereby he was to receive, as tenant by the curtesy, interest on \$2,551.19, should not be rescinded and set aside. The petition alleged that the land partitioned was part of the estate of the father of the petitioner, who had left it to his wife during her life, and after her death to his children, share and share alike; that the wife of the defendant in error, who was the sister of the petitioner, had died before her mother, and the defendant in error had no estate in curtesy; and that the petitioner was a minor at the time partition was made, and had just learned his legal rights. To this a demurrer was filed alleging that petitioner was concluded by the decree, and that he was guilty of laches, and that the court had no power to grant the relief. The demurrer was sustained.

*Henry Gantz and Braden & Miller*, for appellants.

There can be no tenancy by the curtesy of a remainder vested in a wife if the estate continues until the death of the wife. *Chew v. Com.*, 5 Rawle, 160; *Hitner v. Ege*, 23 Pa. St. 305; *Shoemaker v. Walker*, 2 Serg. & R. 554. A mistake will be corrected in the orphans' court where no rights have intervened. *George's Appeal*, 12 Pa. St. 260. If the error appear in the pleadings, it will entitle the party to relief. *Riddle's Estate*, 19 Pa. St. 433; *Dennison v. Goehering*, 6 Pa. St. 404. Where a judgment is sustained, right or wrong, it is in some collateral suit, and not on an application to review its own records. *Painter v. Henderson*, 7 Pa. St. 48; *Herr v. Herr*, 5 Pa. St. 428. The orphans' court will reverse its decrees, irrespective of the statute, when no right has been changed. *Mitcheson's Estate*, 11 Wkly. Notes Cas. 240; *George's Appeal*, 12 Pa. St. 260. It is a common practice for the court of common pleas to set aside its decrees when a gross wrong would be perpetrated, and rights of third parties have not intervened. *Beek's Appeal*, 15 Pa. St. 406. The right of defendant as tenant in curtesy was not adjudicated, and it cannot be inferred that it was passed upon by the court. *Hibshman v. Dulleban*, 4 Watts, 183; *Lentz v. Wallace*, 17 Pa. St. 412; *Martin v. Germandt*, 19 Pa. St. 124; *Lewis' Appeal*, 67 Pa. St. 165.

• *John Aiken and J. W. & A. Donnan*, for appellee.

The decree was conclusive on all parties to the record, and all parties holding under them, until set aside. Freem. Judgm. § 485; *Herr v. Herr*, 5 Pa. St. 428; *Merklein v. Trapnell*, 34 Pa. St. 42; *Gesell's Appeal*, 84 Pa. St. 238. And persons under disability are equally bound with those *sui juris*. Act April 7, 1807; *Warfield v. Fox*, 53 Pa. St. 382; *Beckford v. Wade*, 17 Ves. 92. Where the defendant is in court, and judgment rendered in the regular manner, the power of the court ends with the term at which it is entered. *Mather's Ex'r v. Patterson*, 33 Pa. St. 485; *Com. v. Mayloy*, 57 Pa. St. 291. It cannot do anything after the time in which a writ of error can be sued out. *Smyser v. Brooks*, 1 Pears. 232; *Neill's Appeal*, 93 Pa. St. 181. Ignorance of law excuses not. Broom, Leg. Max. 260; Story, Eq. §§ 3, 137; *Rankin v. Mortimore*, 7 Watts, 372; *Good v. Herr*, 7 Watts & S. 258; *McAninch v. Laughlin*, 13 Pa. St. 371. The judgment was entered by consent of appellant, and cannot now be impeached except for fraud. *Thompson v. Maxwell*, 95 U. S. 391; *Webb v. Webb*, 3 Swanst. 658; *French v. Shotwell*, 5 Johns. Ch. 568; *Ryder v. Phoenix Ins. Co.*, 101 Mass. 548. A bill of review for error can only lie for error in law appearing on the body of the decree, or some new matter arising after the decree. *Green's Appeal*, 59 Pa. St. 238; *Riddle's Estate*, 19 Pa. St. 433; 2 Daniell, Ch. 1578, note; *Buffington v. Harcey*, 95 U. S. 99.

PER CURIAM. The court below was asked, upon a rule to show cause, to rescind and set aside an order and decree made in an action of partition in 1881; and this, without any motion or attempt to open the judgment upon which the order was made. The order which is complained of is consistent with the judgment in partition, and while that stands the order must stand also. As no fraud was practiced upon the court, the right to disturb the judgment at this late day is more than doubtful. We decline to express any opinion upon the merits of the case, as they are not legitimately before us. The court below properly refused the order prayed for. Decree affirmed, and the appeal dismissed, at the costs of the appellants.

CRESSON, C. C. & N. Y. SHORT ROUTE R. CO. v. AUNSMAN.

(Supreme Court of Pennsylvania. October 31, 1887.)

1. EMINENT DOMAIN—APPEAL FROM AWARD—PLEADINGS AS IN TRESPASS.

At the application of plaintiff, viewers were appointed to assess the damage to his land caused by the construction of defendant's railroad. Defendant appealed from their award to the court, who directed an issue to try the question of damages. Plaintiff filed his narr in trespass *quare clausum fregit*, and the defendant pleaded not guilty. *Held*, that the form of the issue was of no consequence, and gave both parties an opportunity to obtain their full rights.

2. SAME—AMOUNT OF DAMAGES—INSTRUCTIONS—OPINION OF COURT.

In a case for damages for land taken for railroad purposes, the testimony was conflicting and estimated the damages from about \$350 up to \$750. The court instructed the jury that the damages could not well be less than the \$350 or more than \$750; "though it is merely an opinion of our own, and not intended to sway you." *Held*, that the opinion of the court was properly qualified, and was not error.

3. SAME—MEASURE OF DAMAGES—VALUE BEFORE AND AFTER TAKING.

The court instructed the jury that the measure of damages for the land taken for a railroad was the actual damage to the land; that that would be best ascertained by what the land was worth before the road was built, and what afterwards, and they were not to consider speculative or imaginary damages. *Held*, that this was the proper rule governing the assessment of damages.

Error to court of common pleas, Cambria county.

The defendant, desiring to obtain a right of way over the land of plaintiff for a railroad, tendered a bond, which was approved by the court, and filed for the benefit of the plaintiff. The latter applied for viewers to assess his damages, and defendant appealed from their award to the court. By direction of the court, plaintiff filed a complaint in trespass *quare clausum fregit*, and the defendant pleaded not guilty. Witnesses estimated the damage to plaintiff from \$350 to \$750, and the court instructed the jury that the amount of the damage should be between those figures as it seemed to him, though this was merely his opinion, and not intended to sway them. He also instructed them that the damage could be best ascertained by what the land was worth before the road was built, and what it was worth afterwards; disregarding all speculative and imaginary damages. The jury found the damages to be \$650, and defendant brings error.

F. A. Shoemaker, for plaintiff in error.

The railroad company having complied with the law, the right of way vested in it. *Railroad Co. v. Lawrence*, 10 Phila. 604. The right of way vesting in the company carried the right of possession, and trespass *quare clausum fregit* would not lie. *Edelman v. Yeake*, 27 Pa. St. 27. The bond stands as security for damages, (*Wadhams v. Railroad Co.*, 42 Pa. St. 303;) and the land-owner must look to his bond, (*Fries v. Railroad Co.*, 85 Pa. St. 73.)

George M. Read, for defendant in error.

Either party may put the cause at issue in the form directed by the court. *Purd. Dig.* (8th Ed.) p. 1164, pl. 7. An issue on an appeal from an award v.11a.no.6—36

of viewers was formed by a declaration in trespass and a plea of not guilty. *Dorlan v. Railroad Co.*, 46 Pa. St. 521; *Railroad Co. v. Stauffer*, 60 Pa. St. 375; *Short v. Railroad Co.*, 8 Atl. Rep. 596; *Harvey v. Railroad Co.*, 47 Pa. St. 428. Prior to the act no declaration was necessary on an appeal from an award of viewers. *Railroad Co. v. Lazarus*, 28 Pa. St. 203. The measure of damages was as laid down by the court. *Watson v. Railroad Co.*, 37 Pa. St. 469; *Railroad Co. v. Hiester*, 40 Pa. St. 53; *Hornstein v. Railroad Co.*, 51 Pa. St. 87; *Phillip's Adm'r v. Railroad Co.*, 107 Pa. St. 464; *Railroad Co. v. Getz*, 34 Pittsb. Leg. J. 448; *Railway Co. v. Reed*, 6 Atl. Rep. 838; *Railroad Co. v. Bunnell*, 81 Pa. St. 414; *Hoffer v. Canal Co.*, 87 Pa. St. 221.

**PER CURIAM.** The form of issue in this case is of no consequence. By it the parties had opportunity to canvass all the facts, and of asserting and settling what they conceived to be their rights; this was all either could require. The learned judge's opinion as to the amount of damages which the jury might find was properly qualified; it did not trespass upon the province of the jury, and therefore did the defendant no harm. His charge contains a proper exposition of the legal rule governing the assessment of damages, and the whole case was well tried, and a proper disposition made of it. The judgment is affirmed.

#### NICHOLSON'S APPEAL.

(*Supreme Court of Pennsylvania.* October 8, 1887.)

##### 1. INTEREST ON JUDGMENT—ENTRY IN JUDGMENT INDEX.

A judgment index failed to show that a judgment therein recorded bore more than 6 per cent. interest. The appearance docket showed that the judgment was to bear 8 per cent. interest. *Held* that, in the distribution of the proceeds of the sale of the debtor's property, a subsequent creditor cannot object to the allowance of 8 per cent. interest, unless it appears affirmatively that he was misled by the entry in the judgment index.

##### 2. USURY—EXCESSIVE INTEREST ON JUDGMENT—RIGHTS OF CREDITORS.

A judgment bore 8 per cent. interest. On the distribution of the proceeds of a sale of the debtor's property, a subsequent creditor objected to the payment of 8 per cent. on the ground of usury. *Held*, that creditors cannot interfere to prevent the payment of more than 6 per cent. interest, unless it appears that there was collusion between the debtor and the judgment creditor to defraud the other creditors under the guise of usury.

Appeal from court of common pleas, Armstrong county; **HARRY WHITE**, Presiding Judge.

Sarah J. Nicholson, on April 9, 1888, loaned Thomas A. Foster \$200, and took a judgment note, which she entered upon the records of Armstrong county the same day. There were several judgments against Foster at the time, one a judgment in favor of Andrew Schall. The judgment index in use in Armstrong county had the following entry: "Foster, Thomas A., Andrew Schall No. 368 June term, 1876. \$1,050, interest fr. May 2, 1876, \$5 costs Entd. 2 May, 1876." On the continuance docket, the entry of the judgment stated 8 per cent. interest from May 2, 1876; the narr and confession stated the same; and "int. from 2d May, 1876, at 8 per ct.," was indorsed on the narr and confession as filed. Among the papers filed to original judgment were the following receipts from plaintiff to defendant: One dated April 28, 1877, for \$80 interest on judgment, filed May 19, 1877; one of April 1, 1878, for \$80 interest, filed January 17, 1879; then one of June 21, 1879, in these words: "Received of Thomas A. Foster, \$80 interest on judgment from April 1, 1878, to April 1, 1879," filed seventeenth of March, 1880; then followed one dated May 26, 1881, for \$160, filed August 31, 1881. Three of the above receipts stated expressly they were for interest, and the last one appears to have been treated by the parties as the interest for two years. These receipts paid the interest at 8 per cent. until May 2, 1881. The lien

of this judgment would continue without revival until May 2, 1881. April 21, 1881, the defendant signed an amicable *scire facias*, reciting, *inter alia*, "that the judgment aforesaid, No. 368, June term, 1876, be revived according to the act of assembly, with costs." It was filed April 22, 1881, entered accordingly on the continuance docket and on the judgment index as follows: "Foster, Thomas A., — Andrew Schall No. 159, June term, 1881." It appears that the parties agreed that the interest should be 6 per cent. after May 2, 1881. To this *sci. fa.* the following receipts were filed: One of August 5, 1882, for \$100, filed December 27, 1882, and one of April 8, 1883, for \$240, filed June 4, 1883. These receipts do not appear for interest alone, but are generally on the judgment.

The property of Thomas Foster was sold at sheriff's sale in June, 1885, and was bid up by Mrs. Nicholson to an amount large enough as she supposed to cover the judgments, computing the Schall judgment at 6 per cent. On July 13th the defendant Foster, by writing, liquidated the balance due on the judgment to the *sci. fa.* at \$940.49, which was filed July 14, 1885. The auditor appointed to distribute the proceeds of the sale computed the interest at 6 per cent. Andrew Schall excepted to the finding of the auditor. On the hearing the court gave the following opinion:

"It is claimed by Mrs. Nicholson, as a subsequent judgment creditor, that this liquidation, so filed after the sheriff's sale, should not control as fixing the amount of the Schall judgment for distribution, contending that the rights of those participating in a sheriff's sale are to be determined by their *status* as shown by the record at the time of the sale. To this position we assent fully. Such is the doctrine reiterated not long since in *Bank's Appeal*, 95 Pa. St. 500, a case impressed upon our recollection because of our personal interest in it while at the bar. Kindred to this principle is the rule that a subsequent incumbrancer, interested in determining how to bid, is not bound to look beyond the judgment docket for information as to the amount of the judgments against the debtor. *Coyne v. Souther*, 61 Pa. St. 458; *Hance's Appeal*, 1 Pa. St. 411; *Ridgway's Appeal*, 15 Pa. St. 181; and other cases. These principles are milestones along the currents of authority, regulating the rights of judgment creditors in distributing the proceeds of sheriff's sales.

"In *Hance's Appeal*, *supra*, we have authority, however, that the subsequent judgment creditor *may* look beyond the judgment docket to correct a mistaken entry. Thus says Justice ROGERS: 'A judgment creditor may be prejudiced, as ruled in *Crutcher v. Com.*, 6 Whart. 340, and *McCleary's Appeal*, 1 Watts & S. 299, by an entry in the judgment docket of less than the amount recovered; yet he cannot be benefited by an entry of more than is due. For so far as regards him, particularly when strangers are interested, the entry in the appearance docket must govern. A subsequent purchaser or a judgment creditor is not *bound* to look beyond the judgment docket; but he *may* do so to correct a mistaken entry.' Following this rule, it is correct that the liquidation of the Schall judgment on the thirteenth of July, after the sheriff's sale, if made for a greater amount than the debt and interest shown by the judgment docket at the date of the sheriff's sale, would not be controlling on the auditor in making distribution. It was the auditor's duty, then, when he sat on distribution, to take the judgments as they were on the judgment record at the time of the sheriff's sale. *Borland's Appeal*, 66 Pa. St. 472; *Dyott's Estate*, 2 Watts & S. 557. It was his duty, also, to hear evidence from subsequent judgment creditors, if offered, that the Schall judgment was conclusive as to them, or that it had been paid or partly paid. *Meckley's Appeal*, 102 Pa. St. 543; *Borland's Appeal*, *supra*. No collusion, however, was intimated or charged here. The auditor could properly, however, turn to the continuance docket, and discover the condition there as to credits and receipts. Observing these rules, what would the auditor discover as the condition of the judgment record at the date of the sheriff's sale? Pre-

cisely what we have stated above in our history of the record,—a judgment entered May 2, 1876, for \$1,050; interest from May 2, 1876. Then, subsequently, a *sci. fa.* and judgment of general revival, marked on the judgment record, and filed April 22, 1881. Following the judgment record alone, at the time of the sale, the debt and interest appearing there exceeds in amount what Schall, the exceptant and plaintiff, now claims out of the fund in hand. But it is contended the amount for which the judgment was revived in April, 1881, was not liquidated and carried to the judgment docket; hence the revival, so far as notice to subsequent creditors, cannot avail to preserve the amount of original judgment and interest as entered on the judgment docket. The intelligent auditor seems, for the purposes of this case, to have practically taken this view. We cannot agree with him. The issuing of a *sci. fa.* itself, within five years from original judgment, without a judgment at all on the *sci. fa.*, would preserve the lien of the original judgment for five years from date of such *sci. fa.* Act of twenty-sixth March, 1827; *Fulton's Estate*, 51 Pa. St. 209. Then, again, when judgment is actually entered on the *sci. fa.*, a general judgment of revival will be sufficient entry on the judgment docket. Says *Fogelsville L. & B. Ass'n's Appeal*, 89 Pa. St. 295: 'The acts of assembly about reviving judgments do not require the amount of the debt and interest then due should be liquidated. A general judgment of revival for another period of five years is all that is prescribed.' This is precisely what we have here, with a regular and prompt entry of it on the judgment docket.

"When, then, the auditor was making distribution, the judgment docket at the time of the sheriff's sale showed the Schall judgment \$1,050, with interest from May 2, 1876, with regular revival. As we have said, it was perfectly proper for the auditor to hear evidence of payments on account, and to refer to the continuance docket to discover any receipts or credits there, so as to liquidate the actual sum owing on the judgment at the date of sheriff's sale. By referring, then, to the continuance docket and the papers of the case, the receipts we have specified above are found. These receipts on the original judgment show the interest paid to May 2, 1881, at 8 per cent. Such payments were made long before the sheriff's sale, also before the entry of Mrs. Nicholson's judgment, which was entered to 150, June term, 1883, and the receipts filed. Applying these receipts, then, to interest, as Foster, the defendant, intended and still desires, and crediting the receipts of August 5, 1882, and April 8, 1883, for \$100 and \$240, respectively, generally on the judgment, counting 6 per cent. after May 2, 1881, which appears to be what the defendant, Foster, claims, and Schall agrees, was to be done, we have the balance due on Schall's judgment at the sheriff's sale, (counting interest on the debt alone, without the interest on attorneys' com.,) \$925.36. This is, indeed, less than appeared at the time on the judgment docket. But it is argued that since there was no note of the 8 per cent. interest made on the judgment docket, subsequent judgment creditors are not required to look beyond the judgment docket, and, the judgment appearing there to bear up the legal interest, such subsequent creditors have a right to have the judgment liquidated on the *sci. fa.* at 6 per cent., and the payments evidenced by the receipts to be applied accordingly. The learned auditor took this view, saying: 'A subsequent judgment creditor can claim that the *sci. fa.* on the Schall judgment shall be liquidated according to the terms of said judgment at its original entry on the judgment index; that is, with interest at six per cent.' Under the circumstances and facts of the Schall judgment here, we cannot adopt this view. We must decide the precise question before us on its own facts and circumstances, unaffected by any probable conclusions from another state of things. We are not called on here to decide what effect an agreement in the entry of the judgment on the continuance docket to pay 8 per cent. interest, when the judgment docket only states interest generally,

not mentioning rate, would have on the subsequent judgment creditor's right to resist the usurious interest, because it would increase the amount of the judgment at the legal rate beyond what the judgment docket indicated at the time of the sheriff's sale. That question is not here. Nor are we embarrassed with the question, suggested by the auditor, whether the court would, in any event, liquidate a judgment at an illegal rate of interest. We may say that the reasoning of the later cases rather indicates that, as in a mortgage or judgment, there is a stipulation for interest in excess of the legal rate, and the mortgagor or defendant does not defend against or object to the excess interest, the court will authorize the liquidation according to contract. Such appears to be the indication of the case of *Bonnell's Appeal*, 11 Atl. Rep. 211. There the mortgage provided for 7 per cent. The plaintiff in the *sci. fa.* claimed judgment at that rate. The defendant not resisting on that ground, a terre-tenant sought to raise the question of usury. He was not allowed to do so, and judgment appears to have been entered on a calculation at the stipulated rate; Mr. Justice GREEN saying: 'In the present state of the law, that defense [usury] is personal, and, if the debtor does not choose to make it, one who is a stranger to the contract cannot.' Where, however, the defendant avails himself of such defense, no device, be it ever so ingenious, can deprive him of it. *Harbaugh v. Uhlinger*, 17 Pittsb. Leg. J. 502, and kindred cases.

"But we need not speculate about these theories in this case. Here we have simply a case where, as we have seen, the judgment index showed at the sale an amount greater than the plaintiff claimed on the distribution, and, when the auditor turns to the continuance docket, he discovers receipts for interest paid at 8 per cent. Now, in such a case, because the rate of 8 per cent. is not the marked rate of interest on the judgment docket, must the appropriation of such payments by the parties to interest alone be disregarded, and, at the instance of a subsequent judgment creditor, be applied on account in a calculation at 6 per cent? We think not. It is not a question of an application of payments the parties have not applied, for the parties here have applied them *specialty* to interest. The only person here, then, who can complain at the rate of interest actually paid, is Foster, the defendant. Such defense is personal. *Bonnell's Appeal*, *supra*. Mr. Justice STERRETT, in *Slayton v. Riddle*, 7 Atl. Rep. 72, is most explicit in this behalf when he says: 'Since the passage of the act (1858) it is not unlawful for a debtor to pay, or a creditor to receive, more than 6 per cent. interest. When done in good faith, and in the usual course of business, other creditors of the debtor have no reason to complain. Nor have they any right to interfere in any case except where, under the guise of usury, there has been a collusive scheme between the debtor and creditor to cheat and defraud other creditors of the former.' So, also, *Trust Co. v. Roseberry*, 81 Pa. St. 313. A subsequent judgment creditor, in the absence of fraud or collusion, has no standing before an auditor to complain of the payment of usury to a prior judgment creditor. *Bank's Appeal*, 85 Pa. St. 528; *Lenning's Appeal*, 93 Pa. St. 307. The payment of interest at 8 per cent. having been made by Foster, the defendant, to Schall, on his judgment, until May 2, 1881, we have here no power to disturb such payments at the instance of Mrs. Nicholson, a subsequent judgment creditor. We will therefore, in liquidating the amount of Schall's judgment at the date of the sheriff's sale, take the interest, as shown by the receipts between the parties, paid to May 2, 1881, calculate interest from that date on the \$1,000 to the sheriff's sale, deducting the receipts of \$100 and \$240 at their proper dates. The result of this liquidation would be an amount less than appeared due and owing, as we have said, on the judgment docket on the original judgment. \* \* \*

"And now, to-wit, August 26, 1887, all exceptions filed to the auditor's report dismissed, except those relating to fixing the amount of the judgment

of Andrew Schall. The finding of the auditor of the amount of the Schall judgment is reversed, and such judgment is liquidated as follows:

Debt, May 2, 1881,	-	-	-	-	-	-	-	\$1,000.00
Interest to August 5, 1882,	-	-	-	-	-	-	-	75.50
								<hr/> \$1,075.50
Then paid,	-	-	-	-	-	-	-	100.00
								<hr/> \$ 975.50
Interest to April 8, 1883,	-	-	-	-	-	-	-	32.51
								<hr/> \$1,015.01
Then paid,	-	-	-	-	-	-	-	240.00
								<hr/> \$ 775.01
Interest to June 5, 1885, (sheriff's sale,)	-	-	-	-	-	-	-	100.35
								<hr/> \$ 875.36
Attorney's com.,	-	-	-	-	-	-	-	50.00
								<hr/> \$ 925.36

Total amount of judgment, - - - - \$ 925.36  
 —Which shall be paid out of the proceeds of sale, and the distribution shall be according to the schedule annexed hereto.”

*W. D. Patton*, for appellant.

A subsequent incumbrancer is not bound to look beyond the judgment docket. *Coyne v. Souther*, 61 Pa. St. 455; *Mehaffy's Appeal*, 7 Watts & S. 200. To the same effect is *Bear v. Patterson*, 3 Watts & S. 233; *Wood v. Reynolds*, 7 Watts & S. 406; *Mann's Appeal*, 1 Pa. St. 24; *Hance's Appeal*, Id. 408; *Ridgway's Appeal*, 15 Pa. St. 177. The principle that no person but the defendant in the judgment can set up the defense of usury has no application to this case.

*Buffington & Buffington*, for Andrew Schall.

**STERRETT, J.** In liquidating the Schall judgment, the learned judge of the common pleas computed interest at the rate of 8 per cent. until May 2, 1881, and thereafter at the rate of 6 per cent. Applying the payments made thereon accordingly, he found the balance due at date of sheriff's sale was \$925.36. This appears to be in harmony with the understanding of the parties as evidenced by the record of the judgment itself, and receipts given on account of interest at the rate of 8 per cent. As we said in *Slayton v. Riddle*, 7 Atl. Rep. 72, it is not unlawful, since the act of 1858, for a debtor to pay, or a creditor to receive, more than 6 per cent. When done in good faith, and in the usual course of business, other creditors of the debtor have no reason to complain; nor have they any right to interfere in any case, except where, under the guise of usury, there has been a collusive scheme between the debtor and creditor to cheat and defraud other creditors of the former. There is nothing in the circumstances of this case to make it an exception to the general rule.

It is contended, however, by appellant, that at the time she loaned the money for which her judgment was given there was nothing on the judgment index to indicate that the debt secured by the Schall judgment was bearing more than 6 per cent. interest, and, inasmuch as she was not bound to look beyond the judgment index, she has a right to insist on liquidation of the judgment on the *scire facias* at the legal rate of interest. If she was misled to her prejudice by relying on the judgment docket, there might be some force in this position; but she was not. She found there a judgment in favor of

Schall for \$1,050, with interest from May 2, 1876, duly revived within five years by *sci. fa.*, but not liquidated. Computed according to what there appeared, the debt would be considerably more than the balance found by the court. On the other hand, if she referred to the record of the original judgment, as under the circumstances she should have done, for the purpose of ascertaining whether any credits were noted thereon, she would have seen that, by the terms of the judgment, it was bearing 8 per cent. interest. In any aspect of the case, it does not appear that appellant was misled to her injury by the omission to note the rate of interest on the judgment index, and hence she has no reason to complain of the action of the court below. The subject is so elaborately considered in the opinion of the learned judge that further comment is unnecessary.

Decree affirmed, and appeal dismissed, at the costs of appellant.

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### TRUBY'S APPEAL.

(*Supreme Court of Pennsylvania. October 31, 1887.*)

#### WILL—ANNUITY—CHARGE ON REALTY—NOT DIVESTED BY SALE.

A testator devised his land to his children, but gave his wife an annuity upon one-third of it. Part of the land was allotted to one of the heirs, and the court decreed that he should pay the other heirs their proportionable parts of the two-thirds of the appraised value of the tract allotted; the legal interest on the remaining one-third to be annually paid to the widow during her natural life, and upon her death the principal to be paid to the persons then thereunto legally entitled. The heir not complying with the decree, the tract was sold under *f. fa.* Held, the annuity of the widow, by virtue of the previous decree of the court, was made a fixed charge upon the land during her life, and the sale under that decree could not divest that charge.

Appeal from decree of orphans' court, Armstrong county.

Jacob Hill died twenty-fifth July, 1876, seized of considerable real estate in Allegheny (now Gilpin) township, Armstrong county. He left surviving him a widow, Hannah Hill, and eight children, viz.: Lucinda C. Parks, Elizabeth Truby, Alvina Truby, John W. Hill, Daniel U. Hill, Winchester Hill, Agnes Crosby, and Caroline Kuhns. He devised to his son John W. Hill about 174 acres; to his son Winchester Hill about 200 acres; and the remainder, about 100 acres, to some of his other children. The price to be paid for the land was to be fixed by appraisers to be appointed by his children. The testator's provision for his wife was as follows: "I will and direct that the one-third part of the appraised value of the said tracts of land, and part or parts thereof, shall be set apart, and the interest thereon be entirely at the disposal of my beloved wife, Hannah Hill, during her life, and direct the payment of the same in such way as she may desire at her death. The remaining two-thirds I will, devise, and bequeath as follows, viz., [equally to his children.]" He also gave her certain parts of the mansion-house, fruit, feed, pasture, etc. The widow accepted under the will.

The children being unable to agree as to choice of appraisers, the orphans' court of Armstrong county, on fourth June, 1877, appointed the sheriff of said county and six appraisers to appraise said real estate. The plantation devised to John W. Hill was appraised at \$5,730.65, and designated as "Allotment No. 2." A rule having been served on all the heirs to appear and accept or refuse, etc., John W. Hill on the third December, 1877, appeared and accepted allotment No. 2 at the appraisement, and on October 6, 1881, the said court decreed, in substance, that the said John W. Hill should pay the other heirs their proportionable parts of the two-thirds of appraised value of said allotment; the legal interest on the remaining one-third to be annually paid to the widow during her natural life, and upon her death the principal to be paid to the persons then thereunto legally entitled. John W. Hill having failed to comply with said decree, the orphans' court, on first March,

1883, awarded a *fi. fa.* to collect the two-thirds and the interest due the widow. The sheriff, on second June, 1883, sold at public sale said allotment to Simon Truby, now deceased. John Gilpin, acting as attorney for Truby, bid in the property, took the deed in his own name, and on seventh June, 1883, assigned the deed to Truby. Neither Simon Truby, the purchaser, nor his heirs, have since said sale paid the widow any interest on the one-third of the appraisement, claiming that the appraisement was divested by the sheriff's sale.

The court, S. S. MEHARD, P. J., delivered the following opinion: "If the main question raised by the pleadings in this case had not been discussed by the learned auditor appointed to distribute the fund arising in the estate of Jacob Hill, deceased, out of the land which this controversy concerns, and had it not been disposed of by the court on exceptions filed to the auditor's report on behalf of the respondents and others, the able arguments of respondents' counsel would call for a full examination in this opinion. But in view of what has there been said and decided, a few words only are necessary here. John W. Hill's allotment of his father's real estate, which respondents' ancestor bought, was not sold under act eighteenth April, 1853, (Purd. Dig. 1457.) The provisions of that act do therefore not apply to the fund created by the sale. The lien of the fund charged on John W. Hill's land, by the will of his father, for the support or annuity of petitioner, was paramount to the title of John W. Hill. Hence petitioner need not and cannot resort to this fund by virtue of act twenty-fourth February, 1834. *McCredy's Appeal*, 47 Pa. St. 442. By the decree of this court under which this land was sold, that fund was to be and remain a charge on the land during the natural life of Hannah Hill. It would therefore not be divested by the sale. *Solliday v. Gruver*, 7 Pa. St. 452. This case cannot be distinguished from *Cowden's Estate*, 1 Pa. St. 267, 284; *Steele's Appeal*, 47 Pa. St. 437; *Wert's Appeal*, 65 Pa. St. 306; and kindred cases. That petitioner has chosen the proper forum is sufficiently shown by *Mohler's Appeal*, 8 Pa. St. 26; *Gibson's Appeal*, 25 Pa. St. 191." Elizabeth Truby, the executrix, appeals.

John F. Whitworth, W. D. Patton, and Jas. S. Whitworth, for appellants.

The main question in this case is whether the one-third of the appraisement of allotment No. 2, accepted by John W. Hill, (the interest of which was payable to the widow,) was divested by the sheriff's sale. The general rule is that legacies charged on real estate, like other liens, are divested by judicial sales; and for the evident reason that "policy requires that the title should be, in the hands of the purchaser at judicial sales, as unfettered and untrammelled as possible." But a legacy, or other incumbrance, to be divested, must be "definite in its amount, certain in its application or capable of being made so." *McKenney's Appeal*, 3 Pa. St. 160. It has been held that "a judicial sale of land divests it of the lien of a legacy payable in annual installments, not due and payable at the time of the sale." *Lobach's Case*, 6 Watts, 167; *McLanahan v. McLanahan*, 1 Pen. & W. 96; *Reed v. Reed*, 1 Watts & S. 235. It was held in *Parker's Appeal*, 61 Pa. St. 478, that "a bequest of a sum 'the interest of which is to be paid to her during life, and the principal to her children at her death,' is a direct bequest of the principal for life, and the legatee is entitled to receive it on securing the interest of those in remainder, according to the 49th section of the act twenty-fourth February, 1834." And so it has been repeatedly held that a bequest of interest for life is a bequest of the principal for life. *Stiknitter's Appeal*, 45 Pa. St. 365; *Schriber v. Cobeau*, 4 Watts, 130. Cases similar to this have been decided by this court. *Hellman v. Hellman*, 4 Rawle, 440; *Christman v. Christ*, 4 Penny. 291. In *Steel's Appeal*, 47 Pa. St. 437, cited by the learned court below, the widow was to receive "a sufficient maintenance during her life." This, of course, would not be divested; the value thereof being unknown at

the time of the sale. The remaining case, *Wertz's Appeal*, 65 Pa. St. 306, was a case of intestacy. The widow would take an estate in the land under the intestate laws. An estate is never divested. There is yet another question. Granting that this fund was not divested, we think that the court erred in decreeing that the heirs of Simon Truby pay the petitioner the interest, etc., accruing prior to his death, it being a debt of the estate, and, as such, should be paid by the executors. The act of twenty-fourth February, 1834, (Purd. Dig. 421.) provides that "all debts owing by any person within this state at the time of his decease shall be paid by his executors or administrators so far as they have assets." The personal estate is the primary fund for the payment of all debts, including liens on real estate. *Mason's Appeal*, 89 Pa. St. 402. A recognizance given in partition in the orphans' court is payable by the administrator out of the personal estate. *Kinter's Appeal*, 62 Pa. St. 318.

*J. M. Hunter and S. M. Crosby*, for appellees.

The rule by which a will is to be construed requires us to examine the whole instrument. Every sentence and word in it must be considered in forming a judicial opinion upon it. "The intention of the testator, drawn from the words of a will, taken altogether, must govern in its construction." "The intention of the testator \* \* \* has always been deemed the first great leading fundamental rule in the construction of wills." *Schott's Estate*, 78 Pa. St. 42. "The intention, however, should not be ascertained by considering the language of the particular devise only, which is sought to be construed, but should be gathered from the whole instrument. The construction given should be such as is consistent with the whole scheme of the will." *Middlewarth's Adm'r v. Blackmore*, 74 Pa. St. 418. "The intention of a testator is to be collected, not from any particular or detached clause of the will, but from the whole taken together." *Butz v. Butz*, 2 Penny. 270. "If a general intent and a particular intent are inconsistent with each other, the latter must yield to the former." 74 Pa. St., *supra*. "The general intent of a will being ascertained, a particular inconsistent intent will be overlooked." *Schott's Estate*, 78 Pa. St. 40. "All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole." 1 Jarm. Wills, 70; *Newbold v. Boone*, 52 Pa. St. 174. "If these clauses are in irreconcilable conflict, we are compelled to adopt the latter, as the latest expression of the testator." *Newbold v. Boone*, 52 Pa. St. 174, and cases cited. Also *Sheetz's Appeal*, 82 Pa. St. 213. "But this is a result never to be submitted to if it be possible to give effect to both clauses, consistently with the main design of the testator." *Id.* And again, in doubtful cases, the law favors a distribution as near to the general rules of inheritance as possible. *Smith's Appeal*, 23 Pa. St. 9; *Fahrney v. Holsinger*, 65 Pa. St. 388. We assert, however, if this court should hold that the power of appointment does refer to the *corpus*, that even that would not render it susceptible of being divested by the sheriff's sale. While the direction for investment saves it from vesting absolutely in the widow, it also preserves it for the remaindermen. *Silkknitter's Appeal*, 45 Pa. St. 365. That only arrearages of the interest or annuity would be divested by the sheriff's sale, we cite *Lauman's Appeal*, 8 Pa. St. 475; *Mohler's Appeal*, 5 Pa. St. 418; *Reed v. Reed*, 1 Watts & S. 239; *Zeigler's Appeal*, 35 Pa. St. 173; *Mather v. McMichael*, 13 Pa. St. 302; *Kline v. Bowman*, 19 Pa. St. 24; *Shertzer's Ex'rs v. Herr*, *Id.* 34; *Dickinson v. Beyer*, 87 Pa. St. 274; *Davison's Appeal*, 95 Pa. St. 394; *Luther v. Wagner*, 107 Pa. St. 343; *Plumer's Appeal*, 11 Wkly. Notes Cas. 144. That the *corpus* upon which this *dower annuity* was based, was not divested, we refer to the same cases, and cite *Fisher v. Kean*, 1 Watts, 259; *Bear v. Whisler*, 7 Watts, 144; *Mix v. Ackla*, *Id.* 316; *Mentzer v. Menor*, 8 Watts, 296; *Swar's Appeal*, 1 Pa. St. 92; *Vandever v. Baker*, 13 Pa. St. 121; *Dewall's Appeal*, 20 Pa. St.

236; *Wertz's Appeal*, 65 Pa. St. 306; *Luther v. Wagner*, 107 Pa. St. 343. "The court below was right in allowing" them "the arrearages of the yearly sum due to them, respectively, under the authority of *Reed v. Reed* and *Mohler's Appeal*." "These cases settle that the arrears of an annuity payable to a widow out of lands devised by a testator, and the interest of her statutory third part, charged on the lands of a decedent in lieu of dower, are payable out of the proceeds of a sheriff's sale, made under a judgment against a subsequent owner." In *Reed v. Reed*, 1 Watts & S. 239, it is said: "The only reason why future arrears of annuity, payable out of the land to the widow, have been excepted, is because of the impossibility of computing their amount. Therefore, as to them, the purchaser has been held to take the land, chargeable with the future payments." "That the purchaser at sheriff's sale should pay the principal of this one-third at the time of the sale, and yet continue to pay the widow the interest for her life, is so strange and preposterous that nothing but the most express terms could induce us to suppose any law so intended." *Mentzer v. Menor*, 8 Watts, 299. In *Luther v. Wagner*, 107 Pa. St. 343, it was held that "a sheriff's sale of land discharged the lien of the annual interest due and in arrear on a recognizance given to secure a widow's dower, but does not discharge the lien of accruing interest not due at the time of the sale." *Grove's Appeal*, 88 Pa. St. 562, held: "Where land charged with a dower interest is sold after the widow's death, under the order of the orphans' court, for the payment of the debts of a terre-tenant, the lien of such dower interest is discharged." In *Wertz's Appeal*, 65 Pa. St. 308, it was said: "It has been well stated as a general rule that a judicial sale will not discharge an incumbrance, whether created by the law or by the parties, when the charge stands in the title, and can be discharged only by the court undertaking to administer the fund by investing it in order to fulfill the purpose of it."

PER CURIAM. The case of *Solliday v. Gruver*, 7 Pa. St. 452, would seem to settle the point in controversy in this case. The annuity of the widow, by virtue of the previous decree of the court, was made a fixed charge upon the land during her life; hence, as the learned judge of the court below held, the sale under that decree could not divest that charge. Appeal dismissed, and decree affirmed, at the costs of the appellant.

#### PUGH v. POWELL and Wife.

(Supreme Court of Pennsylvania. November 7, 1887.)

##### 1. ASSUMPSIT—MONEY HAD AND RECEIVED—PRIVITY.

In an action of *assumpsit* for money had and received, the evidence showed that defendant had received from plaintiff's guardian, for plaintiff's use, pension money, and had appropriated it to his own use. Defendant asked the court to instruct the jury that there was no privity between the parties to the suit. Held that, under the evidence, *assumpsit* would lie in the name of the party for whose benefit the money was paid, and the instruction was properly refused.

##### 2. LIMITATION OF ACTIONS—DISABILITY OF INFANCY.

In an action of *assumpsit* for money had and received, the cause of action accrued during the infancy of plaintiff, and suit was commenced within six years from the time plaintiff attained her majority. The defendant asked the court to instruct the jury that the cause of action was barred by the statute of limitations. Held, properly refused.

Error to court of common pleas, Allegheny county.

This suit was commenced by William A. Powell and Hannah J. Powell, his wife, to recover money paid by her guardian to defendant, and by him converted to his own use. Hannah J. Powell's mother died when she was but two years old. At that time defendant's wife, who was Hannah's aunt, took her to live with them, where she lived as their child until she was 18 years old, when she married William A. Powell. Defendant's wife was in

poor health, and Hannah worked hard from the time she was old enough until her marriage. Shortly after her mother died, her father died in the United States service. Her guardian received from the government \$650.50, as pension money for Hannah on account of the death of her father. The guardian paid the money to defendant, and he converted it to his own use. The guardian on his final account was charged by the orphans' court with the money paid to defendant, but both the guardian and his bondsmen were insolvent. On the trial the defendant claimed the money paid him by the guardian for supporting Hannah, and also claimed that, if any one could bring suit for the money, it was the guardian, and asked the court to instruct the jury that there was no privity between the parties. He also asked the court to instruct the jury that the claim of plaintiffs was barred by the statute of limitations. The court refused both requests. There was a judgment for plaintiffs for the full amount paid by the guardian to defendant, with interest, and defendant brings error.

*W. S. Nesbit*, for plaintiff in error. *James Bredin* and *John M. Greer*, for defendants in error.

PER CURIAM. The objection that there was no privity between the parties was not well taken. The money was paid to the defendant below, for the use and benefit of the plaintiff Hannah J. Powell, *nee* Davis. Under such circumstances it is well settled that *assumpsit* for money had and received will lie in the name of the person for whose benefit it was paid. It was money which the defendant in good conscience ought not to retain. The statute of limitations was no bar. The right of action accrued during the minority of the plaintiff. This suit was brought within six years of her arrival at age. Judgment affirmed.

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BEDELL v. ERRETT and others.

(*Supreme Court of Pennsylvania*. November 7, 1887.)

1. TRIAL.—INSTRUCTIONS.—HARMLESS ERROR.

The verdict of the jury clearly showed that the error in the charge of the trial court did not affect the result. *Held*, that the judgment should not be reversed.

2. SAME.—UNNECESSARY INSTRUCTIONS.

A portion of a charge was not free from criticism, nor was it needed to throw light on the case; but it did not mislead the jury. *Held*, that it was not ground for reversal.

Error to court of common pleas, Allegheny county.

Action for a balance due on a building contract.

About May 1, 1883, a contract was made by which plaintiffs below agreed to build for defendants below four houses in Mansfield borough for \$7,375. The contract was verbal, but the work and materials were to comply with certain specifications. Defendant claimed that the work and materials in said houses were defective in various particulars set forth at length in his affidavit of defense, for all of which particulars the specifications provided in detail, and said work and materials did not conform to said specifications. This action was brought for a balance of \$1,462.28, with interest from January 1, 1884. Defendant admitted this to be the correct balance due plaintiffs if they had fulfilled their contract as to time and quality of work and materials, but claimed it should bear interest only from January 1, 1885, and claimed that there should be deducted from it the sum of \$998, being the amount of damage suffered by him by reason of the delay in finishing the houses, and the defective work and materials.

The trial judge charged the jury as follows: "If they did not complete them [the houses] within a reasonable time, they would be bound to deduct the damages that Mr. Bedell suffered. The most obvious way of getting at these

damages, if you find that the defendant is entitled to any, would be to find what the houses would rent for, \* \* \* and perhaps deducting from that interest on the money he would have had to pay them so much the earlier. If he did not pay what he was to pay at the first of August, if they had been finished then, there would be some deduction to make for interest on the amount of money withheld. The beginning of the running of interest would be when the houses were substantially finished, or when they were ready for occupancy. But I must say this: that plans and specifications never give absolutely every little detail; a great deal must be left, and is left, in all cases to the common manner of finishing a building, and doing work as understood by workmen, and without any specification. \* \* \* If you are building a common stable, and are bargaining about the lumber to go in it, you take what is ordinarily used for such a building, and you put upon it the style of workmanship that is ordinarily expected. If you were building a five hundred dollar house, it is not expected that the same sort of expensive work will go on it as would be put in a twenty thousand dollar house. The specifications will be sent out with you, and there are several gentlemen on the jury who are very familiar with building and with specifications; one especially, who knows a great deal more than we do about this matter."

Verdict and judgment were rendered for plaintiffs, whereupon defendant took this writ.

*E. Edgar Galbreth and W. B. Rodgers*, for plaintiff in error. *Henry A. Davis*, for defendants in error.

**PER CURIAM.** If we concede there was error in the charge of the learned judge below in regard to the matter of interest, it does not necessarily follow that the judgment must be reversed. It is only for serious error, such as would reasonably or probably affect the result, that we would be justified in disturbing the judgment. In this case the error was cured by the verdict. It is manifest the jury have found that the buildings were not to be completed by August 1, 1883, as contended by defendant, and have rejected his claims for the loss of rents. We are unable to see, therefore, how he could have been injured by so much of the charge as is contained in the first and second assignments.

Nor is that portion of it embraced in the third and fourth assignments free from criticism. It might well have been omitted,—it was not needed to throw light upon the case; yet we cannot say that it misled, or was likely to mislead, the jury, and it is certainly no ground of reversal. Judgment affirmed.

**ALLEMANIA FIRE INS. CO. v. PITTS EXPOSITION SOC. ST. PAUL FIRE & MARINE INS. CO. v. SAME. INSURANCE COMPANY OF PENNSYLVANIA v. SAME.**

(*Supreme Court of Pennsylvania. November 7, 1887.*)

**1. INSURANCE—MEANING OF "PREMISES."**

An insurance policy prohibited the keeping of fire-works on the insured premises. The building insured was situated in Exposition grounds, where there was also a stable some 25 or 50 feet distant, in which fire-works were stored at the time of the fire. *Held*, that the meaning of the word "premises" is confined to the building insured, and the policy was not avoided.

**2. SAME—CONSTRUCTION OF POLICY—AGAINST INSURERS.**

A policy of insurance is in the words of the insurers, and in case of doubt should be construed against them.

**3. SAME—PROOF OF LOSS—WAIVER.**

A policy of insurance required the insured in case of loss to furnish proofs, which he omitted to do. The insurers submitted the amount of loss to be ascertained by appraisers. *Held*, sufficient evidence of waiver to go to the jury.

Errors to common pleas No. 2, Allegheny county.

This was an action for \$1,000 on a policy of insurance issued to plaintiffs, and which contained the following clause: "This company shall not be liable for loss occurring while any of the following articles are kept, stored, or used in or on the premises described, any custom or usage of trade or manufacture to the contrary notwithstanding viz.: Benzine, benzole, benzine varnish, chemical oils, *fire-works, gunpowder.*" The building insured was a frame shed situated in the Exposition grounds of the plaintiffs. In these grounds were other buildings; among them, some stables situated from 25 to 50 feet from the building insured. In these stables were stored some fire-works and gunpowder, which ignited, setting fire to the stables, and the heat so caused set fire to the building covered by the policy. No formal proof of loss was furnished by the plaintiffs, as required by the policy, but the parties submitted the amount of loss to be ascertained by appraisers. The judgment of the court below was in plaintiffs' favor, whereupon the defendants brought this writ, and made the following assignments:

*First.* The court erred in its answer to plaintiffs' second point, which point and answer were: "If the first point be refused, then the court is instructed to charge the jury that if they find from the evidence that the fire-works were at the time of the fire in a separate building, stable, or shed, situate wholly detached from the building insured, and distant 30 to 50 feet, and in no way connected or used therewith, then said detached building or shed was not a part of the premises insured, within the meaning of the policies of insurance." *Answer.* The second point is affirmed.

*Second.* The court erred in its answer to plaintiffs' fourth point, which point and answer were: "That the jury have a right under the evidence to find that defendant company waived a formal proof of loss, and the plaintiffs' evidence, if believed, shows such waiver." *Answer.* "The fourth point is affirmed. If the defendant company entered into the written contract in evidence, to refer to appraisers the amount of the loss by fire, and, after the award of the appraisers, refused to pay the amount for other reasons than the failure to supply a detailed statement of the loss, it was a waiver of the furnishing of the proofs of loss required by the policy."

*Josiah Cohen and A. Israel*, for plaintiffs in error.

Defendants have not waived proof of loss. Waiver of proof must be shown by positive evidence, and there was not sufficient evidence of waiver in this case to go to the jury. *Wood, Fire Ins.* 497; *Beatty v. Insurance Co.*, 66 Pa. St. 17; *Angier v. Eaton Co.*, 11 Wkly. Notes Cas. 146. The cases relied on by the court below to support its answer to plaintiffs' second point do not apply.

*C. C. Dickey and Wm. M. Watson*, for defendants in error.

The meaning of the word "premises" must be confined to the building insured. *Moodinger v. Insurance Co.*, 2 Hall, (N. Y.) 527; *Insurance Co. v. Insurance Co.*, 40 Wis. 446; *Robinson v. Insurance Co.*, 27 N. J. 135; *May, Ins. par.* 228; *Wood, Ins. par.* 56. The language of the policy is the language of the insurers, and must be construed against them in case of doubt. *Smith v. Insurance Co.*, 32 N. Y. 399; *Insurance Co. v. Cropper*, 32 Pa. St. 351; *Insurance Co. v. Berger*, 42 Pa. St. 292; *Insurance Co. v. Updegraff*, 43 Pa. St. 358; *Insurance Co. v. Mund*, 102 Pa. St. 89.

**PER CURIAM.** We have examined these cases carefully, and are unable to find any substantial error. The principal question, which is common to all of them, is whether the fire-works were placed upon the insured premises, within the meaning of the policy. The undisputed evidence is that they were placed in a frame stable from 20 to 50 feet from the building covered by the policy. They were not, therefore, upon the insured premises, and not within

the prohibition of the policy. As a contract of insurance is one of indemnity, and the language of the policy is the language of the company, we are not to strain it in favor of the latter as against the assured; on the contrary, we must resolve a doubt about the meaning of the policy, if any exists, against the company, and in favor of the assured. We think there was sufficient evidence of a waiver of proofs of loss to justify the learned judge in submitting this question to the jury. The charge of the court was clear and impartial; and neither in this, nor in the answers to points, do we find anything of which the plaintiffs in error have any just cause of complaint. The judgment in each case is affirmed.

COOK and others v. COMMONWEALTH.

(Supreme Court of Pennsylvania. November 7, 1887.)

PRINCIPAL AND SURETY—RELEASE OF PRINCIPAL—AFFIDAVIT OF DEFENSE.

Plaintiff sued defendants as sureties on a bond given by her guardian during her minority, alleging a decree on final accounting in July, 1886, against her guardian, which had never been paid nor appealed from. Defendants, in an affidavit of defense, alleged a receipt in full, duly executed by plaintiff at the June term, 1886, in the orphans' court, whereby she released her guardian in full of all moneys coming to her; that a writ of attachment was issued against him by the orphans' court; that, after arrest, he was released by plaintiff and her counsel from all liability under the decree; that it was her duty to attempt to collect the amount from the guardian, and her failure to do so, and her release of him, released the sureties. There was no averment of payment of the decree; and the affidavit was made "to the best of the information and knowledge of affiants," but did not state their belief in the information. *Held*, that the affidavit was wanting in any averment that would constitute a defense.

Error to court of common pleas, Allegheny county.

Plaintiff sued the defendants, sureties on a bond given by her guardian, alleging that upon a hearing, July, 1886, upon his final account, the court entered a decree in her favor for \$244.10; that the guardian filed exceptions thereto, which were dismissed; that no appeal has been taken from that decree, and that it has never been paid. The sureties had filed an affidavit of defense alleging that the plaintiff had receipted, prior to the settlement of her account with her guardian, to him in full for all moneys coming to her; that an attachment issued against the guardian, and on his arrest the plaintiff and her counsel released him from all liability on the decree; that it was her duty to make an attempt to collect from the guardian, and that, by her failure to do so, and release of him from all liability, the sureties on the bond were released. The affidavit was to the best of the information of the defendants. On motion of plaintiff judgment was rendered against the defendants for want of a sufficient affidavit of defense, and from that judgment they appealed.

*Robb & Fitzsimons*, for plaintiff in error.

If a creditor gives time to the debtor, his sureties are discharged. *Bank v. Bank*, 7 Watts & S. 343; *Clippinger v. Creps*, 2 Watts, 45; *Talmage v. Burlingame*, 9 Pa. St. 21; *Com. v. Vanderslice*, 8 Serg. & R. 452. An agreement after judgment against the principal to give him time releases the sureties. *Reiner v. Rodgers*, 2 Wkly. Notes Cas. 16. When a creditor releases a lien on the principal, the sureties are released *pro tanto*. *Com. v. Haas*, 16 Serg. & R. 252; *Wharton v. Duncan*, 34 Leg. Int. 105. The surety on a guardian's bond was discharged when his account was referred to referees; not being according to the terms of the bond. *Com. v. Simonton*, 1 Watts, 310. When a creditor has the means of compelling payment by the principal debtor, and gives it up, he discharges the sureties. *Templeton v. Shakley*, 107 Pa. St. 370; *Hutchinson v. Woolwell*, Id. 509; *Boschert v. Brown*, 72 Pa. St. 372.

*W. D. Moore and F. C. McGrir*, for defendant in error.

A decree of the orphans' court directing a guardian to pay the balance due his ward is conclusive in a suit on his official bond, and the only defense is payment. *Com. v. Gracey*, 96 Pa. St. 70. It must be shown in the affidavit with particularity as to time, amount, manner, etc. End. Affidavits of Defense, § 399; *Railroad Co. v. Johnson*, 54 Pa. St. 127; *Snyder v. Powers*, 37 Leg. Int. 387. In an affidavit on information, defendant must state that he believes the information. *Bank v. Gregg*, 79 Pa. St. 384; End. Affidavits of Defense, §§ 342-344, 390.

**PER CURIAM.** The affidavit of the defendants is so utterly wanting of any averment that could constitute a valid defense to the plaintiff's claim that the court below could not legally refuse judgment for want of a sufficient affidavit of defense. Judgment affirmed.

### MONONGAHELA BRIDGE CO. v. BEVARD.

(*Supreme Court of Pennsylvania*. November 7, 1887.)

#### NEGLECT—INJURY FROM DEFECT IN BRIDGE.—KNOWLEDGE—CONTRIBUTORY NEGLIGENCE.

Plaintiff, knowing that a certain plank in a bridge was defective, chanced to step upon it in crossing the bridge, and was injured by the plank giving way with him. Held, in an action for damages, that his previous knowledge of the defect in the plank in nowise compromised him, and that the bridge company could not avoid the responsibility arising from its own neglect by charging the plaintiff with knowledge of that negligence.<sup>1</sup>

Error to court of common pleas, Allegheny county.

This is an action on the case brought by H. L. Bevard against the Monongahela Bridge Company, to recover damages for personal injuries sustained by him while crossing the defendant's bridge. On the evening of March 8, 1886, at half past 9 o'clock, plaintiff, in the company of Harry Rex, on his way from Bridgewater to his home in West Brownsville, started along the foot-way over said bridge. When he was within about 90 feet from the West Brownsville end of the bridge, he stepped upon a board, which broke under him, and precipitated him into the river, a distance of some 40 feet. The plaintiff testified that he had considered this board dangerous, that he knew of its location in the foot-walk, and that he could have avoided it at the time of the accident by walking on either side of it. His witnesses corroborated him in this, and two of them did actually pass by the hole after Mr. Bevard had fallen through. In view of these facts, the defendant requested the court to give to the jury binding instructions in its favor, and to this effect presented two points of law. The refusal of the court to affirm these points constitute two of the assignments of error.

*Lazear & Orr*, for plaintiff in error.

"Where the court below negatives a point of law, presented by counsel, in which the facts are stated hypothetically, the supreme court will, on error, assume that the jury would have found the facts as stated in the point." *Bank v. McMurray*, 98 Pa. St. 538; *King v. Thompson*, 87 Pa. St. 365. Where a party knows of the existence of an open cellar-way in a sidewalk, and attempts to pass the place in the night, he will be considered as taking the risk upon himself even if at the time he has forgotten the existence of the obstruction, and, if he receives injuries from falling into such cellar-way, he

<sup>1</sup>Though a person has knowledge of a defect in a highway, yet if he believes that by the exercise of ordinary care no harm will result in passing over it, and has the right as a reasonably prudent man to so believe, he is not guilty of contributory negligence in going upon the highway where the defect exists. *Kendall v. City of Albia*, (Iowa,) 34 N. W. Rep. 833, and note.

is guilty of contributory negligence, and cannot recover. *Town of Mt. Vernon v. Dusouchett*, 2 Ind. 586; *Bruker v. Town of Covington*, 69 Ind. 33. See, also, *King v. Thompson*, 87 Pa. St. 369. The plaintiff's right to recover is precluded when the omission to employ the senses contributes to the injury; that is, when by their employment he might have avoided the injury. *Railroad Co. v. Whitacre*, 35 Ohio St. 631; *Railroad v. Crawford*, 24 Ohio St. 638; *Railroad v. Miller*, 25 Mich. 274. See, also, Beach, Cont. Neg. 39, 40, 258. It matters not what degree of care may be required of the defendant, or how negligent he may be, yet, if the plaintiff, by his negligence, contributed in any degree to the injury complained of, he cannot recover. This rule has been consistently and uniformly declared from the time of Lord ELLENBOROUGH's decision in *Butterfield v. Forester*, 11 East, 60, to the present. A man is as much bound to avoid a known danger on a public highway as anywhere else. *Forks Tp. v. King*, 84 Pa. St. 230; *Durkin v. City of Troy*, 61 Barb. 437; *Erie v. Magill*, 101 Pa. St. 616; *Railway Co. v. Taylor*, 104 Pa. St. 306.

*Knox & Reed and C. S. Crawford*, for defendant in error.

The only question arising upon the record in this case, and argued on behalf of plaintiff in error, is whether, under all the evidence in the case, plaintiff in error was guilty of such contributory negligence as would defeat his right to recover damages for the personal injuries he sustained while crossing the company's bridge on the night of March 8, 1886. This question, of necessity, became a question of fact for the jury, and was very properly left to the jury to pass upon. "The question of contributory negligence is a mixed question of law and fact. When the facts are undisputed, the court should declare the law thereon; but when the evidence of contributory negligence is conflicting, or the facts on which a right to recover are controverted, a jury should pass upon that evidence and upon those facts." *City of Harrisburg v. Saylor*, 87 Pa. St. 216. "Negligence is always a question for the jury when there is reasonable doubt as to the facts, or as to the inferences to be drawn from them. Where the measure of duty is ordinary and reasonable care, and the degree of care varies according to circumstances, the question of negligence is necessarily for the jury." *Railroad Co. v. White*, 88 Pa. St. 327. "Where a point is presented reciting certain facts in the cause which, standing alone, would warrant the affirmance of the point, if there be other facts in evidence qualifying those stated in the point, it is not error to refuse to affirm the point." *City of Altoona v. Lotz*, 18 Wkly. Notes Cas. 524, 7 Atl. Rep. 240. Mr. Justice PAXSON, in *Oil City, etc., Bridge v. Jackson*, Pittsb. Leg. J., October 27, 1886, says: "It being the duty of the company to keep the bridge in repair, it is evident that had the accident been the result of its being out of repair the company would have been liable, even though such defect was latent, and the company had no knowledge of it. Thus, if there had been a defective plank or a hole in the carriage-way, and an accident had resulted therefrom, there could have been no question of the liability of the company therefor, even though ignorant of the existence of such defect. To this extent the company may be said to insure the safety of those who cross its bridge."

PER CURIAM. The court below was clearly right in all its rulings. The plaintiff, having paid his toll, had a right to expect that the bridge was safe, and that he might walk over it without danger. His previous knowledge of the defective plank in nowise compromised him, for he might justly suppose that the company had in the mean time discharged its duty by repairing the defect. It was an insurer as against any defect which it could foresee and prevent, and especially as against a defect, such as the one in this case, arising from its own neglect, and it cannot avoid responsibility by charging the plaintiff with a knowledge of that negligence. Judgment affirmed.

## MUTUAL LIFE INS. CO. OF BALTIMORE v. McSHERRY.

*(Court of Appeals of Maryland. December 9, 1887.)*

## 1. CORPORATIONS — IGNORANCE OF BY-LAWS NO EXCUSE TO DIRECTOR — LIMITATION OF ACTIONS.

Plaintiff's decedent had contributed to the guaranty fund of the defendant, of which he was a director. The by-laws provided that, on the death of a subscribing director, his subscription should be returned to his representative, after his successor was elected. Plaintiff was elected to succeed decedent, and the board voted to withdraw all but 20 per cent. of the guaranty capital. Plaintiff received the note held by the company for decedent's subscription, and gave a check for the 20 per cent. to the company. Nine years after he sued to recover it back, defendant pleaded the statute of limitations, and plaintiff replied that one L., whom he supposed to be general manager, told him it must be paid to get back the note, and that he was in ignorance of the by-law until within three years. *Held*, that as he was a director of the company, his ignorance of the by-law was the result of his own want of care, and that as there was no proof that L. was an agent acting in the scope of his authority, or that defendant had subsequently ratified what he had said or done, no fraud could be imputed to defendant, and the statute of limitations was a bar.

## 2. LIMITATION OF ACTIONS—KNOWLEDGE OF FACTS—MEANS OF ASCERTAINING.

Plaintiff, in reply to a plea of the statute of limitations, alleged that he was ignorant, until a short time before bringing the suit, that any cause of action existed, and that it had been fraudulently concealed from him. *Held*, that if plaintiff was fully informed of, or had the means of becoming acquainted with, all the facts in the case, he could not avoid the plea of limitation.<sup>1</sup>

## Appeal from Baltimore city court.

Action by William A. McSherry, surviving administrator of John A. McSherry, against the Mutual Life Insurance Company of Baltimore to recover money paid under an alleged mistake. Judgment for the plaintiff, and defendant appealed.

*M. W. Audoun and J. Wilson Leakin*, for plaintiff. *C. J. Bonaparte*, for defendant.

YELLOTT, J. The appellant was authorized by the act of incorporation to acquire property, not exceeding \$100,000, as a guaranty capital for its business. John A. McSherry, the appellee's intestate, was a director in said corporation, and on July 1, 1873, contributed \$10,000 to this guaranty capital in the form of a demand note to the order of Rand, McSherry & Co., and indorsed by that firm. John A. McSherry continued to be a director of the corporation until November 28, 1874, on which day his death occurred, and the appellee and Joseph H. Audoun were appointed his administrators by the orphans' court of Baltimore city. At the time of giving the note already mentioned, there was a by-law of the corporation which provided that, "in case of the resignation, displacement, or death of any director who holds any portion of the guaranty capital, the securities or property contributed by him to said guaranty capital shall be returned him or his representative by the board thirty days after the election of his successor."

On the fifth of April, 1876, the appellee was elected a director to fill the vacancy caused by the death of the said John A. McSherry. There can be no doubt that, 30 days after his election to fill the vacancy, he and his co-administrator could, in conformity with the provisions of the by-law, have demanded and would have been entitled to receive the note for \$10,000 given by his intestate as his contribution to the guaranty capital of the company. But no such demand was made. On the same evening when the appellee was elected a director, he and his co-administrator being present, a resolution was unanimously adopted to withdraw all except 20 per cent. of the guaranty capital, that being necessary "to restore the reserve assets of the company to the re-

<sup>1</sup> See note at end of case.

quired legal standard." It was further provided by this and a subsequent resolution that the company should issue scrip for the amount of the assessment, "such scrip, principal and interest, payable as soon as the reserve assets of the company shall exceed the reserve required by law, and the amount of scrip authorized, and \$10,000. It is shown by proof in the record that the reserve assets of the company have never, since June 20, 1877, exceeded the reserve required by law, and the amount of scrip authorized to be issued by the resolution of April 5, 1876, and \$10,000.

On June 20, 1877, the appellee's co-administrator, who had charge of the funds and all the arrangement of the estate, as is shown by the appellee's testimony, gave his check to the appellant for \$2,000, being 20 per cent. of the amount contributed by his intestate to the guaranty capital, and received a certificate in conformity with the resolution of the company, and had the note for \$10,000 originally given by his intestate returned to him at the same time. There was subsequently an allowance for this payment in the administration account. The death of the appellee's co-administrator occurred in April, 1884, and this suit was instituted in November, 1886, for the purpose of recovering the \$2,000, paid by him in June, 1877, or more than nine years before the commencement of the action.

There are in this record no prayers for instructions offered by the plaintiff in the court below, and the only questions which can be considered and determined by this court are such as are presented by the exceptions taken to the rejection of all the defendant's prayers, except the sixth. The first prayer of the defendant asks the court to say to the jury that, assuming the evidence of the plaintiff to be true, and giving him the benefit of every inference which could be reasonably drawn to his advantage from it, or from that offered by the defendant, he has made out no such case as could entitle him to their verdict under the issues joined in the cause, and their verdict must therefore be for the defendant. The view which we take of this case renders it unnecessary to determine anything in relation to the ruling on this prayer.

The second and third prayers of the defendant are founded on its plea of limitation. The appellee, in his replication, meets this plea by averring a fraudulent concealment of his cause of action by the defendant, and alleges that he brought his action within three years from the time when he could, by usual and ordinary diligence, discover the fraud. These averments are put in issue by the defendant's rejoinder. The proof adduced in support of the averment of fraudulent concealment is the testimony of the appellee that he was ignorant of the existence of the by-law which authorized him to demand, and entitled him to receive, the note given by his intestate, and that one Dr. Lansberg told him that the only way to obtain said note was by paying the assessment of \$2,000, and advised him to do so. He supposes that Lansberg was the manager of the company, as he was always advising and directing what should be done. But Lansberg was neither the president nor a director of the company; and it is perfectly apparent that he could not be its general and exclusive manager, as the act of incorporation places the general management of the affairs of the company under the control of its president and board of directors. Lansberg might have been an agent of the company for the transaction of some part of its business. There is no proof of such agency, and, assuming that this person was the company's agent, in order to legally establish fraud practiced by the appellant, it would be necessary to show, by competent evidence, either that the agent was acting within the scope of his authority, or that the principal had subsequently ratified what he had said and done. No such proof is disclosed by this record, and therefore no fraud is imputable to the appellant. *Railroad Co. v. Wilkins*, 44 Md. 27; *Carter v. Machine Co.*, 51 Md. 298.

The appellee not only relies upon the alleged fraudulent concealment of the appellant, but also upon his own ignorance of the existence of the by-law

already referred to. The only proof in support of the averment of ignorance is to be found in his own testimony. He says he asked several of the directors, and some of the employes in the office, and that it seemed impossible to get a copy of these by-laws. In contradiction of this testimony, the president of the company, when examined as a witness in the cause, said "that the green books containing the by-laws had been printed in 1873 to give information to all persons interested in the company, and were kept constantly in his office for distribution to any one who asked for them, and that the plaintiff, by asking, could at any moment have obtained a copy." As the appellee had important duties to perform, not only as a director of the company, but also as an administrator of the estate of a decedent who had been extensively interested in the affairs of the company, it is manifest that his ignorance of the existence of the by-laws was the result of that want of care and diligence which should have actuated him in the discharge of the duties devolving upon him in both capacities. As more than nine years had elapsed after the alleged cause of action had accrued before this suit was brought, the defendant had a legal right to rely upon the plea of limitation, and the court below erred in rejecting its second and third prayers.

The defendant's fourth prayer enunciates the proposition that there is no legally sufficient evidence that the check of the twentieth of June, offered in evidence, was given by its signer under any mistake of fact or in consequence of any fraud, and, therefore, under the pleadings and all the evidence in the case, the verdict must be for the defendant. From what has already been said in relation to alleged fraud on the part of the appellant, and mistake resulting from ignorance on the part of the appellee, it is apparent that this instruction should have been granted.

The fifth and seventh prayers of the defendant should also have been granted. They simply enunciate the proposition that, if the plaintiff and his co-administrator were present at a meeting of the defendant's directors on April 5, 1876, and that the plaintiff was present at a meeting on May 2, 1877, and that both were cognizant of the proceedings as set forth in the minute-book read in evidence, then the plaintiff could not maintain this action. This would have been tantamount to saying that, if the plaintiff was fully informed of, or had the means of becoming acquainted with, all the facts connected with the transactions out of which this suit has grown, he could not avail himself of the averment of ignorance on his part or of fraud practiced by his adversary in the cause so as to avoid the legal operation of the plea of limitation interposed as a bar to the remedy which he has sought to obtain.

From what has been said, it follows that the judgment of the court below must be reversed.

#### NOTE.

**LIMITATIONS—CONCEALMENT OF CAUSE OF ACTION.** When a party is prevented by the fraud or actual fraudulent concealment of another from obtaining knowledge of a cause of action existing in his favor against the latter, the statute does not commence to run until the right of action is discovered, or until, with the use of due diligence, it might be discovered. *Bradford v. McCormick*, (Iowa,) 32 N. W. Rep. 93; *Wilder v. Secor*, (Iowa,) 33 N. W. Rep. 448. The rule applies when the cause of action does not grow out of the fraud alleged, but exists independently of it, and is governed by the general statute of limitations. *Bradford v. McCormick*, *supra*. The concealment must consist of some affirmative act or line of conduct. Mere silence does not amount to such a concealment as will take a cause of action out of the operation of the statute. *Churchman v. City of Indianapolis*, (Ind.) 11 N. E. Rep. 301. The mere fact that a plaintiff is ignorant of facts constituting a cause of action does not prevent the running of the statute from the time the right of action accrues. *Welton v. Merrick*, (Neb.) 20 N. W. Rep. 111; *Dee v. Hyland*, (Utah.) 3 Pac. Rep. 388. If a party, with ordinary care and attention, could detect fraud, he will be charged with actual knowledge of it. *Welton v. Merrick*, *supra*. Where one injured through the negligence of another was placed by the latter in the care of a doctor, who had previously acted as physician for both parties, held that false representations made by the physician to the plaintiff

as to his injuries would not prevent the running of the statute, the latter only being misled as to the extent of his injuries, and it not being alleged that the defendant employed the doctor to make such false representations. *Chamberlain v. Railroad Co.*, 27 Fed. Rep. 181.

### OTT v. KAUFMAN.

(Court of Appeals of Maryland. December 9, 1887.)

#### ABATEMENT AND REVIVAL—DEATH OF DEFENDANT—SURVIVAL OF ACTION FOR ASSAULT AND BATTERY.

Under Code Md. art. 50, § 146, providing that actions for personal injuries and slander shall not survive against the administrator or executor of the testator or intestate, an action to recover consequential damages for an assault and battery on plaintiff's wife is not maintainable against the executrix of defendant, as the right depends upon the nature of the action, and not upon the character of the damages claimed.<sup>1</sup>

Appeal from court of common pleas, Baltimore city.

Action by Gottfried Ott, to recover damages for an assault and battery on his wife, against Joseph Kaufman, and, defendant dying pending the suit, against his executrix, Anna Mary Kaufman.

*D'Arcy Paul*, for appellant. *W. Pinkney Whyte*, for appellee.

ROBINSON, J. This is an action by a husband to recover damages for an assault and battery on his wife, *per quod* he lost her services, and was obliged to expend money for medical and other attendance upon her. Pending the suit the defendant died, and the question is whether the action survives against his executrix; and this depends upon the construction of section 146, art. 50, Code, which provides that personal actions of every kind, except actions for personal injuries and slander, shall survive against the executor or administrator of the testator or intestate. Actions for personal injuries are thus expressly exempted from the saving clause of the statute, and this would seem to be conclusive as to the question now before us. The argument, however, is that the plaintiff is not seeking to recover damages for the personal injury to his wife, but consequential damages, for the loss of her services, etc. This is true, but the injury to his wife is, after all, the foundation of the action; and the question whether the action survives on the death of the defendant depends upon the nature of the action itself, and not upon the character of the damages claimed. At common law, personal actions of every kind abated on the death of the sole plaintiff or sole defendant, and, if the action was founded on contract, a new action would lie against the executor or administrator; but if the action was founded on a tort, for a wrong committed by the defendant, it did not survive,—the maxim being *actio personalis moritur cum persona*. *Humbly v. Trott*, Cowp. 374; *Wheatly v. Lane*, 1 Saund. 216a; *Wentworth v. Cock*, 2 Perry & D. 257. In the language of Lord MANSFIELD, the wrong and the wrong-doer were buried together. So, at common law, an action would lie in the name of the husband and wife for the personal injury to the wife, and another action in the name of the husband to recover consequential damages for the loss of her services; but neither of these actions survived on the death of the defendant. And when the Code says an action for a personal injury shall not survive against the administrator or executor of the defendant, it means an action founded on a personal injury, without regard to the nature of the damages claimed. Now, *Oregin's Case*, 83 N. Y. 596, was based upon the New York statute which provides that actions for wrongs done to the "property," "rights," and "interests" of another shall survive, and not abate by the death of the

<sup>1</sup>In Michigan, causes of action for assault and battery and for false imprisonment survive. *Dayton v. Fargo*, 7 N. W. Rep. 758. See *Everett v. Railroad Co.*, (Iowa,) 28 N. W. Rep. 410, and note.

plaintiff or defendant. And in that case, where the wife was injured through the negligence of the defendant company, the court held that the action brought by the husband to recover damages by way of compensation for the loss of his wife's services, and expenses incurred for medical attendance, did not abate on the death of the plaintiff. The wife's services, say the court, were of a pecuniary value to the husband, and a wrong done by which he was deprived of such services was a wrong done to his "rights" and "interests" within the meaning of the statute. There is no such language, however, as "wrongs done to the rights and interests" of another in our Code, and the decision in that case cannot be accepted as an authority in the construction of our statute. Judgment affirmed.

#### GREENLAND v. COUNTY COM'RS OF HARFORD CO.

(Court of Appeals of Maryland. December 9, 1887.)

#### HIGHWAYS—APPLICATION TO OPEN—DECISION OF CIRCUIT COURT ON APPEAL FINAL.

Code Gen. Laws Md. art. 28, § 12, provides that applications for opening roads shall be by petition to county commissioners. Rev. Code, art. 71, § 90, provides for an appeal from the decision of the commissioners to the circuit court, whose judgment on such appeal shall be final. On petition, examiners were appointed by county commissioners, who laid out a road over the land of plaintiff. An appeal was taken to the circuit court, when a judgment was rendered, and plaintiff brought a writ of error. *Heid*, that there was no appeal from the judgment, and a writ of error had no greater effect than an appeal.

Error to circuit court, Harford county.

*Herman Stump and W. H. Harlan*, for plaintiff in error. *W. Young and S. A. Williams*, for defendants in error.

**YELLOTT, J.** Proceedings were commenced in this case by a petition invoking the official action of the commissioners of Harford county, and asking for the opening of a public road over the lands of the plaintiff in error, and of other citizens of said county. Upon this petition, a commission was issued to examiners, and from the order confirming the report of said examiners an appeal was taken to the circuit court for Harford county. In that court, issues were framed, and a trial by jury resulted in a verdict and judgment. The cause has been brought into this court on writ of error founded on alleged irregularities in the proceedings.

It is clear that the only question which can be considered and determined in this court is that which relates to the jurisdiction of the court below. If that court assumed a jurisdiction which did not belong to it, and the proceedings were *coram non judice*, the interposition of this court has been properly invoked; but if the circuit court had jurisdiction, then its alleged error and irregularities cannot be reviewed and corrected in the court of appeals of this state, because the statute, giving an appeal from any decision or order of the county commissioners to the circuit court, says that the judgment of said court on such appeal "shall be final, and may be enforced by due process of law." Rev. Code, art. 71, § 90. If the court below acted in the exercise of a special jurisdiction given by a statute which does not provide for the further prosecution of the cause, but in express terms renders its judgment a finality, then no supposed error committed by it can be brought here for revision and correction. As was decided by this court in the very recent case of *Gaither v. Watkins*, 66 Md. 582, 8 Atl. Rep. 464, "if the county commissioners had jurisdiction over the subject-matter, subsequent irregularities in their proceedings, or in those of the examiners, were matters to be taken advantage of by way of appeal to the circuit court. Such irregularities in no manner affected their jurisdiction over the subject-matter." In the case just cited, this court has decided that "the county commissioners have exclusive jurisdiction in regard to the opening of public roads." This jurisdiction is given by the general law applicable to all the coun-

ties in the state. The Code of General Laws, art. 28, § 12, provides that "all applications for opening, altering, or closing roads shall be by petition to the county commissioners." The local law of 1878, c. 356, does not confer the jurisdiction. It simply designates the mode and manner in which the jurisdiction given by the general law shall be exercised with respect to the publication of notices and other papers. It has no application, as has been contended, to the petition and notice coming from persons applying for the opening, altering, locating, or widening of any road. If it did, then a non-compliance with its provisions would affect the question of jurisdiction. If the commissioners had no jurisdiction, the circuit court would have none. The act is intended to apply to the publication of notices and other papers by the commissioners after they have proceeded to exercise the jurisdiction conferred by the general law.

It is manifest that if the commissioners of Harford county, in the exercise of the jurisdiction conferred by the general law, deviated from the provisions of the local law with respect to the publication of any notice or other paper, they committed an error which, as this court has said in 66 Md., could have been corrected on an appeal to the circuit court. The circuit court had jurisdiction, and even if it committed errors, as has been alleged by the plaintiff in error, such errors cannot be examined and corrected in this court, because the statute giving appellate jurisdiction to the circuit court declares that its judgment shall be final and conclusive. As was said in *Rundle v. Mayor, etc.*, 28 Md. 356, which was an appeal from the judgment of the criminal court dismissing an appeal from the commissioners for opening streets: "If no appellate power whatever had been conferred on the criminal court of Baltimore in such cases, its judgment, unwarrantably pronounced in assertion of jurisdiction over the subject, might by appeal be reviewed and reversed in this court." But the court proceeds to say that, the right of appeal to the criminal court being given, "its judgment is final and conclusive; there being no right of appeal given by statute from such judgment." This case, it is true, is brought here, not on appeal, but by writ of error; but the same principle is applicable. In *Coston v. Coston*, 25 Md. 504, it was decided that a writ of error has no more extensive range or greater effect than an appeal; they being but different modes of obtaining a review of judgments of courts of inferior jurisdiction in an appellate tribunal.

From what has been said it is apparent that this writ of error should be dismissed. Writ of error dismissed.

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TISE and others v. SHAW.

(Court of Appeals of Maryland. December 14, 1887.)

For opinion of the court, see *ante*, 363.

ALVEY, C. J., (*dissenting*.) With the greatest respect for the opinions of others, I cannot agree to the opinion of the court rendered in this case. The plea of infancy interposed here has the effect, and was intended to have the effect, of the plea of parol demurrer, as that anomalous and antiquated plea is defined by the common law, or, rather, the feudal law, on the principles of which the plea is founded. The second section of the act of 1785, c. 80, embodied in the Code as section 40 of article 75, seems to have been taken almost literally from the third book of Blackstone's Commentaries, p. 800, where the parol demurrer is defined; and what the defense really is, and when it could be invoked in England, before it was abolished by statute, may be seen in the case of *Plasket v. Beeby*, 4 East, 485, where the form of the plea, and the prayer that the parol may demur, may be found. It is matter of defense only by way of suspension of the right to prosecute the action until all the infants may arrive at the full age of 21 years. It is a dilatory plea, and like all other

dilatory pleas, it cannot be pleaded with pleas in bar of the action; for if pleas in bar are interposed with dilatory pleas, or before matters pleaded in abatement or suspension of the action are disposed of by the court, such dilatory defense is, by the well-established principles of pleading, waived and abandoned. *Chapman v. Davis*, 4 Gill, 166, 176; *Cruzen v. McKaig*, 57 Md. 459; *Sheppard v. Graves*, 14 How. 505; *Railroad Co. v. Harris*, 12 Wall. 65, 84; Steph. Pl. 430, 431; 1 Chit. Pl. (16th Ed.) 463. Here, the infants, by their guardian, have pleaded "that the right of possession," as well as the actual possession, of the real estate sued for, is in them, which is a plea in bar of the right of the plaintiff to recover; for the plaintiffs cannot recover unless they have both the legal title and the immediate right of possession at the time of bringing the action. *Wilson v. Inloes*, 11 Gill & J. 353; *Lannay v. Wilson*, 30 Md. 546. But with this plea in bar was also pleaded the infancy of the defendants, though without observing the formality of such plea, by praying the parol to demur. There was a motion by the plaintiffs that this dilatory plea should not be received, and I think that motion should have prevailed. In the case of *Derisley v. Custance*, 4 Term R. 75, it was held that an infant could not pray the parol to demur in any stage of the proceeding, after pleading to the merits of the suit. And in that case Mr. Justice BUTLER said: "If the defendant had intended to take advantage of his infancy, he should have done it before he pleaded, for it is a dilatory plea, and does not go to the merits; it only suspends the proceeding." The plea certainly has nothing to commend it, and the strictest rules ought to be applied to it.

But I dissent from the opinion of the majority of the court upon a broader ground than that of mere matter of pleading. In my judgment, that provision of the Code, taken from the act of 1785, c. 80, which authorizes the suspension of the prosecution of actions until the infant defendants, however young, attain full age, is contrary to the fundamental principles of right and justice, and is therefore unconstitutional and void. This is an action of ejectment, wherein it is alleged that the land sued for is the property of the plaintiffs, and that it was tortiously entered upon by the father of the defendants, and the plaintiffs wrongfully ejected therefrom. After the action was brought against the party alleged to be a wrong-doer he died, and his infant children, as his heirs at law,—some of them very young,—have been made defendants; and because of this accidental change of parties in the course of the proceeding, it is now determined that, by virtue of the provision of the statute, these children of the party alleged to be the wrong-doer are to be allowed to remain in possession and enjoyment of this property for the next 20 years to come, at the expiration of which time the property may be shown to be the rightful estate of the plaintiffs, after it has, perhaps, been devastated and ruined,—and all this to be effected under the forms of law.

There are some things, I apprehend, that the legislature cannot do; and among these is the exercise of power to take the private property of one man and confer it upon another, even for a limited period or use, (*University v. Williams*, 9 Gill & J. 365;) and, that being so, it is difficult to distinguish that case from the present, where the law is made to operate to prevent the recovery by the owner of property wrongfully withheld from him. It is clearly a denial of justice; the closing of the courts against a party who may have been grievously wronged, and whose property may be secured to the use of the infant defendants, against all right, for a period of half a life-time. In my judgment, a statute that works out such a result is in derogation, not only of the first principles of justice, but of the nineteenth section of the declaration of rights, which provides "that every man, for any injury done to him, in his person or property, ought to have remedy by the course of the law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the law of the land." If this declaration of fundamental principle is to have any force or effect in restrain-

ing legislative power, it would seem to be sufficient to protect the plaintiffs in this case against a great wrong which they might show to exist in violation of their right of property.

It is for the reasons that I have briefly assigned that I feel constrained to dissent from the opinion of a majority of the court.

GAMBLE and others v. SENTMAN.

(Court of Appeals of Maryland. December 15, 1887.)

1. APPEAL—TRANSMISSION OF RECORD—TIME RUNS FROM DATE OF ALLOWANCE.

Judgment was rendered on the first of April, 1887. The petition for a writ of error was filed on the eleventh of that month, and the court ordered its allowance on the thirtieth of June following. The transcript of the record was brought into the court of appeals within three months from the date of the order. *Held* that, under rule 2 of the Maryland court of appeals, as amended by rule 27, the time of three months for transmission runs from the date of the order allowing the writ of error or appeal.

2. TENDER—PAYMENT INTO COURT—VERDICT FOR EXACT AMOUNT OF TENDER—COSTS.

Defendants paid into court \$160, under Rev. Code Md. 1878, art. 64, § 81, which allows defendants in certain actions to pay into court a sum of money by way of compensation or amends. Plaintiff, under section 82, replied that the sum paid in was not enough to satisfy the claim. The statute further provides that, "in the event of an issue thereon being found for the defendant, the defendant shall be entitled to his costs of suit, and the plaintiff to so much of the sum paid into court as shall be found for him." The jury brought in a sealed verdict for plaintiff for \$160, without stating whether it was for the sum paid in or for damages *ultra* that amount. *Held*, the verdict being for the precise sum paid into court, and it being apparent that the jury could not have intended their verdict to be for that amount in addition, the trial court, after directing the money to be delivered to plaintiff, should under the statute have entered judgment for defendants, and directed the costs to be taxed in their favor.

Appeal and writ of error in one record from circuit court, Cecil county.

*Wm. S. Evans and R. E. Thackery*, for appellants. *Albert Constable*, for appellee.

MILLER, J. The motion to dismiss the writ of error in this case is overruled. The judgment was rendered on the first of April, 1887. The petition for the writ was filed in due time, on the eleventh of April, and the order of court allowing it was passed on the thirtieth of June following. The transcript of the record reached this court on the fifth of September, within three months from the date of the order allowing the writ, and, under rule 2, relating to appeals, as amended by rule 27, the time for transmission runs from the date of that order.

The third plea is in the form set out in 1 Poe, Pl. & Pr. § 611, and is similar to that found in 2 Chit. Pl. (17th Amer. Ed.) 471. It admits part of the plaintiff's claim, with tender and payment into court of such part, and denies the residue. It is, in effect, a plea of payment of money into court under sections 19 and 20, art. 75, of the Code, which is a species of tender. 1 Poe, Pl. & Pr. § 695. These sections are substantially copied from the statute of 3 & 4 Wm. IV. c. 42, § 21, and the rules as to costs thereby provided. Their object is to encourage the settlement of suits without the cost and delay of trial. They allow a defendant, except in certain actions, "to pay into court a sum of money by way of compensation or amends," and such payment may be set up by plea. The plaintiff, then, after the money has thus been paid in, may reply by accepting the same "in full satisfaction and discharge of the action;" and if he does this, he may have his costs taxed, and if they be not immediately paid, he shall have judgment therefor; or he may reply that the sum paid in "is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded," and in the event of an issue thereon being found for the defendant, the defendant shall be entitled to his costs of

suit, and the plaintiff to so much of the sum paid into court as shall be found for him." In the present case the plaintiff adopted the latter course. His replication follows the language of the statute. Issue was joined upon it, and, in view of this issue and the provisions of the statute, the question arises, how is the sealed verdict to be interpreted?

The concluding paragraph of the law, as above quoted, plainly indicates that, where the plaintiff replies that the money paid in is not enough to satisfy his claim, it is the duty of the court to hold on to the money until the issue on that replication is decided, and then to pay over to the plaintiff only so much of it as the jury may find to be due him. It also indicates with equal clearness that, upon such issue, the jury may find, either that the whole amount paid in, or a less sum, is due to the plaintiff; and whether their verdict be for the whole or a less sum, it is practically a verdict for the defendant, because the plaintiff has not succeeded in maintaining his replication. But the sealed verdict in this case is for the plaintiff generally for a specific sum, without stating (as it ought to have done) whether it was for the sum paid in or not; and it has been earnestly contended by counsel for the defendant in error that it is a verdict in favor of the plaintiff for damages *ultra* the amount paid in, and that such is its necessary construction and legal effect. In this view the court below concurred, and acted accordingly. They allowed the plaintiff to take out of court the \$160 paid in, and to recover another sum of \$160 by giving judgment in his favor on the verdict. After a careful consideration of the question, and of the able argument of counsel thereon, we are of opinion this was error. Ordinarily there is little difficulty in determining what a verdict means; and we are mindful of the rule that on writ of error every intendment must be made in support of the verdict. But in this case, and under the issues joined on these pleadings, and the peculiar provisions of the statute, we think the true meaning of this verdict is that the jury found that the plaintiff was entitled to the sum paid into court, and no more. It is for the precise sum so paid in, and this is a circumstance which has potent weight in determining its meaning, and the intention of the jury in finding it. Again, the note as declared on in the first count of the declaration bore interest on its face from its date, and the jury were bound to allow such interest in making up their verdict, if their intention was to give the plaintiff \$160 in addition to what was paid in. But by no correct method of calculating interest up to the time the verdict was rendered, could this sum be made out as then due on this note over and above the amount paid in. Such then being, in our opinion, the true construction and legal effect of this verdict, it follows that the court, after directing the money to be delivered to the plaintiff, should, under the statute, have entered judgment on the verdict for the defendants, and directed the costs of the suit to be taxed in their favor. The question we have thus decided is plainly presented by the third and fifth assignments of error in the petition for the writ, and, as this disposes of the case, it dispenses with the necessity of considering the other grounds of error set out in the petition for the writ. We reverse the judgment and remand the case, in order that a judgment may be entered and the costs taxed as above stated.

The record entries show that, after the court has overruled the defendant's motion to amend the judgment, they prayed an appeal on the same day, which was the first of April, 1887. This appeal has been docketed in this court, but the motion to dismiss it must prevail, as the transcript of the record was not transmitted to this court within three months from the date of the appeal, according to the rule on that subject. Appeal dismissed.

## YEARLY v. COCKEY.

(Court of Appeals of Maryland. October Term, 1887.)

EXECUTORS AND ADMINISTRATORS—FINAL SETTLEMENT—OPENING—ESTOPPEL BY DELAY.

Plaintiff's intestate left certain property, and her husband was appointed administrator. He died before the estate was settled, and his executor settled that estate as well as that of his testator. The next of kin of plaintiff's intestate had full notice of all proceedings, and acquiesced in them. Eighteen years after the settlement of the estates a descendant of the next of kin petitioned to have the settlement of testator's estate opened, on the ground that testator had not reduced certain personal property of his wife to possession, and it should not therefore have been included in his estate. *Held*, that the acquiescence for 18 years in the settlement, of which they had full notice, estopped the next of kin or their descendants from raising any objections to the proceedings.

Appeal from orphans' court, Baltimore county.

*D. G. McIntosh* and *S. T. Wallis*, for appellants. *Robert Baldwin*, for appellee.

**MCSherry, J.** In 1860 Mary A. Cockey died intestate, leaving her husband, Thomas B. Cockey, one sister, and four brothers, but no children, surviving her. At the time of her death she owned real and personal property. Letters of administration were granted upon her personal estate on April 3, 1867, to her husband, who, on the ninth of that month, returned to and filed in the orphans' court of Baltimore county an inventory of a part of the personal property of his deceased wife. That inventory embraced the following items: One share of Baltimore city stock, one redeemable subground rent, and two hundred shares of the capital stock of the Reesterstown Turnpike Company. On the seventeenth of November, 1859, Benjamin Horn and wife executed to Mary A. Cockey a mortgage upon real estate situated in Baltimore city, to secure the payment in 10 years from that date of a promissory note for \$4,000, and the payment of 20 other promissory notes of the like date for the semi-annual interest on the principal sum. After her death this mortgage and these mortgage notes passed into the actual possession of her husband, who collected the interest notes as they matured until the time of his death, which occurred in 1868, before the mortgage fell due. Mr. Cockey made no settlement or distribution of his wife's estate in the orphans' court, and did nothing further respecting it than to file the inventory already alluded to. During his life he collected the interest in the share of Baltimore city stock, and the dividends on the turnpike stock, but took no steps to have the certificates transferred to himself, suffering them to remain standing in the name of his wife. After his death, letters testamentary were granted upon his estate by the orphans' court of Baltimore city to the appellant, Thomas C. Yearly, the executor, named in his will. On the seventh of April, 1869, Mr. Yearly, as executor of Thomas B. Cockey, settled an account in the estate of Mary A. Cockey in the orphans' court of Baltimore county; and in that account charged his testator, the administrator of Mrs. Cockey, with the amount of the inventory previously filed by Mr. Cockey, and after taking credit for sundry small items of costs, obtained a further credit for the "rest and residue of decedent's personal estate retained by this accountant's testator, as husband and sole heir at law of deceased." Neither this inventory nor this account included the mortgage or the mortgage notes held by Mrs. Cockey at the time of her death. In November, 1869, Mr. Yearly, as executor of Thomas B. Cockey, collected the Horn mortgage, surrendered the mortgage notes paid to him, released the mortgage, and carried the amount thus collected into the personal estate of Thomas B. Cockey, which he shortly thereafter settled and distributed, in the orphans' court of Baltimore city, according to his testator's will, to Charles T. Cockey, the legatee thereunder. Charles T. Cockey since then has received the interest and dividends on the city and the turnpike

stocks, though the former still stands in the name of Mary A. Cockey, the latter having been transferred by Mr. Yearly to Charles T. Cockey, along with other stock of the same company, which stood in the name of Thomas B. Cockey. The leasehold property was disposed of by Mr. Cockey in his lifetime.

The matter stood thus, unchallenged and unquestioned by any of the brothers or by the sister of Mary A. Cockey during their lives. But on the second of March, 1887, after the death of these brothers and of this sister, and nearly 18 years after the settlement by Mr. Yearly in the orphans' court of Baltimore county of the account referred to, in the estate of Mary A. Cockey, the appellee, Joshua F. Cockey, who had been appointed, on the sixteenth day of February in that year, administrator *de bonis non* of Mary A. Cockey's estate, presented to the orphans' court of Baltimore county a petition, which was followed on the thirteenth of March succeeding by an amended petition, claiming that these stocks and the mortgage notes had never been reduced into possession by Thomas B. Cockey in his life-time, and that they were consequently erroneously included by his executor in his estate; and praying that the account so passed on the seventh of April, 1869, might be opened, and that Mr. Yearly, as executor, might be required to deliver to the appellee, the administrator *de bonis non*, all bonds, notes, accounts, and certificates of debt which said deceased administrator, Thomas B. Cockey, may have taken, etc. To this petition an answer was filed by Mr. Yearly, wherein he avers that the full and exclusive ownership in the property in question was asserted by Mr. Cockey, and that the distribution of Mrs. Cockey's personal estate was thoroughly known to and acquiesced in by the parties interested. Charles T. Cockey also answered. The orphans' court passed an order granting the prayer of the petition, and from that order this appeal has been taken.

As the mortgage from Horn to Mrs. Cockey did not mature during the life-time of Mr. Cockey, it was, of course, impossible for him to have enforced payment of it; and it has been, therefore, urged that, by reason of this fact, there could not have possibly been, and really was not, a reduction of it into possession on his part. It has been further insisted that there was not in fact a reduction by him into possession of the city and turnpike stocks. However this may be, and whether the acts relied on as evidencing a technical reduction of these choses in action into the possession of the husband are consistent solely with that theory, or are equally compatible with the mere enjoyment by Mr. Cockey of a life-estate in his wife's personal property, there is, in the view we have taken of this case, an objection, at its very threshold, which entirely precludes affirmance of the order of the orphans' court.

The administration account, which has been assailed, was passed, as we have stated, in the orphans' court of Baltimore county on the seventh of April, 1869, while the four brothers and the one sister of Mary A. Cockey were all living. It is clearly established by the evidence in the record that these only next of kin of Mrs. Cockey had full knowledge of that settlement and of the distribution of the estate of Thomas B. Cockey; and it is not disputed that "his ownership of the personal property referred to was never questioned during the life-time of the said Thomas B. Cockey by any of" these next of kin. This was fully acquiesced in by them all. After the lapse of so many years, and after the death of these brothers and this sister, the claim now made by some of their descendants is for the first time presented. Can it be entertained under these circumstances?

A matter once settled, without any imputation of fraud, and deliberately acquiesced in by all the parties in interest for so long a period of time, ought not to be lightly disturbed. To tolerate it would be subversive of a most salutary as well as a fundamental principle, and the firmly-settled policy of the law, "as the lapse of time carries with it the life and the memory of witnesses, the muniments of evidence, and the other means of judicial proof." As has

been said by the supreme court of the United States in *Lansdale v. Smith*, 106 U. S. 394, 1 Sup. Ct. Rep. 350, "the peace of society and the security of property demand that the presumption of right arising from a great lapse of time, without the assertion of an adverse claim, should not be disturbed. In such cases sound discretion requires that the court should withhold relief." A contrary doctrine "would violate the best principles of public policy and jurisprudence." *Hawkins v. Chapman*, 36 Md. 83. We can with propriety apply to this case the language of the court of appeals of this state in *Ridenour v. Keller*, 2 Gill, 145, a somewhat analogous cause, viz.: "Our conclusion, from these facts, is placed beyond a doubt by the lapse of time when this distribution was made, before any attempt is made to question its integrity. This transaction slept for more than sixteen years, in as profound silence as its author; and, when an effort is made to drag it up from its long repose, it is not by any charge of deceit, or unfairness, or fraud, but that the letter of the law has not been fully observed, performed, and kept."

If Mrs. Cockey's brothers and sister, who, as is conclusively shown by the evidence in the record, assented to the settlements and distributions in her estate and in that of her husband, and who, with full knowledge, acquiesced therein, were living and had initiated the proceedings now before us, can it be doubted, in view of the principles just invoked, that they would be denied the relief sought here; and that, too, without reference to the question whether there was or was not error in the settlements as made? In a court of equity their acquiescence and their laches would be a bar to any relief. There is no reason that we know of for the application of a different doctrine when the proceedings originate and are prosecuted in the orphans' court instead of in a court of equity. The same policy which dictates a denial, in one tribunal, of relief to those who have slept for so long a period upon their right, with equal force applies to like proceedings in the other. The policy and the reason of the law in this respect are the same in both jurisdictions. We hold, then, that these next of kin would have been precluded from opening this settlement, because of their acquiescence in it, and because of the long delay in inaugurating proceedings to accomplish that end. Are their descendants, now that these next of kin are dead, in any better position to assail this account than were those under whom they claim? It is not perceived that they have, though securing the appointment of an administrator *de bonis non*, acquired, or that they possess, any superior rights. They are visited with all the consequences of the acquiescence and the laches of those under whom they claim. Whatever rights they have succeeded to are subordinate to those consequences.

Without considering the other questions discussed, we are of opinion that there was error in passing the order appealed from, because of the long acquiescence and delay on the part of the next of kin of Mary A. Cockey. We will therefore reverse that order and dismiss the petition.

#### BAUMGARTNER and another v. HAAS.

(Court of Appeals of Maryland. December 9, 1887.)

#### 1. EXECUTORS AND ADMINISTRATORS—EXECUTOR DE SON TORT—POSTPONEMENT OF DEBT—NOTICE OF DISPUTED TITLE.

Defendant, after his debtor's death, took possession of 50 cows covered by bills of sale, absolute on their face, executed during the debtor's life-time. Upon bill filed by another creditor of deceased to set aside the bills of sale as fraudulent, and for general relief, the court decided that there was no sufficient evidence to countervail the presumption of the *bona fides* of the consideration of the sale, but found the description in the bills insufficient to pass title, and in subsequent proceedings defendant was treated as executor *de son tort*, and his debt postponed to those of other creditors. Held, that defendant's claim to have taken possession in good faith, and under color of title, will not relieve him from liability as executor *de son tort*, as the bill filed against him gave him sufficient notice that his title was disputed.

**2. SAME—EQUITY WILL NOT RELIEVE EXECUTOR DE SON TORT.**

A suit by creditors of an estate to order an executor *de son tort* to account, and bring the proceeds into court for distribution among them, postponing such executor's claims to theirs, is not a suit to enforce a penalty, against which equity may relieve, but simply to recover a just debt; and at law the executor *de son tort* is required to pay the assets to other creditors, though nothing would be left to pay his own claim.

Appeal from circuit court of Baltimore city.

Bill in equity by Jacob Haas to set aside bills of sale executed in his lifetime by Frederick C. Baumgartner to Henry Gunther, making Mary E. Baumgartner, administratrix of Frederick C., and Elizabeth Gunther, administratrix of Henry, defendants.

Charles Marshall, Randolph Barton, and Skipwith Wilmer, for appellants. J. W. Denney and Henry F. Garey, for appellee.

STONE, J. The principal question in this case is whether Gunther, one of the defendants, shall be held liable as executor *de son tort*. The facts necessary for us to notice are these: A certain Frederick C. Baumgartner, now deceased, in his life-time executed several bills of sale, absolute on their face, to the defendant Gunther, who was his father-in-law. These bills of sale, among other things, included 50 cows, which were in the possession of Frederick C. Baumgartner at the time of his death. Immediately upon the death of Frederick C. Baumgartner, Gunther took possession of these cows, and continued to carry on the milk business which his son-in-law, Frederick, was engaged in at the time of his death. Letters of administration were, soon after the death of Frederick, granted to his widow, Mary, and she returned a small inventory, not including any of the 50 cows. Within 10 days after the death of Frederick C. Gunther, the complainant, Haas, one of his creditors, filed a bill against Henry Gunther for the purpose of setting aside the aforementioned bills of sale, as fraudulent and void against him, (the complainant,) as a creditor of Frederick, and for general relief, and also made the administratrix Mary a defendant. Answers were duly filed and testimony taken, and the court decided that while there was not sufficient proof to countervail the presumption of the *bona fides* of the consideration of the bills of sale, that the description of the cows was not sufficient to pass any title to them under the bills of sale, and decreed that Gunther should account for them, and from this decree there was no appeal. In the subsequent proceedings in the case, Gunther was treated as an executor *de son tort*, and his debt postponed to the debts of other creditors, and from this, and the valuation of the cows, he has appealed.

It has been strenuously argued by the appellant, Gunther, that he should not be held liable as an executor *de son tort*, because he took possession of these cows under color of title, and that he believed he had the legal right to do so. There are cases to be found where a party has not been held executor *de son tort* where he in good faith, and believing he had the title, took possession of property, and to which it was afterwards shown that he had not a perfect legal title. The leading case on this subject seems to be the case of *Femings v. Jarrat*, 1 Esp. 335. In that case there was a *bona fide* sale of the ship to the defendant, but the bill of sale was defectively executed, and the court held that under such circumstances the defendant should not be held liable as executor *de son tort*. This decision has been followed in several of the states. But in every case to which we have been referred the element of good faith will be found. We by no means intend to assert the extreme proposition that he who takes possession of the goods of the deceased in good faith, and believing he has a good title to them, will be held in all cases as executor *de son tort*. But there must be at least colorable ground for his claim, and good faith in its assertion. Is this the case with Gunther?

Within 10 days after the death of Frederick C. Baumgartner, the complain-

ant filed a bill against Gunther attacking this bill of sale, and claiming that the property should go into the hands of the administratrix. It is true enough that the bill of complaint alleged a want of consideration for the bill of sale, but it also prayed that it might be declared void as against him, and also prayed that Gunther should account to him, and for general relief. This was notice to Gunther that his right to the property was disputed. An opportunity was then afforded Gunther to state fully and frankly his position, and claim to this property. The bills of sale were taken either as a security for a debt, or as an absolute conveyance, and it was incumbent on him to state his claim truly. But his answer on that point is evasive. He does not state explicitly in his answer to the bill of complaint whether he claimed the property absolutely, or only a lien on it for his debt; but when examined as a witness afterwards he admits that the bills of sale were taken as security only. Apart from his own evidence, there are other facts in the case which would clearly prove the same thing. If, then, being only in reality a mortgagee, and knowing himself to be such, he took possession of nearly the whole property of the deceased, a pertinent inquiry at once arises, what was his motive in so doing? These motives are shown, we think, by his subsequent conduct, and his treatment of the property. He (Gunther) kept a feed store; and he continued to feed the cows out of it, and to run the milk business, until his account against the property, according to his own showing, stood, profits from the sale of milk \$1,500; expenses for feed, etc., \$2,900,—and then he sold the cows. The difference he evidently expected to be paid out of the sale of the property. As soon as he took possession of this property, he took measures to prevent the other creditors either from seeing the cattle, or knowing the amount of milk that he was selling. These and other circumstances that might be mentioned are utterly irreconcilable with the theory of an honest mistake, which might relieve him from the liability of an executor *de son tort*. His daughter administered, but he seems to have managed the administration, and, after causing an inventory of something over \$100 in value, he took possession of all the rest, with the result that we have shown. If, under the circumstances we have detailed, the defendant is not to be treated as an executor *de son tort*, how is he to be regarded? He held and used the property of the deceased without the right to do so, and it is difficult to see how he can be called to account for it except as executor *de son tort*; there being at the time a rightful executor.

In *Bentley v. Cowman*, 6 Gill & J. 152, the court distinctly recognize the right to hold a party accountable in equity as executor *de son tort*. In that case, a creditor filed a bill for the sale of the real estate of a deceased debtor, upon the ground that his personal estate was inadequate to pay his debts, and what there was of it had been expended by his heirs without any administration. No account of the personal estate was asked for, and no charge made that the heirs were executors *de son tort*; but the sale of the realty was asked, and the usual prayer for general relief; and Judge DORSEY, in the opinion of the court, says: "But conceding it [a disclaimer by way of plea] to be an unexceptionable disclaimer as to the land, and a bar to all relief sought in relation thereto, it would not warrant the decree dismissing the complainant's bill: the allegations in which not only present a claim against the defendants in respect to the realty of the deceased, but also as executors *de son tort* of the personalty and, although there is no formal prayer for an account in the bill, yet the facts authorizing it are sufficiently charged, and the prayer for general relief entitled the complainants to such an account." This case very clearly recognizes the right to call an executor *de son tort* to an account in a court of equity, as well as by suit at law. In many cases he can be effectually reached only in equity.

In the case at bar, there is both a prayer for an account, and for general relief, and the defendant Gunther can clearly be held to account as such execu-

tor *de son tort*. Now, an executor *de son tort*, sued at law as such by a creditor of the deceased, is not allowed to retain for his own debt. The current of authorities is uniform on this point, and it is enough for us to refer to the case of *Glenn v. Smith*, 2 Gill & J 493, where the law is definitely settled in this state. It is true that that case, as all the others within our notice, were cases at law, and it has been very strenuously argued that a different rule should prevail in equity. It is insisted that in refusing to allow Gunther to retain any portion of the property in controversy in payment of his own debt, that a court of equity would be enforcing a penalty upon him, which a court of equity will never do. The rule of the common law which refuses to allow executors *de son tort* to retain for their own debts until the other creditors are paid, is based upon sound public policy. To allow it (2 Bl. Comm. 511) would tend to encourage creditors to strive who should first take possession of the goods of the deceased, and would allow a creditor to take advantage of his own wrongful act by paying himself first. Such is unquestionably the rule of the common law from time immemorial. Can a court of equity annul this rule? A quotation from an eminent American writer (Story) will answer this question: "For example, [1 Story, Eq. Jur. § 11,] the first proposition that equity will relieve against general rule of law is neither sanctioned by principle nor by authority; for, although it may be true that equity has decided differently in many cases from courts of law, yet it will be found that these cases involved circumstances to which a court of law could not advert, but which, in point of substantial justice, were deserving of particular consideration, and which a court of equity, proceeding on principles of substantial justice, felt itself bound to respect."

This is a bill in equity, and it has been argued that when the decree was passed against Gunther, requiring him to account for this property, and bring it into court for distribution among the creditors of the deceased, Gunther, being a creditor, should participate in the distribution. If the creditor Haas had brought suit at law and recovered, the defendant could not certainly have retained anything for his own debt. The plaintiff, if his debt amounted to the whole value of the property, would have taken it all. This is unquestionably the rule at law. Should an honest and meritorious creditor of the deceased be placed in a worse position when he seeks the aid of a court of equity, or should a manifest wrong-doer fare better in equity than at law? We think the answer to these propositions must be in the negative. To allow the defendant to come in and participate in the division of the property recovered from him is practically to allow him to retain a share of it for his own debt, and thus relieve him from the operation of the rule of the common law that forbids such a retainer.

The general proposition is laid down in the elementary writers upon the powers of a court of equity (see Bl. Comm. and Story, Eq. Jur.) that equity cannot relieve against a rule of the common law, however harshly it may operate. A long list of cases where these rules do operate harshly and rigorously, but which equity is powerless to relieve against, is given by these writers. If we admit that there may be exceptions to this general rule, they must be in cases where there are circumstances to which a court of law cannot advert and reach through its procedure, and which are necessary for a court of equity to notice, in order to reach substantial justice. But the case at bar does not come within these exceptions, (if such exist,) and the conduct of the defendant has not been such that substantial justice would require any abatement of the rigor of the rule.

But it has been further argued that a court of equity, while it may relieve against, yet will never aid in the enforcement of a penalty; and that the postponement of the debt of the defendant to the claims of the other creditors is a penalty upon him, and therefore a court of equity will not enforce it. There is no doubt of this law. It is laid down in the text writers, and fully sanc-

tioned in *Cross v. McClenahan*, 54 Md. 21. But this law applies to cases where the aid of a court of equity is sought to enforce a penalty. Now, this is not a suit to enforce a penalty, but simply a suit by a creditor to recover a just debt. Penalties in civil matters are imposed by statute, or by agreement of parties; principally the latter. The case of *Cross v. McClenahan*, above mentioned, is an example of the former, and the case of *McKim v. Mason*, 2 Md. Ch. 510, an example of the latter. But a rule of the common law regulating the order in which an executor *de son tort*, or wrongful executor, shall pay away the assets in his hands, (for the rule amounts to that,) never was and never can be considered a penalty. He is required by it to pay all other creditors before he pays himself. If there is nothing left after the payment of the others, he gets nothing. So a rightful executor is required by our statute to pay judgments before bond debts; and if he holds a bond of the deceased, and the judgments take the whole estate, he gets nothing. It may as well be said that our statute imposes a penalty upon bondholders, by postponing their claims to those of judgment creditors, as that the rule of the common law which postpones the debt of a wrongful executor (as far as the assets in his hands are affected) to all other creditors imposes a penalty on him. We are therefore of opinion that the defendant Gunther in this case is properly chargeable as executor *de son tort*, and that the report of the auditor, and order of the court thereon excluding him from the participation of the assets in his hands, are correct, and must be affirmed.

As to the other question presented, we think the valuation of the property made by the auditor fully warranted by the testimony, and the order must be affirmed, with costs. Order affirmed.

#### CHADEAYNE and Wife v. ROBINSON and Wife.

(Supreme Court of Errors of Connecticut. July 15, 1887.)

#### WATERS AND WATER-COURSES—SURFACE WATER—ERECTION OF BARRIERS—AGREEMENT TO FENCE.

Defendants erected a tight board fence between their lot and that of plaintiffs, whereby the surface water from plaintiffs' lot was stopped from flowing on their lot. The fence was built in part on a portion of the division line, which was to have been fenced by plaintiffs. *Held*, that defendants had a right to erect a perfect barrier to the surface water, and it was not modified by the agreement as to the portion of the fence to be built by them.

Appeal from superior court, New Haven county; STODDARD, Judge.

George W. Chadeayne and wife, plaintiffs, sued Philander Robinson and wife, defendants, for obstructing the flow of surface water in defendant's land by the erection of a tight board fence. Judgment for defendants and plaintiffs appeal.

*E. Zacher* and *J. P. Thompson*, for appellants. *W. C. Case* and *W. H. Ely*, for appellees.

PARDEE, J. This is a complaint for obstructing the passage of surface water flowing upon the defendants' land, whereby it was set back upon the land of the plaintiffs. Judgment was rendered for the defendants, and the plaintiffs have appealed. The following are the reasons of appeal assigned: (1) That the court erred in ruling as a matter of law, upon the facts found, that there was *damnum absque injuria*; and that therefore the plaintiffs were not entitled to recover damages. (2) The court having found that the course of the surface water, coming from the lands south of the plaintiffs' and flowing across their land, was thence upon the defendant's land, and that the defendants constructed their fence two or three feet beyond the point of division and upon the plaintiffs' line, and that the agreed place of dividing said divisional fence was at or very near the place where the greater quantity

of water was accustomed to flow from the plaintiffs' to the defendants' land, and the defendants' divisional fence constituted the substantial obstruction to its flow, and that except for the erection of said fence by the defendants the damage to the plaintiffs would not have occurred, and that material damage was done to and in the house of the plaintiffs by said divisional fence, stopping the water, erred in ruling that, as a matter of law, the plaintiffs were not entitled to damages.

The parties are severally owners of adjoining village lots, with a house upon each. Except for the intervention of man, surface water would run from the plaintiffs' lot upon that of the defendants. They made an agreement as to the portion of division fence to be built and maintained by each. The defendants built a tight board fence two or three feet longer than the agreement required from them for the purpose of closing an opening left by the plaintiffs. The agreed place of division of the fence was at or near the place where the greatest part of the surface water flowed, and the defendants' fence prevented the usual flow, and ponded the water on the plaintiffs' land to their material damage.

The general common-law rule in reference to surface water is that stated in Gould, Wat. § 267, as follows: "The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface, or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface, or flowing onto it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow." This rule was accepted as the law by this court in *Grant v. Allen*, 41 Conn. 156; the court there saying that "the right of the owner of land to determine the manner in which he will use it, or the mode in which he will enjoy it, the same being lawful, is too high in character to be affected by considerations growing out of the retention, diversion, or repulsion of mere surface water, the result of falling rain or melting snow." Under that rule it is the right of the defendants to erect for the entire depth of their lot a structure which will be a perfect barrier to surface water. Of course, that which they may do perfectly and permanently, they may do imperfectly and temporarily; and the plaintiffs must accept the consequences. And this rule is neither suspended nor modified in the present case by the agreement as to the portion of fence to be constructed by each. That agreement was not intended, and is not by either party to be interpreted, as a permanent quitclaim by the other of the right to improve his property to the fullest extent.

There is no error in the judgment complained of.  
(The other judges concurred.)

#### KNOWLES v. CRAMPTON.

(*Supreme Court of Connecticut.* October 19, 1887.)

##### 1. NEGLIGENCE—EVIDENCE—SECTION OF HUMAN BODY—DISCRETION OF COURT.

In an action for damages for personal injuries, it appeared that the wagon in which plaintiff was riding was run into by defendant's wagon, and plaintiff was thrown out, and one of her ribs broken. Defendant, to contradict certain evidence introduced by plaintiff, offered to show the exact location of the ribs in the human system by means of a section of a human body. Held that, such an exhibition being unnecessary and offensive, it was a proper exercise of discretion for the court to refuse it.

##### 2. SAME—EVIDENCE—LETTER CONTAINING OFFER OF COMPROMISE.

In an action for damages for personal injuries, defendant offered in evidence a letter written to him by plaintiff's attorney stating the extent of the injury suffered  
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by plaintiff, and containing an offer to accept a certain sum as compensation. *Held* that, as the letter contained an offer of compromise, it was inadmissible as a whole for any purpose whatever.

3. SAME—PASSING TEAM IN HIGHWAY—INSTRUCTIONS.

In an action for damages for personal injuries, the court instructed the jury that, when teams are passing along the highway in the same direction, the rear team may pass the one in advance, and, if damage results without fault of the advance team, the one attempting to pass is liable for the consequences. *Held*, that the charge is equally applicable when the team in advance is standing still, and, if the jury is charged as to negligence, the instruction is properly given.

4. SAME—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

In an action for damages for personal injuries, the court had instructed the jury that the plaintiff must show, not only that the defendant was negligent, but that the injury was not caused, in whole or in part, by her own negligence. A further instruction was given "that contributory negligence, to be a defense, must have contributed to produce the injury, and even then the defendant must have been in the exercise of ordinary care." *Held*, that the latter instruction, though not proper as an abstract statement, was proper in the connection in which it was given, and could not have operated to mislead the jury.

Appeal from court of common pleas, New Haven county; DEMING, Judge.

This was an action for damages for personal injuries, brought by Elizabeth M. Knowles against William B. Crampton. The plaintiff was riding home from church with her brother. They stopped their team to talk to a friend, and defendant, who was close behind, attempted to drive by. In so doing, the wheels of defendant's wagon struck the wheels of the wagon in which plaintiff was riding, and tipped it over. Plaintiff was thrown out, and had a rib broken, besides sustaining other injuries. On the trial in the court below, judgment was rendered for the plaintiff, and defendant appeals.

*J. H. Whiting* and *J. McKean*, for plaintiff. *H. G. Newton*, *C. K. Bush*, and *C. Kleitner*, for defendants.

CARPENTER, J. 1. The plaintiff claimed, and offered evidence in support of her claim, that two or three of her ribs were broken. The physicians who testified in her behalf located the ribs. The defendant denied the claim, and further contended that at the place described there were no ribs. To support his claim on this point, he offered in evidence a section of a human body. To this evidence the plaintiff objected, and the court excluded it. We see no necessity for evidence of this character. It was not in itself evidence, although it might serve to illustrate, and might perhaps assist the jury somewhat in understanding, the expert testimony. But for that purpose it was hardly needed, as that testimony was reasonably intelligible in itself; but, if not, the jury could easily have been made to comprehend it by other means. The exhibit being of doubtful utility, and offensive in its nature, we think the court might well exercise its discretion. In matters of discretion the action of the trial court is not subject to review in this court.

2. The second reason of appeal is the rejection by the court of a letter offered by the defendant, written to him by the attorney of the plaintiff, stating the claim, naming a sum which would be accepted, and requesting a settlement. The letter purports to present a claim of the father of the plaintiff "for the loss of services, nursing, and doctor's bill, etc., necessary for his daughter," and contains no intimation of a claim in behalf of the daughter for personal injuries. Of course, no admission or declaration by the father is admissible against the plaintiff. But the defendant offered to prove that the letter was authorized by the plaintiff, and so was in fact her letter. This too was rejected. The rejection of the letter, and the accompanying evidence, cannot be wholly vindicated on the ground that it was an offer to compromise an existing controversy. The material part of the letter is as follows: "Mr. Henry D. Knowles has put a claim which he has against you into my hands for settlement. He claims that, while his children were peacefully driving home from Sunday-school last Sunday, your carriage ran into his,

throwing the children out, and fracturing one of his daughter's ribs, and otherwise injuring her so badly that she is now under the doctor's care, and liable to be so for some time to come. He authorizes me to say that, while he does not consider \$50 a fair compensation for the loss of service, nursing, and doctor's bill, etc., necessary for his daughter, yet, to avoid any further difficulty, he will be willing to accept that sum as full compensation." That part of the letter which states the facts is absolute, not conditional. It is not expressly stated to be without prejudice, and nothing in it justifies the inference that it is a concession for the mere purpose of a compromise. That part, aside from the remaining portion, would have been admissible if the defendant had chosen to offer it. But it is otherwise with that part relating to the amount of damages. There is a concession, and it is clearly stated to be for the purpose of effecting a settlement without suit. That is clearly inadmissible. The whole letter was offered in evidence,—that part as well as the other. If it was not divisible, the objectionable part would seem to exclude the whole. If divisible, the defendant should have offered only that part which he was entitled to, as that might have been received and the other excluded. Instead of limiting his offer to the admissible part, and stating the purpose for which he offered it, he insisted upon his right to have the whole, not stating the object for which he wanted it; leaving it open to the inference that it was the objectionable part that he wanted, and that solely for the purpose of affecting the amount of damages. The court was not bound to discriminate for him, but properly excluded the whole.

3. The court charged the jury as follows: "When teams are passing along the public highway in the same direction, the rear team may pass on either side of the advance team, provided there is ample room; and if, in attempting to pass, damage occurs, without fault on the part of the advance team, the party attempting to pass, and causing the damage, is liable for the consequences." The *third* reason of appeal alleges that this charge was erroneous—*First*, on the ground that it was not applicable to the case; and, *second*, that it imposed upon the defendant a liability without negligence on his part. The rules which govern attempts to drive by others going in the same direction are equally applicable whether the forward team is in motion, or is for the moment standing still; so that the first objection fails. The second is equally groundless, for the jury were fully charged on the subject of negligence, and were distinctly told that negligence was essential to the defendant's liability.

4. The court charged the jury that "contributory negligence, to be a defense, must have contributed to produce the injury, and even then the defendant must have been in the exercise of ordinary care." This is excepted to. As an abstract proposition, divorced from the facts of the case and the context, it may be erroneous. Taken in connection with the respective claims of the parties, it is not difficult to discover the meaning of the court. The supposed negligence of the plaintiff consisted in stopping just ahead of the defendant, and it was claimed that the defendant was negligent in driving by. The court doubtless intended to say that the defendant must use such care as men of ordinary prudence would use under the circumstances. In view of the plaintiff's situation, admitting that she was there negligently, and that the defendant knew it, he was certainly required to use reasonable care not to injure her. In dangerous situations ordinary care means great care; the greater the danger, the greater the care required; and the want of the degree of care required may amount to culpable negligence. In a crowded city, a man may negligently leave the sidewalk, and walk in that part of the street devoted to the use of carriages; but that will not justify the driver of a carriage in wantonly driving against him. In such cases, there is manifestly a limit to the defense of contributory negligence; and that limitation the court had in mind. It is not necessary, however, to vindicate the charge wholly

on that ground; for, taken in connection with what precedes and what follows the sentence quoted, we think the jury were not misled. The jury had just been told that the plaintiff must prove, not only negligence by the defendant, but also "that the injury was not caused, in whole or in part, by his own negligence;" and, immediately after, they were told that if the plaintiff "was carelessly and negligently run into by the defendant and injured, without any act on her part contributing to the injury, your verdict will be for the plaintiff." And again: "The law is so that when both parties, by their mutual neglect to use proper precaution, have contributed to the injury, and when it would not have occurred but through the combined negligence of both, no damages can be recovered."

There are in all 19 reasons of appeal, the others of which present several questions of minor importance. None of them, however, although alluded to, are strenuously insisted on. We deem it unnecessary to consider them in detail. It is sufficient to say that in none of them do we find any reason for granting a new trial.

There is no error in the judgment complained of, and a new trial is not granted.

(The other judges concurred.)

### PHELPS v. PHELPS and others.

(*Supreme Court of Connecticut.* November 2, 1887.)

#### 1. WILL—CONSTRUCTION—"IN EVENT OF THE DECEASE"—LIFE-ESTATE.

A testator divided his estate between his three children, with a proviso that, "in the event of the decease of either of them without having issue at his or her decease, the portion of said deceased is to be shared equally by the survivors or their issue." *Held*, that the words, "in event of the decease," meant the decease of either of the legatees before the decease of the testator, and were not words limiting the estate devised to the life of the legatees.

#### 2. SAME—DEATH OF DEVISEE BEFORE TESTATOR.

A testator devised his estate to his three children. His will contained a proviso that his daughter should "keep her share in her sole and separate right, or until her children shall marry or become of age; and should she die without living issue, her portion is to revert to her brothers," etc. *Held*, that the intention of the testator was that, in case his daughter should die before he did, then her share should go to her brothers, but otherwise she to enjoy it as her sole and separate property.

#### 3. SAME.

A will contained a proviso that, in case of the death of one of the legatees before his youngest child became twenty-one years of age, certain property was to be held in trust for the widow and children, and, "in case of the decease of said children and their father before they are twenty-one years of age, leaving no issue, their portion shall revert to" the other two children of testator. *Held*, that this clause contemplates the death of the legatee in the life-time of the testator, and, if the legatee survives the testator, the widow and children can take nothing under the will.

Appeal from superior court, Hartford county.

Reserved case. This was an action brought by Roswell H. Phelps, as executor, against Julia E. Phelps and others, to obtain a judicial construction of the will of Richard H. Phelps.

C. E. Gross, for Roswell H. Phelps and Aline Hoff, children of the testator. L. Sperry, for the grandchildren of the testator. J. W. Johnson, for William G. Phelps, son of the testator, and Edith Phelps, his wife.

CARPENTER, J. This suit is brought to obtain a judicial construction of the will of Richard H. Phelps. In the first clause he gives to his wife an annuity and the use of certain real estate for life, or so long as she remains his widow and lives on the premises. Under that clause no question arises. The second clause is as follows: "All my estate, real and personal, of which I may die possessed, (the aforesaid annuity and reservations excepted,) I give equally

to my children, Roswell, William, and Alline, or, in the event of the decease of either of them without leaving issue at his or her decease, the portion of said deceased is to be shared equally by the survivors or their issue."

The first and most important question is, what estate do the children take? Is it a fee or a life-estate? It is difficult to distinguish this case from *White v. White*, 52 Conn. 518; and still more difficult to distinguish it from *Coe v. James*, 54 Conn. 511, 9 Atl. Rep. 392. In each of those cases it was held that the death of the devisees spoken of in the will meant death during the life-time of the testator. We are inclined to follow those cases, and adopt the same construction in this case. We find that view strongly supported by several considerations suggested by other portions of the will. The leading thought in the mind of the testator was to give all his property to his family, —his wife and children. He first provides for his wife, and then for his children. There is no primary gift to the grandchildren. The gifts to them, so far as they may be called gifts, are secondary, incidental, and contingent. We see nothing in the case indicating a preference for grandchildren. There is no lack of confidence in his sons, for they are made executors; nor in his daughter or her husband, for he is made a co-executor, and, in one contingency, a trustee. If we compare the first and second clauses, we shall see that the testator knew the difference between a life-estate and a fee; and he had in mind the appropriate language for creating the former, for, in giving a life-estate in the first clause, he did so expressly, leaving nothing to implication. There is a marked difference in the language of the two clauses. It is inconceivable that he should desire to give but a life-estate, and should use language so much unlike that in the first clause, and so apt to convey a fee. If he had stopped after naming his children, and omitted the rest of that clause, no doubt could be entertained as to his meaning. We think that clause was added, not for the purpose of providing for his grandchildren upon the death of his children after a possible long life, but in view of the possibility that they might die young, or at least before he did; so that, if we read the will as intending death during his own life-time, we shall harmonize those two clauses, and give effect to his real intention. Not only so, but that construction aids us materially in understanding and harmonizing other portions of the will. The third clause is as follows: "My daughter Alline is to keep her share in her own sole and separate right, or until her children shall marry or become of age, and should she die without living issue, her portion is to revert to her brothers Roswell and William, or either of them, or their heirs, or survivors." We remark, parenthetically, that the words "her share" and "her portion" are more applicable to a fee than to a life-estate. They seem to imply that she has an interest in the principal as such, and not merely a right to the income.

But to return. Precisely what is meant by this language it is not easy to see. There is a slight implication that he intended that her children, on marrying or becoming of age, should have her portion of his estate; but he does not say that, and his language does not necessarily imply it. Therefore we cannot say legally that he meant it. In providing that his daughter should enjoy her portion as her separate property, it seems to have occurred to him that that might not always be necessary, and so he adds, "or until her children shall marry or become of age." The rest of that clause is plain enough, provided we assume, as we do, that he intended death during his life-time. Hence all that is expressed in this clause with sufficient certainty is that, if his daughter dies before he does, leaving no issue, her portion shall go to her brothers; and if she lives to come into possession of her share, she shall enjoy it as her sole and separate property.

We may add that the word "portion," used in the second clause of the will, is much more applicable to a share of an estate, in view of a prospective division of it under a will, than to the same share after it has passed to the dis-

tributee, and is being enjoyed by him. It is then almost invariably spoken of as his property or his estate, and no longer as his share of an estate. It is therefore a word that the testator would more naturally have used with reference to shares of his estate that would at once upon his death become fixed, and to facts which would then operate at once upon the distribution of his estate, than with reference to the ultimate disposal of the shares at the end of the lives of the legatees.

A further consideration in favor of the view that the "dying without issue" in the second clause of the will means a dying in the life-time of the testator, is that, while the contrary view would give his children severally only life-estates, in the portions given them, yet the gift over to the survivors on the death of either without children has no such limitation attached to it, and passes to the survivors in fee. No reason can be conceived why the children should take only life-estates in the primary bequests, and yet fees in the secondary or contingent ones.

The fourth clause of the will is as follows: "In case of the decease of my son William before his youngest child becomes twenty-one years of age, my real estate in Maryland, occupied by him, is to be sold, and the avails thereof, with the rest of his share, are to be invested in the state of Connecticut by my executors, and his children are to reside in said state in order to receive the benefit of the avails of this portion, and the general care and supervision of them and their property, and its income and expenditure are to be under the care and supervision and control of my executors, according to their best judgment, for their education and support, and the support of their mother, if living, until the youngest surviving child becomes twenty-one years of age, and then their portion is to be given to said children, or the survivors of them. In case of the decease of said children and of their father before they are twenty-one years of age, leaving no issue, their portion is to revert to my children Roswell and Alline, and in case of their decease then to their issue."

If we bear in mind that the testator is speaking of William's death during his own life-time, it is not difficult to discover his meaning. He contemplates such death in one of two contingencies,—leaving children, the youngest child being under 21 years of age, or leaving no children or the issue of children. In the former contingency, the share that would otherwise have gone to William is placed in trust until the youngest child comes of age, for the support and education of the children, and the support of the mother, if living, when the principal is to be distributed to the children. In the latter contingency, William's portion is to go to his brother and sister or their issue. Inasmuch as William survived the testator, the trust fails, the widow and children of William take nothing under the will, and the whole fourth clause becomes inoperative, as neither contingency on which it depends has happened, or ever can happen.

A question is made whether the provision that the children shall provide for the widow, in case the provision for her support proves to be insufficient, is a charge upon the estate. That question has not been discussed by counsel, and as no one appears in behalf of the widow, who, perhaps, has more interest in that question than any one else, we have deemed it inexpedient to decide it.

The superior court is advised that the children take their respective shares in fee-simple; that the daughter takes her share to her sole and separate use; and that her children and the children and widow of William take nothing under the will.

(The other judges concurred.)

THATCHER v. WEEKS and another.<sup>1</sup>

(Supreme Judicial Court of Maine. December 17, 1887.)

## ARREST—DETENTION OF PROPERTY BY OFFICER—LIABILITY.

An officer making an arrest for violation of a city ordinance in beating drums, is not justified in detaining the drums after the trial without an order of court, even though he has reason to believe, and does believe, that the arrested party will immediately use the drums in violation of the same ordinance.

On exceptions by plaintiff from superior court, Kennebec county.

Action of trover brought by the plaintiff, captain of the Salvation Army in Augusta, against the mayor and city marshal for the alleged conversion of certain drums, for the beating of which in violation of a city ordinance the plaintiff and his followers had been arrested. *At nisi prius* the verdict was in favor of the defendants, and the plaintiff alleged exceptions.

*M. S. Holway*, for plaintiff. *A. M. Goddard*, for defendants.

EMERY, J. One of the defendants was the city marshal of Augusta, and had arrested the plaintiff for violation of a city ordinance in beating drums. The case does not show what the officer did with his prisoner, but we may assume that he did his duty, and took him within a reasonable time before the proper court for trial. We may also assume that the court duly disposed of the charge. At the time of the arrest, the officer also took from the plaintiff the drums, and had kept them for something over three months, when the plaintiff, after demand, brought this action of trover for their value. The officer did not bring the drums before any court or magistrate, nor did he obtain any order or decree from any magistrate as to their disposition. The officer (the defendant) claims it was no part of his duty so to do. He claims that, for the purpose of preventing any further violation of the city ordinance, he could lawfully take the drums thus being unlawfully used, and could lawfully retain them in his own possession so long as he had reason to believe, and did believe, that the plaintiff would immediately again use the drums in the same unlawful manner if restored to him. The principle thus contended for by the officer would enable him to detain the team of a person arrested for too fast driving, so long as he (the officer) believed, with reason, the owner would immediately repeat his offense of too fast driving if the team were restored to him. Does the power of executive officers extend so far?

It is common learning that an officer may, without a precept, arrest any person he finds committing an offense. It is also well known that he must within a reasonable time bring his prisoner before the proper court, or obtain a legal precept for detaining him. A failure to do so may make the officer a trespasser. Rev. St. c. 183, § 4. An officer making an arrest upon a criminal charge may also take from the prisoner the instruments of the crime, and such other articles as may be of use as evidence upon the trial. These may not be confiscated or destroyed by the officer, however, without some order or judgment of a court. We do not find any authority or reason for the officer's rendering any judgment in the matter. He holds the property, as he does the prisoner, to await, and subject to, the order of the court. The officer, having taken into his possession such articles as will supply evidence, "holds them to be disposed of as the court shall direct." Bish. Crim. Proc. 211. "The taking of things from the arrested person does not change the property in them. The officer holds all such property subject to the order of court." Id. 212. Wharton, in his Criminal Practice, (8th Ed.) § 60, says: "They [the articles taken from the prisoner] should be carefully preserved for the purposes of the trial, and after its close returned to the person whose property they lawfully are." In *Spaulding v. Preston*, 21 Vt. 9, relied upon

<sup>1</sup> Reported by Leslie C. Cornish, Esq., of the Augusta bar.

by the defendant, the prisoner was committed for trial, and the officer was preserving the property (counterfeit coin) to be used as evidence at the trial. The court held that the officer could lawfully retain them for that purpose. In the case before us, it is not claimed that the drums were detained for evidence. The trial was presumably long over. There is an evident difference, also, between articles which can only have an unlawful use, like counterfeit coin, and articles in themselves innocent, like drums. If an officer may indefinitely hold the former, it does not follow that he can so hold the latter. Yet in the former case it is provided by our statute (Rev. St. c. 125, § 12) that all such contraband articles are to be kept "by the direction of the court or magistrate having cognizance of the case."

We think it clear that, after the trial is over, the officer has no right to detain the property without some order of the court. The court below sustained the defendants' contention above stated. We think this was error. Exceptions sustained.

PETERS, C. J., WALTON, DANFORTH, VIRGIN, and FOSTER, JJ., concurred.

### WILLIAMS v. CAMDEN & ROCHELAND WATER CO.<sup>1</sup>

(Supreme Judicial Court of Maine. December 17, 1887.)

#### WATERS AND WATER-COURSES—DIVERSION—DAMAGES.

In an action on the case for the unlawful diversion of water from a natural water-course over the plaintiff's land, the plaintiff's damages are limited to those sustained prior to the date of the writ.

On exceptions by plaintiff from supreme judicial court, Knox county.

Case against the defendant for diverting the water from a natural water-course over the plaintiff's land. The court, *at nisi prius*, ruled that the plaintiff's damages were limited to those sustained prior to the date of the writ, and the plaintiff alleged exceptions.

*J. H. Montgomery*, for plaintiff. *C. E. Littlefield*, for defendant.

LIBBEY, J. This is an action of case against the defendant for diverting the water from a natural water-course over the plaintiff's land, from April 1, 1886, to the date of writ, July 26, 1886. The water-course flowed from Oyster River pond, and in 1885 the defendant erected a dam at the outlet of the pond, which, when the water was low, diverted the water from the brook, which the plaintiff claims damaged her pasture and a natural mill privilege on her land. The contention between the parties is whether the plaintiff can recover in this action prospective damages, or must be limited to damages sustained prior to the commencement of the action. The court below ruled that she could recover only what she had sustained at the date of the writ. We think this ruling correct. The case, as reported, does not show the destruction of the water-course. The flow of the water in it was diminished only. In time of drought it is prevented by the dam from flowing at all. If the dam was unlawfully erected, it is the duty of the defendant to remove it, or open a gate in it to give the water its natural flow over the plaintiff's land, and every day it continues the dam it is guilty of a wrong. If it removes the dam, which it may at any time do, or permits the water to have its natural flow in its course, it is no longer guilty. While the dam is maintained it is a nuisance, and its continuance may be enjoined. In such case it is the settled law of this state that damages are limited to the date of the writ. *Canal Co. v. Hitchings*, 65 Me. 140; *Dority v. Dunning*, 78 Me. 881, 6 Atl. Rep. 6.

But the plaintiff claims that the diversion of the water by the defendant is by virtue of an act of the legislature of 1885, c. 522, which gives authority to

<sup>1</sup>Reported by Leslie C. Cornish, Esq., of the Augusta bar.

take it for the purposes specified; and therefore the injury is permanent. The case does not show that the erection of the dam by the defendant was under the authority of that act. If the water was taken by it in conformity with the requirements of the act, it was not unlawful,—not a tort,—and this action cannot be maintained. The plaintiff must pursue her remedy for damages under section 4 of the act, which provides that they shall be “ascertained in the same manner, and under the same conditions, restrictions, and limitations, as are by law prescribed in the case of damages by the laying out of highways.” But the case, as reported, does not show that the defendant had taken the water in accordance with the provisions of the act.

By the report, if the exceptions are overruled, the court is to assess the damages upon the evidence reported. We think the evidence does not show that the plaintiff sustained more than \$10 damage prior to the date of the writ. Exceptions overruled. Damages assessed at \$10.

WALTON, DANFORTH, EMERY, FOSTER, and HASKELL, JJ., concurred. PETERS, C. J., did not sit.

### PALMER v. MORSE.<sup>1</sup>

(*Supreme Judicial Court of Maine.* November 30, 1887.)

#### LIMITATION OF ACTIONS—RESIDENCE IN ANOTHER STATE—PROMISSORY NOTES.

An action on a promissory note can be maintained, where the defense is the statute of limitations, if the time during which the defendant has resided outside the state, deducted from the time the note has run, leaves a balance of less than six years.

On report from superior court, Cumberland county.

*Assumpsit* on a promissory note dated at Portland, Maine, January 1, 1877, for \$57.25 and interest. The writ was dated October 5, 1886. The plea was general issue, and brief statement setting up the statute of limitations. The plaintiff, by counter brief statement, alleged that the defendant had resided in Boston, Massachusetts, from January 1, 1877, till March 1, 1886.

*F. V. Chase*, for plaintiff. *Savage & Oakes*, for defendant.

PER CURIAM. On a careful examination of the report in this case, we have come to the conclusion that the plaintiff has sustained the allegations in his replication, and that the defendant did “reside” in Boston, within the meaning and intent of Rev. St. c. 81, § 103. Deducting the number of years during which he there resided, the action is not barred by the statute of limitations. Judgment for plaintiff for amount of the note sued on.

### STATE v. CARVILLE.<sup>1</sup>

(*Supreme Judicial Court of Maine.* December 7, 1887.)

#### INDICTMENT AND INFORMATION—MISPELLED WORD—“INCESTUOUS.”

An indictment for incest is not bad because the word “incestuous” is spelled “incestuous.”

On exceptions by respondent from superior court, Kennebec county.

Indictment for incest. The respondent filed a motion in arrest of judgment on the ground that the indictment was bad because the word “incestuous” was spelled “incestous.” The presiding judge overruled the motion, and the respondent alleged exceptions.

*L. T. Carleton*, Co. Atty., for the State. *J. H. Potter*, for respondent.

<sup>1</sup>Reported by Leslie C. Cornish, Esq., of the Augusta bar.

**PER CURIAM.** In this indictment for incest between father and daughter, the word "incestuous" is spelled "incestous;" a letter "u" being omitted by chance. It is, however, not a fatal omission. It is not only nearly enough *idem sonans*, but the spelling is not grammatically incorrect. The essential part of the meaning of the term is in the noun "incest," a word borrowed from the Latin language, into which it was imported from the Greek. The adjective may not incorrectly be "incestous," although it is, for merely the sake of euphony, spelt "incestuous." No one could mistake its meaning in its connection in this indictment.

The other points taken do not require particular discussion. The more important ones have been clearly settled in this state in previous decisions.

Exceptions overruled. Judgment for the state.

### STATE v. MALIA.<sup>1</sup>

(*Supreme Judicial Court of Maine.* December 12, 1887.)

**CRIMINAL PRACTICE—PLEA IN ABATEMENT—MISNOMER—REPLICATION.**

When the respondent, in a criminal prosecution, pleads misnomer in abatement, and the plea is sufficient in form, the question of *idem sonans*, being a question of fact, must be raised by replication, and not by demurrer.

On exceptions by respondent from supreme judicial court, Sagadahoc county.

Indictment. Plea of misnomer, to which the county attorney filed a demurrer. The demurrer was sustained by the presiding judge, and the respondent alleged exceptions.

*F. J. Buker*, Co. Atty., for the State. *Geo. H. Hughes*, for respondent.

**VIRGIN, J.** The county attorney filed a demurrer to the defendant's plea of misnomer. No question is raised as to the form of the plea, and we perceive no defect therein. *State v. Fleming*, 66 Me. 142. The demurrer having been sustained by the judge, the defendant was found guilty on his plea of not guilty. By going to trial, he waived no right to his exceptions on the pleading. *State v. Pike*, 65 Me. 111. In the absence of any defect in the plea of misnomer, the state could have raised either of two questions by replication: (1) That the defendant was known as well by the name in the complaint as by that in the plea. (*State v. Corkery*, 64 Me. 521,) or (2) that the two names were pronounced alike. The county attorney filed no replication, but demurred; and now contends, in substance, that the two names are *idem sonans*, which is not a question of law, but of fact, which the defendant has the right to submit to a jury. *Ree v. Shakespeare*, 10 East, 83, and cases in note *a*; *Com. v. Mehan*, 11 Gray, 321, and cases there cited.

The result is, exceptions sustained; verdict set aside; judgment for the defendant.

**PETERS, C. J., DANFORTH, WALTON, FOSTER, and HASKELL, JJ., concurred.**

### SNOW v. FOSTER.<sup>1</sup>

(*Supreme Judicial Court of Maine.* December 22, 1887.)

**INSOLVENCY—DISCHARGE—RENEWAL OF NOTE.**

An action by the indorsee of a promissory note, made after the enactment of the insolvent law, though in renewal of a note made prior thereto, is barred by the maker's discharge in insolvency.

On report from supreme judicial court, Somerset county.

<sup>1</sup> Reported by Leslie C. Cornish, Esq., of the Augusta bar.

*Assumpsit* by the indorsee of a promissory note against the maker. Plea, discharge in insolvency. The opinion states the facts.

*Danforth & Gould*, for plaintiff. *Walton & Walton*, for defendant.

DANFORTH, J. This is an action upon a negotiable promissory note payable to William B. Snow, administrator, and by him as the case shows indorsed and delivered to the plaintiff. The defense is a discharge in insolvency, which is admitted to have been duly obtained. To this it is replied that the note in suit was given in renewal of a prior note bearing date before the passage of the insolvent law, and is not therefore affected by the discharge. The note in suit comes within the provisions of the law; the prior one does not. Which is to prevail? It is evident that if the prior note was discharged by the later the defense is made out. It is now too well settled in this state that taking a negotiable note in consideration of an existing debt is a presumptive payment of that debt, to require the citation of authorities. This presumption may be rebutted, for the parties may make such a contract in regard to it as they see fit. In this case the facts agreed upon show nothing tending to rebut that presumption. There was no collateral security for the first note. That had only the personal liability of the defendant; the last note had the same. The existence of the insolvent law would not affect any security, whatever influence it might have upon the note. On the other hand, the facts tend strongly to confirm the presumption. When the new note was given, the old one was delivered to the maker, which unexplained must be considered a cancellation of it. But further, and if possible more conclusive than this, the payee has indorsed and delivered the last note to the plaintiff; thus treating it as a distinct and subsisting contract. The two cannot stand together as separate contracts. The parties have treated the first as discharged, and the last as the only one in force. The plaintiff certainly can have no claim for exemption from the insolvent law. He shows no connection with the prior debt. His rights began with the purchase of the note in suit, and he can only claim such rights as that gives him. His contract was made under the insolvent law, and must be subject to its provisions. Judgment for defendant.

PETERS, C. J., WALTON, VIRGIN, EMERY, and FOSTER, JJ., concurred.

#### SKILLIN v. MOORE.<sup>1</sup>

(*Supreme Judicial Court of Maine*. December 20, 1887.)

MECHANIC'S LIEN—RECORDING—REAL ESTATE—CONTRACT OF PURCHASE.

A house erected by one in possession of land under a contract of purchase, and attached to the land, becomes a part of the realty, in the absence of an agreement to the contrary, and, to preserve a laborer's lien upon the same, the lien claim must be filed in the registry of deeds, and not in the office of the town clerk.

On report from supreme judicial court, Piscataquis county.

Action of *assumpsit* to enforce a laborer's lien. The lien claim was filed in the office of the town clerk of Monson as an attachment of personal property, and not in the registry of deeds for Piscataquis county, as an attachment of real estate. The opinion states the facts.

*Henry Hudson* and *J. F. Sprague*, for plaintiff. *Ephraim Flint*, *A. G. Lebroke*, and *W. E. Parsons*, for defendant.

LIBBEY, J. The contention between the plaintiff and William Paine, claimant of the property, is whether the plaintiff is entitled to a judgment against the house described in his writ for the lien claimed by him. The ev-

<sup>1</sup> Reported by Leslie C. Cornish, Esq., of the Augusta bar.

idence reported fully establishes the following facts: In March, 1884, one Chapin purchased the land known as the "Cushman Farm," in Monson, of Lucinda Cushman, paying her a part of the price agreed upon, and taking a bond for a deed on the payment of the balance at times stipulated. It was understood between the parties that Chapin might take possession of the land, and sell it in lots for the erection of dwelling-houses. Afterwards, in the spring of the same year, Chapin contracted with one Penny to sell him a part of the land, and give him a deed, when he made payment of the price as agreed. In the same season Penny, by parol agreement, sold a part of the land which he bought of Chapin to Paine, the claimant. It was understood between all the parties that the purchaser might build on the land as if it was his own; but there was no agreement or understanding between them that the buildings should be the personal property of the builder, and might be moved off by him. It was the ordinary case of contract for the purchase of land with a bond for a deed, the purchaser to have the right to enter into possession at once, and erect buildings. In such case the buildings, when erected and attached to the land, became a part of the realty, and the legal title to them is in the owner of the land. *Hemengway v. Cutler*, 51 Me. 407; *Lapham v. Norton*, 71 Me. 83. The plaintiff worked on the house for the defendant, Moore, who built it by contract for Paine, in the fall of 1884. December 12, 1884, Chapin paid the balance of the purchase money, and took a deed from Mrs. Cushman, and December 13, 1884, Chapin conveyed to Penny, who conveyed to Paine, June 17, 1885.

The house was real estate, and the plaintiff so claimed it when he filed his lien claim, January 1, 1885, in the office of the town clerk. After describing the buildings in language sufficient, if in a deed, to convey the house and land on which it stood, he says: "For which I claim a lien on said buildings, and the land on which the same are situated." If the plaintiff had a lien for his work, as he claims, as against Paine, it was on the house and lot, and, to preserve and enforce it, the house and lot should have been attached as real estate; but the officer did not return his attachment to the registry of deeds in the county, but returned it to the town clerk of Monson, as an attachment of personal property. For this reason the plaintiff cannot have judgment for his lien, and, as this is fatal, it is unnecessary to consider the other grounds of defense.

Judgment against Moore for the sum claimed. Judgment for lien on the house denied.

PETERS, C. J., WALTON, DANFORTH, EMERY, FOSTER, and HASKELL, JJ., concurred.

#### STATE v. LASHUS.<sup>1</sup>

(Supreme Judicial Court of Maine. December 12, 1887.)

INTOXICATING LIQUORS—UNLAWFUL TRANSPORTATION—COMPLAINT—INDEFINITENESS.

A complaint founded on Rev. St. c. 27, § 31, which avers that the respondent, at a town named, "did then and there knowingly transport from place to place in the state of Maine intoxicating liquors, with intent that the same shall be sold in violation of law in the county of Kennebec," does not sufficiently state the places from which and to which the liquor was conveyed, and is bad on demurrer.

On exceptions by respondent from superior court, Kennebec county.

Indictment for the illegal transportation of intoxicating liquors in violation of Rev. St. c. 27, § 31, which is as follows: "No person shall knowingly bring into the state, or knowingly transport from place to place in the state, any intoxicating liquors, with intent to sell the same in the state in violation

<sup>1</sup>Reported by Leslie C. Cornish, Esq., of the Augusta bar.

of law, or with intent that the same shall be so sold by any person, or to aid any person in such sale, under a penalty of fifty dollars for each offense." The respondent demurred to the indictment, and, his demurrer being overruled by the presiding judge, alleged exceptions.

*L. T. Carleton*, Co. Atty., for the State. *F. A. Waldron*, for respondent.

**VIRGIN, J.** The complaint follows the language of the statutory provision (Rev. St. c. 27, § 31) which creates the offense intended to be charged; but such a mode of setting out a violation of a penal or criminal statute is not necessarily sufficient. *State v. Railroad Co.*, 76 Me. 411; *Com. v. Pray*, 13 Pick. 359. The law affords to the respondent in a criminal prosecution such a reasonably particular statement of all the essential elements which constitute the intended offense as shall apprise him of the criminal act charged; and to the end, also, that if he again be prosecuted for the same offense, he may plead the former conviction or acquittal in bar.

Recurring to the complaint, we find no allegation designating from what place, or to what place, "in the state of Maine," the liquors were transported. The complaint is too indefinite to afford to the defendant the requisite information to which the law entitles him, or to identify it in case another and subsequent prosecution for the same offense should be instituted. The case of *Com. v. Reilly*, 9 Gray, 1, based on a similar statute, is in point, and holds, on a motion in arrest of judgment, that a complaint like the one at bar is insufficient. Had the allegations limited the places to and from which the liquors were transported to a particular town or city, the complaint might have been sufficient. *Com. v. Hutchinson*, 6 Allen, 595. Exceptions sustained. Complaint adjudged bad.

**PETERS, C. J., DANFORTH, WALTON, EMERY, and FOSTER, JJ.**, concurred.

### BLUMENTHAL v. MAINE CENT. R. Co.<sup>1</sup>

(*Supreme Judicial Court of Maine. December 17, 1887.*)

#### 1. CARRIERS—RIGHTS OF PASSENGER—BAGGAGE—MERCHANDISE.

By the sale of a ticket to a passenger, a railroad company is rendered liable for the safe transportation of the passenger and his reasonable personal baggage, but not for merchandise delivered by the passenger as baggage, without clear proof of an agreement to that effect.

#### 2. SAME—IMPLIED REPRESENTATIONS AS TO CONTENTS OF VALISE—FRAUD.

A passenger presenting a valise to the baggage master in the ordinary way to be checked, represents by implication that it contains his personal baggage, and if it in fact contains merchandise, he is guilty of such legal fraud as to absolve the carrier from liability for failure to transport it.

#### 3. SAME—KNOWLEDGE OF CARRIER'S SERVANTS.

Nor is the company rendered liable because there is evidence tending to show that baggage masters at other stations on the same line had previously checked the same valise, with a knowledge of its contents.

On report from superior court, Kennebec county.

Action of *assumpsit* to recover the value of a valise and its contents, delivered to the defendant's agent at Bangor, to be transported to Waterville, as personal baggage, but which they failed to transport. The valise contained merchandise only.

*F. E. Southard*, for plaintiff. *Baker, Baker & Cornish*, for defendant.

**EMERY, J.** The plaintiff's story is substantially as follows: Just before the morning train was leaving for Augusta, he was at the Bangor station of the Maine Central Railroad, the defendant company, with a large valise,

<sup>1</sup>Reported by Leslie C. Cornish, Esq., of the Augusta bar.

around which an oil-cloth cover was strapped with a common shawl-strap. This valise contained no personal baggage for use upon a journey, but only merchandise for sale. He purchased of the company's ticket agent a passage ticket for Augusta, and then having his ticket in his hand took the valise to the baggage master, and asked him to check it for Waterville, and received from him a check therefor. He did not inform the baggage master of the contents of the valise, but held the passage ticket so it could be seen. The baggage master made no inquiries. The plaintiff went to Augusta on the same morning train, giving up his passage ticket to the conductor. A few days later he presented his baggage check to the baggage master of the railroad company, at Waterville, but his valise could not be found there. He has made no inquiries at Bangor, and has made no other effort to find his valise. He has now brought this action against the railroad company to recover the value of the merchandise, alleging, as a cause of action, its obligation to transport the merchandise safely, and its failure to do so.

The plaintiff's purchase of a passage ticket entitled him to safe transportation of himself and his personal baggage on the same train. It entitled him to nothing else. The company was thus under that obligation, but under no other obligation to him. There was created no obligation to transport the plaintiff's merchandise. *Wilson v. Railway*, 56 Me. 60. By going as he did with his valise to the baggage master, and asking for a baggage check for Waterville, without stating the contents of the valise, he evidently meant the baggage master to believe that he was intending to take passage on the train then about to leave, and that the valise contained only personal baggage, such as he was entitled to take with him as a passenger. The check was given him in that belief. He thus committed a fraud upon the company to obtain free transportation of his merchandise. His fraud, however, did not impose upon the company such an obligation. The baggage master received the valise upon the implied assurance of the plaintiff that it contained personal baggage only. If that assurance was false, and the valise contained no personal baggage, neither the baggage master nor the company were bound to forward it, though they had received it.

The plaintiff further testified, however, that other baggage masters of the same company at other stations knew the usual contents of the valise, and he now urges that the company thus had notice of the contents at the time it was received by the Bangor baggage master. Notice to other baggage masters at other times and other places of matters existing only at those times and places, cannot affect the company at this time and place, where its only eyes and ears in this matter were those of its Bangor baggage master. The other baggage masters had nothing to do with the Bangor station, and were not servants of the company there.

Of course, the baggage master, having received the valise, could not lawfully throw it away, destroy it, or convert it, and if he or any of the company's servants has done so, the company may be liable therefor. There is no such evidence in this case, however. The valise may still be at Bangor waiting for the plaintiff to remove it, or, if lost, may have been lost without fault of the company. This action is for failure to transport safely, and the evidence does not show any such obligation on the company. Judgment for defendant.

PETERS, C. J., WALTON, DANFORTH, VIRGIN, and FOSTER, JJ., concurred.

BROWNE v. FRENCH and another.

(Court of Chancery of New Jersey. December 1, 1887.)

EQUITY—PLEADING—DISMISSAL—FAILURE OF EQUITY—PART TRIABLE AT LAW.

A complaint alleged an illegal distress for rent which was not due, and an illegal foreclosure of a chattel mortgage on account of the distraint. On a motion to show

cause why the distraint should not be enjoined, the answer and affidavits contained distinct denials, robbing complainant of all equity. *Held* that, as the complainant could not sustain his action as to the rent, the other part of the case, containing only a single issue, triable at law, must fall with it.

**Bill for relief.** Heard on bill, answer, and affidavits.

Browne, the complainant, purchased a printing-press, etc., of French, one of the defendants, paying part cash, and giving notes, secured by chattel mortgage, for the balance, with a provision that, if any process issued against the property, it should be due at once; and also rented a building of the other defendant, French's wife. Mrs. French distrained on the property for rent, and French foreclosed. Complainant filed a bill asking for an injunction, alleging that the rent was not due at the time of the distraint, which, on order to show cause why injunction should not issue, defendant denied.

*J. L. Vansyckel*, for complainant. *W. V. Birault*, for defendants.

**BIRD, V. C.** In this case, the defendant Mrs. French distrained for rent. The complainant filed his bill, and obtained an order to show cause why an injunction should not issue restraining all further proceedings upon the distress warrant. Upon the hearing, the answer and affidavits make such positive and distinct denial as to rob the complainant of all equity. The equity of the case did not arise out of the alleged illegal distraint, because the rent was not yet due; but because one of the other defendants, who held a chattel mortgage on the same and other goods, or at least on other goods, took advantage of the distraint to seize upon all of the goods in the chattel mortgage named; thereby so complicating the alleged rights of the complainant as to give him a standing in this court. But it is my judgment that neither one of the said causes, (the illegal distraint, nor the illegal seizure under the chattel mortgage,) standing alone, is sufficient to give this court jurisdiction. The complainant not being able, on the hearing, to show a legal right to the order as to the rent, that branch of his case must fall, and, of course, the other, being the only question,—a single issue, and triable at law,—must fall with it. I will so advise, with costs.

# CONWAY and others v. WILSON and others.

(*Court of Chancery of New Jersey.* December 14, 1887.)

## MORTGAGES—BY WIFE TO SECURE DEBT OF HUSBAND—VALIDITY.

A husband and wife signed a bond, and secured it by a mortgage on the property of the wife. The debt was that of the husband. A bill to foreclose alleged the debt to be a joint one, which the answer denied. *Held*, that the complainants were entitled to a decree.<sup>1</sup>

**Bill to foreclose a mortgage.**

*J. W. Morgan* and *E. A. Armstrong*, for complainants. *J. W. Wartman* and *J. J. Crandall*, for defendants.

**BIRD, V. C.** This bill is filed to foreclose a mortgage given to secure the payment of a bond made by Wilson and his wife. The lands mortgaged are the lands of the wife; but the debt is the debt of the husband. The allegation of the bill is that the defendants, being jointly indebted, gave their joint bond to secure the payment of the debt, and at the same time made and executed the mortgage to secure the payment of the said bond. The answer denies that the debt was joint, and insists that it was the debt of the husband alone, but admits the execution of the mortgage upon the lands of the wife

<sup>1</sup> In *Connecticut*, a mortgage given by a wife on her real estate, with the consent of the husband, to secure the debt of the latter, is good, no attempt being made to hold the wife on the note. *Bank v. Underwood*, 4 Atl. Rep. 248. As to the validity of the contracts of a married woman, see *Sellmeyer v. Welch*, (Ark.) 1 S. W. Rep. 777, and note.

to secure the debt. All the resistance to a decree comes from what is said to be a false allegation in the bill, to-wit, that the debt was the debt of the husband and wife, when it was not her debt at all, and that, because that allegation is untrue, the complainant cannot recover; is not entitled to any decree; it being seriously insisted and elaborately urged that the complainant's bill ought to be dismissed. It would strike me as exceedingly harsh, indeed, for this court to be influenced by such an argument.

The defendants say: "Yes, the mortgage is a legal one. The consideration for which it is given is recognized in every court; but, because the law does not permit the wife to bind herself personally to pay the obligations of the husband, which she has attempted to do in this case by joining with him in the bond, therefore the mortgage itself must go for naught." I can find no principle of law that requires me to adopt any such method of reasoning; and, as no other questions have been raised in the case, I shall advise a decree for the complainants, with costs.

JONES and another v. PITTSBURGH & L. E. R. Co.

(*Supreme Court of Pennsylvania.* November 11, 1887.)

1. RAILROAD COMPANIES—CONSTRUCTION OF ROAD—INJURY TO FERRY—MEASURE OF DAMAGES.

In a suit for damages for the obstructing of a ferry-landing by the building of a railroad, where it was shown that the lease under which the ferry was operated had expired, the court instructed the jury that the measure of damages was the actual loss by the obstruction, as shown by the loss of tolls. *Held*, that the instruction was proper. See 2 Atl. Rep. 410.

2. SAME—EVIDENCE—VALUE OF FERRY.

Plaintiffs sued defendant for damages arising from the construction of a railroad along a river bank, and across a landing where plaintiffs operated a ferry under a franchise which had expired before the suit was brought. The court refused to allow plaintiffs to show the value of the ferry prior to the building of the railroad, and its value after it was built. *Held* no error. See 2 Atl. Rep. 410.

Error to court of common pleas, Allegheny county.

Carrie V. Jones, in 1875, obtained a franchise to operate a ferry, and as the owner of a ferry-boat operated it until 1878, when she sold the boat, and has made no use of the franchise since. She was accustomed to land with the boat at the foot of a graded street. The defendant built its road along the river bank, but built a trestle-work over the street, high enough to admit the passage of wagons under it. When the water was high it flowed over the street, and beyond the bridge, so that Mrs. Jones could not reach the portion of the street that was out of water, and the embankment of defendant prevented her reaching any other part of the river bank. The lease expired in 1882. This action was brought to recover damages for the injury to the property of the plaintiffs. The court instructed the jury that the loss of tolls during the time the boat was actually stopped could be recovered in this action, and refused to allow the plaintiffs to show what the value of the ferry was prior to the building of the railroad, and what it was since. The jury found a verdict for the plaintiffs of \$499.10. On a former trial of this case, plaintiffs recovered judgment for \$4,258.33, which was reversed in the supreme court. 2 Atl. Rep. 410.

*W. S. Wilson and George D. Riddle*, for plaintiffs in error.

Plaintiffs were entitled to show the value of the entire property prior to the building of the railroad along their landing, and what it was afterwards. *Getz v. Railroad*, 105 Pa. St. 547; *Railway v. McCloskey*, 16 Wkly. Notes Cas. 563, 1 Atl. Rep. 555.

*Know & Reed*, for defendants in error.

The instruction of the court as to the measure of damages was correct. *Railroad v. McCutcheon*, 18 Wkly. Notes, Cas. 527, 7 Atl. Rep. 146.

PER CURIAM. This case was so fairly disposed of in the court below that we cannot see our way clear to sustain any of the assignments of error. The judgment is affirmed.

### HOSTETTER and others v. BALTIMORE & O. R. Co.

(*Supreme Court of Pennsylvania.* November 7, 1887.)

#### 1. CARRIERS—OF GOODS—BILL OF LADING—PAROL EVIDENCE.

In an action against a railroad company for losing goods shipped by it, plaintiff asked the court to charge that a bill of lading on its face was but a memorandum, and not in form a contract *inter partes*, and oral testimony might be received to show the real contract, which was refused. *Held* not error.<sup>1</sup>

#### 2. SAME—ROUTE OF SHIPMENT—OPTION.

The bill of lading signed by the defendant was an ordinary bill of lading, and contained no conditions that the goods were to be shipped all-rail, and the judge charged the jury the bill of lading gave the defendant the option of shipping by any proper route. *Held*, to be a proper instruction.

#### 3. SAME—ALL-RAIL ROUTE—REVOCATION OF CONTRACT.

The plaintiff telephoned the defendant for an all-rail rate, and received a 90-cent rate. The next day it shipped the goods, and sent with them to the depot an ordinary dray-ticket. The judge charged that the sending of this ticket without any designation that the freight was to go by an all-rail route was a contract that it should go in the ordinary way, and a revocation of the telephone contract. *Held*, a proper charge.

Error to court of common pleas, Allegheny county.

The facts appear in the following charge of the court:

"It seems that Hostetter & Smith, the plaintiffs, shipped by way of the Baltimore & Ohio Railroad to Charleston, S. C., on the twenty-first of January, 1885, fifty boxes of bitters, worth \$7.50 a box, and that they were never delivered to the consignee, Clatter & Brother. The evidence on both sides shows that the plaintiffs are large and frequent shippers over the defendants' road. They are shippers to such an extent that they keep blanks on hand of the bills of lading, and of what they call dray-tickets, that they fill up and send to the freight-office when they have a shipment to make over that road. The plaintiffs knew that the road of the Baltimore & Ohio Railroad Company terminated at Baltimore so far as its route to Charleston was concerned, and that the goods had to be shipped from there by way of some other road or by vessel. There is no dispute that the contract was that, if the Baltimore & Ohio Railroad Company should deliver the goods in good order at their terminus to the proper carrier for Charleston, then their liability ceased. If accident occurred to them from negligence of the shipper beyond Baltimore, the Baltimore & Ohio Railroad Company would not be responsible to the plaintiffs, but the water transportation company would. That is in the written contract, and there is no cavil in regard to that part of it.

"Plaintiffs claim, however, that the defendants did not deliver to the right carrier at Baltimore for further shipment to Charleston, and they say that on

<sup>1</sup> Bills of lading are *prima facie* evidence of the contract for transportation entered into between a carrier and a shipper. *Railroad Co. v. Beeson*, (Kan.) 2 Pac. Rep. 496. And evidence of conversations taking place prior to the date of a bill of lading is inadmissible to vary its provisions. *O'Rourke v. Tons of Coal*, 1 Fed. Rep. 619. But a parol contract for the carriage of goods will not be held to be superseded by a bill of lading subsequently handed to the shipper by the carrier, signed by one party only, and read and understood only by the carrier, where the original contract has been principally executed and fulfilled by the shipper, the party who did not understand the contents of the bill of lading, and who is to suffer if the original contract is to be overturned. *Railroad Co. v. Beeson*, *supra*.

the day of the shipment (perhaps, the day before) they telephoned to the Baltimore & Ohio Railroad Company's freight-office to get an all-rail rate to Charleston, and they got an answer of ninety cents. We admitted the testimony because we think that the business of communication by telephone is so well and plainly recognized among business men in this city, and in the cities of the country generally, that contracts made in that way must be recognized. We think, also, that if the plaintiffs communicated with the Baltimore & Ohio Railroad Company's freight-office asking a question, and got an answer, the presumptions are it was given by some officer authorized to make it. Mr. Myers said that he had a conversation over the telephone with an officer of the defendant company in which an all-rail rate was given. The officers of the Baltimore & Ohio Railroad Company deny that there was any such contract, and say they were simply asked for a rate. If it stood on that alone, we would leave it to the jury to say whether or not such a contract was made, that the shipment was to be by all-rail, but the testimony on both sides shows that the plaintiffs kept a blank of this kind of the defendants, [shows dray-ticket in evidence:] and when they came to ship the bitters they filled up two of these blanks which corresponded, one of them to be signed by the receiving officer at the freight depot and returned to plaintiffs, and the other to be kept by the railroad company. That blank was filled up in the office of Hostetter & Co., not by the railroad company, and it was a receipt for fifty boxes of bitters for Charleston, S. C., H. Clatter & Brother, with this provision: 'It is agreed and it shall be transported only on the conditions named in the company's regular bill of lading.' The bill of lading was filled in by Hostetter & Co. and sent there.

"Now, under the course of business as testified to on both sides, and not in dispute at all, this makes the contract between the parties. If it was to be an all-rail route, or to be something different from the ordinary bill of lading, it should have been on the dray receipt plaintiffs sent up to the depot, and especially when the business that they claim was transacted was by telephone. Even if it had been understood distinctly that the freight was to go by an all-rail route, I take it that the sending of this ticket without any designation of that kind on it would be a revocation, and it was to go in the ordinary way. So I instruct you that under all the evidence there is not sufficient to make an agreement on the part of the railroad company that these bitters were to go by an all-rail route. The action of the plaintiffs afterwards in sending the goods up, with the bill of lading and the dray receipts made out to be shipped in the ordinary way, is to be taken as the contract. This bill of lading, as I understand it, and as I instruct you, gives the *defendants the option* of shipping by any proper, reasonable route from their terminus to Charleston. Plaintiffs say, and defendants also, that the usual route has been to ship by water from Baltimore. Defendants say that the rate fixed was the rail and water rate, and not an all-rail rate. I instruct you that if the defendants delivered at Baltimore the goods of the plaintiffs to a responsible carrier by steamer for Charleston, in the way they were accustomed to ship, that is the end of their liability under this contract. The testimony of the last witness who was called, who states that he was the transfer shipping clerk at Baltimore, is that he attended to the shipping of these goods, and that they were shipped in good order a few days after the date of their receipt at Pittsburgh, on a certain steamer of the general line of transportation. If that was done, that is the end of the defendants' liability. There is no evidence to contradict that testimony, and I do not see any reason why you should not believe it. If you do believe it, your verdict should be for the defendants. If the plaintiffs have a claim against anybody, it is against the steam-boat company running between Baltimore and Charleston."

Plaintiffs' attorney requested the court to charge the jury as follows: "*First*. That a bill of lading, on its face, is but a memorandum, and not in

form a contract *inter partes*, and oral testimony may be received to show the real contract. *Second.* The fact that a railroad company gives a shipper a bill of lading when the goods are delivered, does not preclude the shipper in an action against the railroad company, as common carriers, from showing, when such is the fact, that the bill of lading does not express the terms of the transportation contract. *Third.* If the jury believe from the testimony of Myers and Robb that a contract was made for the transportation of the goods from Pittsburgh to Charleston by railroad, or 'all-rail,' and defendant company caused a transshipment from Locust Point by a sea-going vessel, and the goods were lost, it is liable; such change of the route agreed upon being negligence on the part of the railroad company." These requests were refused. Plaintiffs bring error.

*Albert H. Clarke*, for plaintiffs in error.

**PER CURIAM.** The exceptions in this case are confined to the charge of the court. After examining that charge with the shipping bill, we are constrained to say that the assignments of error cannot be sustained. The charge contains a sound and clear exposition of the law governing the controversy, and as our comments can add nothing to its value we abstain from a useless labor. Judgment affirmed.

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STONEY v. WINTERHALTER.

(*Supreme Court of Pennsylvania.* November 7, 1887.)

**DEED—DELIVERY—QUESTION FOR JURY.**

In an action of ejectment the evidence showed that plaintiff was the step-son of F. Kaiser, who was his guardian, and who died in 1882. Among his papers his executor found a deed conveying to plaintiff the two lots in question. It was duly acknowledged, but not recorded. At the time of the execution of the deed in controversy, Mrs. Kaiser informed her husband that her son wanted a settlement of the guardianship account. Whereupon Kaisersaid "it was all right. 'I will give him that house on Devilliers street, if you are satisfied.'" And his wife replied: "Yes, I am satisfied." The deed was made out pursuant to this arrangement. The trial court left it to the jury to say whether there had been a delivery of the deed. The jury found that there had been a delivery. *Held*, that this was a question of fact, and properly submitted to the jury; and, if the verdict was wrong, it could only be corrected by a new trial, with which the supreme court had nothing to do.

Error to court of common pleas, Allegheny county.

Action of ejectment to recover two city lots, by F. E. Winterhalter, step-son of F. Kaiser, against R. J. Stoney, trustee of the estate of F. Kaiser, deceased.

When plaintiff was about three years of age, his mother married Frederick Kaiser, who was appointed plaintiff's guardian, and during his minority continued to collect rents from the step-son's property in Ohio, for which he was indebted to his ward at the time of his death, in 1882, to an amount exceeding \$8,000. With the capital thus acquired, and other moneys which were subsequently bequeathed to his wife and step-son by relatives in Germany, Kaiser built up a large business. Kaiser had a son by a former wife, whom he made his residuary legatee, and gave him the bulk of his estate in trust. The plaintiff served his adopted father up to the time of his death. About the time of the execution of the deed in controversy, Mrs. Kaiser informed her husband that her son wanted a settlement of the guardianship account; whereupon Kaiser said "it was all right. 'I will give him that house on Devilliers street, if you are satisfied;'" and I said: "Yes, I am satisfied." Pursuant to this arrangement, Kaiser and his wife had a deed prepared for the lot in dispute, which was duly acknowledged before a notary public on April 18, 1878, and which, it is claimed, was duly delivered to the grantee therein named, but was found unrecorded by the present trustee among the papers of the estate which were turned over to him by the administrator of the original

trustee under F. Kaiser's will. Plaintiff had a verdict, and defendant brings error.

The following portions of the charge are assigned as error:

"On the face of the deed the plaintiff has a perfect title to this property. The deed is not recorded. That is not necessary to a perfect title. We have a law requiring deeds to be recorded within six months after they are executed, but that is only to protect the vendee against a subsequent conveyance by the vendor. When the vendee takes possession, or when there has been no other conveyance by the vendor, the vendee has a perfect title without recording his deed. A great many people, especially as I have found those of German connection, don't record their deeds, but keep them, sometimes fifteen, twenty, or thirty years without having them recorded. It is always better to have deeds recorded, but it is not necessary to their validity. If the deed is properly executed and acknowledged, it is perfectly valid without being recorded. On the face of this deed, then, the plaintiff has a perfect title to the property claimed by him in this action."

"Further, the evidence shows that the plaintiff never had the exclusive possession of this property. The deed was made in 1878. Mr. Kaiser died, I believe, in 1882, four years after the deed was dated, and during that time Mr. Kaiser collected the rents, paid the taxes, and controlled and managed the property, and since his death his executors have done it; the plaintiff not bringing his action until a year or so ago. The bringing of the action, however, at the late date, has very little to do with the case. A man may hope to settle a case, and defer bringing suit, and it will not do always to say that because a man does not hurry and jump into law, and waits, hoping to adjust the matter, that that is to be counted to his prejudice afterwards."

"I might say, also, that an indication that the deed was not delivered was the finding of the blank bond and mortgage by Mr. Stoney in connection with this deed; the blank mortgage being written by the same person who wrote the deed, and bearing date the same day. These facts are relied upon by the defendant as evidence conclusive to the jury that this deed never was delivered; and of course, if it never was filed, the plaintiff cannot recover. The plaintiff, however, replies to all that, or rather, by evidence in chief and direct, undertakes to prove that there was a delivery of this deed. The evidence mainly on that point was the testimony of Mr. Porte, that young Winterhalter, the plaintiff, brought the deed to him—he believes it to be the deed—some time after its execution. Of course, if that is true, it shows that he had possession of the deed. If you believe that Mr. Porte had this deed, that it was brought to him by young Winterhalter to see if it was right, it would be very strong, if not conclusive, evidence, that it had been handed over to Winterhalter by Mr. Kaiser. The fact of its afterwards getting back into the safe would be of very little consequence. But Mr. Porte may be mistaken, as the defendant's counsel contend; that it must have been another deed that that old Mrs. Kaiser referred to. These are questions of fact for you."

"The plaintiff also has the testimony of several witnesses as to declarations of the old gentleman that he had given, or intended to give, his step-son, Winterhalter, property. Some of them referred to it as 'property on the hill,' and this, it appears, was the only property that he had on the hill; and others that he intended to give, or had given, him property, without specifying where it was; and then the testimony of a witness that he spoke of this very house as 'Ed's house.' All of these are matters to be considered by you."

"It is also suggested that the fact of a blank bond and mortgage being drawn up by Mr. Koethen at the time the deed was drawn, and being found among Mr. Kaiser's papers, is very strong evidence that it was either a purchase by young Winterhalter, or that there was an intention of the old gentleman to give it to him, and that intention was never carried out. The deed purports to be for the consideration of \$4,500. The bond and mortgage is only

for the sum of \$2,000. Now, a man in giving a deed making a gift of property—and it is very customary, in fact—puts down a substantial consideration. Sometimes the deed says, 'in consideration of \$1, and of natural love and affection;' but perhaps, more usually, when a deed is not strictly from a father to a son or step-son, a substantial consideration is put in the deed. Sometimes it may not be the true value of the property. We have no evidence that young Winterhalter ever purchased this property from the old gentleman; that there was any bargain, or any talk of bargaining for it,—no evidence that he ever knew anything about this bond and mortgage; but the old lady testifies that when she married Mr. Kaiser, in Canton, Ohio, this boy was about three years old. Her former husband had had some property, and was in business then. That Mr. Kaiser sold off everything, and wanted to come to the city of Pittsburgh, and, in order to effect a sale, he was appointed guardian of this child, three years of age, and that as guardian he received money or property that belonged to the ward, or in which the ward had an interest. From that time on the boy lived with the old gentleman,—with his mother and step-father. The father had but one son, Frederick Kaiser, Jr. The two boys grew up together in the family, and worked for the old gentleman in the store. Then Mrs. Kaiser says that, about the time this deed was executed, she received some money from her father's estate in Germany, and that Mr. Kaiser got that money. It went into their business, and that she then suggested to him that Edward, her son, wanted a settlement with him as guardian: that the old gentleman then proposed to her to give him a house and lot upon Devilliers street, by way of settling that guardian account, and wanted to know from her if that would do, and she assented to it; and in consequence of that, she says, this deed was executed. If you believe that testimony, that was a substantial consideration for this deed, either in whole or in part, and the fact that no provision is made in his will for the son would indicate either that he had in some way settled for what was due the step-son from him as guardian, or that he had died without providing that the son should be repaid what he had received on his account unless it had been settled in some other way. The old lady's testimony is the only testimony we have as to why this deed was executed, and that is utterly inconsistent with the idea that it was a purchase by the son, or that there was any bond or mortgage accompanying it."

"It is material, gentlemen, in view of this case, to know why the deed was executed. It was executed, and executed for some purpose. What was that purpose? And it is material, too, bearing upon the question of the delivery of the deed. If these parties had been total strangers, living at different places, perhaps the jury might require stronger evidence of actual delivery than they would when it is father and son, or father and step-son, especially in view of the testimony of the old lady. It seems that the plaintiff lived with his father and mother until he got married, or shortly before that time, and was still working for Frederick Kaiser in his store, down, I believe, until the time of his death. Had the plaintiff any papers or did he keep anything of that kind anywhere himself? Was this deed simply put in the safe for safe-keeping? It might also bear some little on the question whether he would exact from the old gentleman the adverse possession of the property, and exact all rents against him. There is some evidence that he was somewhat peculiar, and would he not, under the circumstances, defer very largely to the wishes of the old man?"

"And if you believe the account that was put in evidence here, that the old gentleman received rents from the house and lot of the plaintiff in Canton, Ohio, it would be very natural, also, for him to receive rents from this house and lot here in the city."

"And I say, gentlemen, the relation of these parties to each other,—the old gentleman being the guardian of the son, and having some money of the

son's,—and Mrs. Kaiser's testimony, are all to be considered by you as bearing upon the question whether there was a delivery or not, either directly handing it over to him, or delivering it to him, and then keeping it in the safe for safety. Because of the mere fact of its being in the safe of itself would not disprove delivery. I say it is *prima facie* evidence that there was no delivery, but it is for you to say whether the evidence satisfies you that this deed was executed either for the purpose of a gift, or in payment of what the old gentleman owed him; and if it was executed for either or both purposes combined, and delivered over to him, but kept by the old gentleman in his safe simply for safe-keeping, that would be a good title. A man may make a deed by way of a gift, even to a stranger, when it is a small portion of his estate. It seems that Mr. Kaiser had a very large estate, enough to amply justify giving a deed for a house and lot worth four or five thousand dollars, even to a stranger, much more to a son,—a step-son; the son of his wife; one he had raised, and who had been working for him; one who, as the evidence would indicate, was quite as kind to him as was his own son."

*William S. Pter*, for plaintiff in error. *John Barton* and *A. B. Force*, for defendant in error.

**PER CURIAM.** The material question in this case was the delivery of the deed of April 18th by Kaiser to Winterhalter. This was a question of fact, and was properly submitted. We cannot, therefore, sustain the exceptions to the charge. The jury might, from the evidence, well have found differently from what they did find, but, as that evidence could not have been legally withdrawn from them, a wrong verdict could only be corrected by a new trial, and with this we have nothing to do. Judgment affirmed.

### McKINNIE and another v. KILGALLON.

(*Supreme Court of Pennsylvania. November 7, 1887.*)

#### MASTER AND SERVANT—DEFECTIVE APPLIANCES—DANGEROUS ELEVATOR.

Certain servants in a hotel were required, when in working costume, to use the freight elevator as a means of transit to and from the various floors. While going up in this elevator, plaintiff, one of the servants, had her foot crushed between the elevator and the wall. *Held* that, as the evidence showed that the elevator was not fitted for the safe transportation of human beings, a judgment for plaintiff in an action for damages was warranted.

Error to court of common pleas, Allegheny county.

This was an action on the case by Winnie Kilgallon against McKinnie & Bean to recover damages for injuries caused by an accident to plaintiff while upon the elevator of the Anderson Hotel, in the city of Pittsburgh. The defendants are proprietors of the hotel, and the plaintiff was employed as a scrubbing girl. The building belongs to Joseph N. Anderson, from whom it is rented by the defendants. They took possession in June, 1885, before which time the elevator had been constructed for Mr. Anderson by the Crane Elevator Company. There were two elevators in the hotel, constructed in exactly the same manner, except as to the fitting of the platform. One was used for guests, and the other for freight and servants. There was some conflict of evidence as to the orders in reference to the use of the elevator by servants. It was admitted that none of the servants were required to use the elevator except the scrubbing girls, and they only when in their working clothes. On part of the defendants, it was alleged that they were only required to use it when carrying their buckets and soiled rags. The plaintiff testified that they were required to use it unless they were "dressed up." On the twenty-first of October, 1885, while using the elevator in passing from her work to her room, her foot was in some way caught between the floor of the elevator and the cornice of the door-way leading to the office floor. He:

injuries were severe, necessitating amputation of her foot. The evidence at the trial as to the fitness of the elevator was very voluminous and conflicting. A verdict was rendered in favor of plaintiff for \$2,441.66, and a judgment entered, to which this writ of error was taken. There were a number of exceptions taken to evidence in the progress of the trial, which are not assigned as errors.

*J. F. Slagle*, for plaintiffs in error. *A. V. D. Watterson* and *A. M. Brown*, for defendant in error.

PER CURIAM. None of the assignments of error in this case can be sustained. The evidence was properly submitted to the jury, and that body found that the elevator was not fitted for the safe transportation of human beings. In this they were warranted by the evidence, and we therefore approve both verdict and judgment. Judgment affirmed.

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MILLER v. RANKIN.

(*Supreme Court of Pennsylvania.* November 7, 1887.)

1. DAMAGES—LIQUIDATED—PENALTY FOR SUBLETTING.

A lease for one year provided for a penalty of \$300 for subletting the premises, to be paid as rent, computing from the time of subletting. Defendant sublet, and plaintiff, in an action on the covenant, recovered \$25 per month as liquidated damages for the time the premises were sublet. *Held*, under the contract, the judgment was not erroneous.

2. SAME—PENALTY TREATED AS LIQUIDATED DAMAGES—ACTUAL DAMAGES.

A lease for one year contained a covenant providing \$300 as a penalty for subletting the premises, to be collected as rent, in proportion to the time the premises were sublet. In an action on the covenant, defendant filed an affidavit of defense that he was not liable; no actual damages having been alleged or proved. The court treated the penalty as liquidated damages, and entered judgment for want of sufficient defense. *Held* not error.

Error to court of common pleas, Allegheny county.

Plaintiff, G. W. Rankin, let a dwelling-house to defendant, Miller, for the term of one year, beginning April 1, 1886, at the yearly rental of \$318, payable monthly in advance, to-wit, \$26.50 per month. The written lease contains the following covenant: "And the said party of the second part covenants and agrees to pay the rent aforesaid at the days and times hereinbefore limited and appointed for the payment thereof; that he will not relet or sublet the premises, or any part thereof, or assign this lease, without the written consent of the said party of the first part, under a penalty of three hundred dollars, to be paid by the said lessee and his subtenant in the nature of rent, in addition to the amount above mentioned, in equal monthly installments at the time of payment of the rent hereinbefore reserved, computing from the date of subletting." The lessee went into possession at the beginning of the term, and occupied the leased premises until June, when he purchased a house to which he removed, leaving the leased premises vacant until the latter part of September, and he paid the rent reserved until October 1, 1886. Late in September the lessee sublet the premises to one Elliott, who has since occupied them without the lessor's consent. On November 10, 1886, the lessor entered suit before an alderman to recover the unpaid rent reserved for the months of October and November, and, in addition, the sum of \$25 for each of said months as penalty for subletting. The lessee tendered payment of the rent, to-wit, \$53, but refused to pay any part of the penalty. The alderman entered judgment for the full amount of the lessor's claim, and the lessee appealed to the common pleas No. 2. The lessor then filed his affidavit of claim and narr, setting forth his claim as above stated, and the defendant filed his affidavit of defense, in which he admits the lease and subletting; shows tender of the amount of rent reserved; that the subtenant is a proper

person to occupy the premises; that the lessor arbitrarily and unreasonably refused to consent to his subletting; and that the lessor has suffered no damage in any manner by reason of such subletting. The plaintiff (lessor) entered a rule for judgment for want of a sufficient affidavit of defense, which was made absolute by the court below, and judgment entered for the full amount of the plaintiff's claim. The plaintiff in error (lessee) then sued out this writ, and claims that the \$300 mentioned in the lease is not to be treated as liquidated damages, to be paid by reason of the mere fact of subletting, and that he is not liable for more than the amount of the monthly rent reserved, in the absence of allegation and proof of actual damage.

*S. A. & M. Johnston*, for plaintiff in error. *S. W. Cunningham* and *T. D. Chantler*, for defendant in error.

**PER CURIAM.** The defendant in this case, who comes before us as plaintiff in error, has no reason to complain of the judgment of the court below. He has had his own contract enforced against him. He agreed to pay a penalty or additional rent of \$300 in case he should sublet the premises. With this in view, he did sublet, and it is but just that he should be compelled to abide by the terms of his own contract. The judgment is affirmed.

#### CHAUTAUQUA LAKE ICE CO. v. McLUCKEY and Wife.

(*Supreme Court of Pennsylvania. November 7, 1887.*)

##### **NEGLIGENCE—CONTRIBUTORY—QUESTION FOR JURY.**

In an action by a husband and wife for personal injuries to the wife, caused by being knocked off a bridge by a wagon driven by defendant's employe, the evidence was conflicting. The defendant asked the court to instruct the jury "that, under the evidence, the plaintiff was guilty of contributory negligence," and also "that the verdict of the jury should be for the defendant." *Held* properly refused.

Error to court of common pleas, Allegheny county.

Mrs. McLuckey, the defendant in error, brought suit against the Chautauqua Lake Ice Company, alleging that she was thrown from a "bridge" on Thirty-Fourth street, South Side, Pittsburgh, by coming in contact with a wagon of said company driven down said bridge while she was passing up one evening in March or April, 1886. The street is unpaved and ungraded, and is traversed by a ravine. From Carson street towards the river, for a distance of 154 feet, a roadway has been constructed by erecting trestles and covering them with plank, and this is what is called the "bridge." This bridge is elevated at the upper end some 10 or 12 feet, and the elevation is gradually reduced until at the lower end the bridge reaches the surface of the ground. The portion of the street on which the bridge is, has buildings erected fronting on it, and the entire street is 60 feet in width. The bridge at the upper end was 12 feet in width, but towards the lower end became narrower, so that in places it was only 8 feet wide. The descent was 10 feet to the hundred. There was a railing on one side, a distance of 55 feet from the top, then a gap of 30 feet, then railing for 10 feet, then no railing for the remaining distance of 60 feet. The other side had no railing whatever. Plaintiff alleged that while she was going up the bridge, and the wagon descending, a single-tree of the wagon struck her, and pushed her off at a point where there was no railing, and injured her. Plaintiff alleged that she was on the bridge before the wagon came on. Defendant's witnesses testified that she came on the bridge after the wagon was almost half way down the bridge, and in full view, and was pushed or fell off 34 feet from the bottom of the bridge. Plaintiff's witnesses testified that plaintiff was nearly half-way across the bridge when the wagon drove on the bridge from behind a building, and that the wagon was coming fast. It appears that upon the evening in question there had been rain, and the planks of the bridge were wet and slippery. The defendant below asked the court to

instruct the jury that plaintiff could not recover, on the ground that it was negligence for her to attempt to pass up the street by the bridge, and that, if she chose to do so, it was at her own risk. The court refused to so instruct, but directed the attention of the jury to the question as to whether or not the plaintiff went upon the bridge while defendant's wagon was coming down, and then instructed them that, if she did, it was a question of fact for them as to whether or not this showed negligence, instead of instructing that it was negligence *per se* for her to go upon the bridge under such circumstances.

Verdict and judgment for plaintiffs. Defendant brings error.

*S. A. McClung*, for plaintiff in error. *James H. Porte* and *Moore & McGirr*, for defendants in error.

**PER CURIAM.** The result of this case depended upon the credibility of evidence produced by the parties during the trial, and the court could not lawfully withdraw that evidence from the consideration of the jury. Nor can we see that the submission was not in proper form, or that there was anything exceptionable in the charge. Under these circumstances, we must refuse to sustain the assignments of error. Judgment affirmed.

### HART and others v. M'GREW.

(*Supreme Court of Pennsylvania. November 7, 1887.*)

#### 1. HUSBAND AND WIFE—CURTESY—DESEPTION—PROVINCE OF JURY.

An action of ejectment was brought by a husband against the devisee of his deceased wife's estate, claiming as tenant by curtesy. The husband and wife had not lived together for a number of years. The court instructed the jury that, if the husband willfully and intentionally deserted his wife, he was not entitled to curtesy in her estate; but that if the separation was voluntary, and in consequence of the mutual agreement of the parties, he did not forfeit his rights. *Held*, that the question as to whether there was willful desertion was one proper to be submitted to the jury.

#### 2. SAME—EVIDENCE—DECLARATIONS OF WIFE TO DISPROVE DESEPTION.

An action of ejectment was brought by a husband against the devisee of his deceased wife's estate, claiming as tenant by curtesy. The evidence showed that the husband and wife had not lived together for a number of years. *Held*, that the declarations of the wife tending to disprove the alleged willful and malicious character of the separation on his part were admissible.

#### 3. EJECTMENT—ABSTRACT OF TITLE—RULE OF COURT—EVIDENCE.

Under rule 90, court of common pleas, Allegheny county, Pennsylvania, which provides that it shall be the duty of the plaintiff, in an action of ejectment, to file in the office of the prothonotary an abstract of the title on which he relies for recovery, it is proper to admit such abstract in evidence.

#### 4. SAME—MESNE PROFITS—NOTICE—EVIDENCE.

After the commencement of an action of ejectment, and before the trial, plaintiff died. His administrator, who then prosecuted the suit, served a notice upon defendants claiming damages or mesne profits for the occupation of the premises. *Held*, that in such action the notice was admissible in evidence.

#### 5. SAME—DEFENDANT NOT COMPETENT TO TESTIFY.

After the death of the plaintiff in an action of ejectment, the suit was prosecuted by the administrator for the recovery of damages or mesne profits for the occupation of the premises. *Held*, that the testimony of the defendant on such action was inadmissible.

Error to court of common pleas, Allegheny county.

James McGrew brought the present action of ejectment to recover possession of a house and lot devised by his wife, Elizabeth, to the defendant, Angelina Hart; McGrew claiming as tenant by curtesy. The defense was that McGrew had willfully deserted his wife, and had not lived with her for 10 years immediately before her death, nor in all that time had he contributed anything to her support; that therefore he could not maintain the present action. The case came on for trial June 8, 1886, and there was a verdict for

defendants. McGrew died June 14th, and on July 8th a new trial was granted. November 20th, the usual notice was given, that plaintiff would claim mesne profits; and January 15, 1887, the present plaintiff, John McGrew, was appointed administrator of the estate of James McGrew. Upon the second trial, witnesses for plaintiff testified in regard to declarations of Mrs. McGrew, from which it appeared that she had sent her husband away because he had become too much of a charge for her to keep; that she had got tired of keeping him. To the admission of this testimony defendants objected. Plaintiff introduced in evidence his abstract of title, filed in the case, and the notice of claim for mesne profits. Defendant objected, and their admission is assigned as error. Defendants' counsel proposed to call Angelina Hart, one of the defendants, as a witness, and plaintiff's objection thereto was sustained.

The court instructed the jury as follows: "Now was there a desertion? Upon that I do not think the testimony is quite as strong as upon the other two matters. It seem he went away. Some of the witnesses say the wife did not want him to go. Of course, the wife's duty was to nurse him. It is said she was willing for him to go away. Witnesses who were present at the time say she did not want him to go; that she went to see him, and never did want him to go. On the other hand, her declarations made at different times would seem to indicate that she could not take care of him, and let him go. If you find for the defendants on the ground of desertion, you must find that it was willful and intentional, and not by the wife's agreement; not a voluntary separation. It is contended on the part of the plaintiff that it was voluntary; that she let him go, wanted him to go, and agreed to the separation. On the other hand, it is contended she did not do anything of the kind, and tried to get him back. You will say how that was. If it was voluntary, this defense would not be sufficient, and the plaintiff would be entitled to recover."

There was a verdict for plaintiff in the sum of \$225, and defendants appeal.

*James M. Nevin, W. D. Moore, and F. C. McGirr*, for plaintiffs in error.

The action of ejectment is founded on present right to possession. If plaintiff had title when suit was brought, and has not when the suit is tried, he cannot recover the land. *Heffner v. Betz*, 32 Pa. St. 376. The right to recover mesne profits depends upon possession. *Caldwell v. Walters*, 22 Pa. St. 378; *Sedg. & W. Tr. title Land*, §§ 648, 649. The wife's declarations are inadmissible in cases like the present. *Taylor v. Kelly*, 80 Pa. St. 95; *Peck v. Ward*, 18 Pa. St. 506; *Jones v. McKee*, 3 Pa. St. 496.

*Geo. H. Quail and T. F. Newlin*, for defendant in error.

The plaintiff in an ejectment suit may prove and recover his damages in the same action, upon his giving notice to the defendants of his intention so to do. *Boyd v. Cowan*, 4 Dall. 138; *Osbourn v. Osbourn*, 11 Serg. & R. 55; *Cook v. Nicholas*, 2 Watts & S. 27; *Bayard v. Inglis*, 5 Watts & S. 465. A woman's declarations, at or about the time she is leaving her husband, that she is going to desert him, are admissible on behalf of the husband in divorce proceedings. *Matchin v. Matchin*, 6 Pa. St. 332. Plaintiff in ejectment shall recover according to his title when suit was brought; but if, pending suit, his title is divested, he may proceed for damages and costs. *Tyler*, Ej. 577; *Murray v. Garretson*, 4 Serg. & R. 130; *Jackson v. Davenport*, 18 Johns. 295; *Dodge v. Page*, 49 Vt. 137; *Woodhull v. Rosenthal*, 61 N. Y. 385; *Carman v. Beam*, 88 Pa. St. 319. If the title of the plaintiff in ejectment, being a life-estate, ends before the trial of the cause, though he cannot turn the defendant out of possession, he is nevertheless entitled to judgment to enable him to recover the mesne profits. *Jackson v. Davenport*, *supra*; *Dodge v. Page*, *supra*; *Woodhull v. Rosenthal*, *supra*. No writ of ejectment shall abate by reason of the death of any plaintiff. Act April 13, 1807, § 3, (1 Purd. Dig. 638.)

**PER CURIAM.** As the court below well said, this case is a very simple one. If James McGrew willfully and intentionally deserted his wife, he was certainly not entitled to curtesy in her estate. If, on the other hand, the separation was rendered necessary by the circumstances of the parties, and for their mutual comfort they agreed to live apart, then, of course, he did not forfeit his right in her estate. The question thus stated was, with proper instructions, submitted to the jury, and they determined it in favor of the plaintiff. Her declarations were rightly admitted for the purpose of disproving the alleged willful and malicious character of the separation on his part. The exceptions to the admission in evidence of the abstract of title, and notice of the plaintiff's claim for mesne profits, cannot be sustained. That the testimony of Mrs. Angelina Hart, one of the defendants, was properly excluded, is a proposition too plain for discussion. Judgment affirmed.

### BURRELL TP. *v.* UNCAPHER.

(*Supreme Court of Pennsylvania.* November 7, 1887.)

#### 1. NEGLIGENCE—PROXIMATE AND REMOTE CAUSE.

Where a horse was frightened at an engine standing in a road, and threw the occupants of the wagon to which it was attached over a steep bank not properly guarded with a protecting rail, thereby injuring them, there was no question, in an action for the injury caused thereby, as to proximate or remote cause.

#### 2. SAME—NEGLECT OF DEFENDANT AND THIRD PARTY.

Even though two causes of an accident exist, without both of which the accident would not have occurred, and both are due to negligence, one party guilty of negligence cannot render the excuse that he is not liable to plaintiff for damages caused thereby because a third party was also in fault.<sup>1</sup>

#### 3. SAME—NEGLECT QUESTION FOR JURY.

Whether the maintaining of a road by a township in a certain condition was or was not negligence is a question of fact within the province of a jury, and its finding will not be reversed.

#### 4. HIGHWAYS—LIABILITY OF TOWN FOR DEFECTS.

A township owes a duty to the public to keep a reasonably safe road at any given place, and, if an injury occurs from its failure so to do, it is responsible for its negligence.

#### 5. HUSBAND AND WIFE—HUSBAND NOMINAL PARTY TO ACTION—CANNOT BE COMPELLED TO TESTIFY

A husband and wife joined in an action for damages suffered by the wife; the husband being merely a nominal party. *Held*, that the husband could not be considered such a party to the action as to give the opposite party a right to compel him to testify to matters against the interest of his wife.

Error to court of common pleas, Armstrong county.

Action against a town for negligence. Plaintiffs, who were husband and wife, while driving along a country road undertook to pass an engine standing by the roadside, which frightened their horse, and they were thrown over an embankment on the opposite side of the road, which they alleged was left by the town authorities negligently without a protecting rail to prevent such a mishap. The accident resulted in an injury to the wife, for whose benefit the action was brought. During the trial the defendant's counsel attempted to elicit, as upon cross-examination, certain facts from the husband, on the ground that he was a party to the action. Plaintiff objected, on the ground that the wife was the real party in interest, and the husband could not be compelled to give evidence against his wife's interest. This objection was sustained. Testimony was also admitted to show that one of the supervisors had been notified of the dangerous character of the place where the accident occurred, which was alleged as error. Alleged errors 6 to 14 were as to the proximate or remote cause of the injury. Verdict for plaintiff. Defendant brings error.

<sup>1</sup> See note at end of case.

*J. P. Coulter and David Barclay*, for plaintiff in error. *J. M. Hunter, E. S. Golden, and H. L. Golden*, for defendant in error.

GREEN, J. The several assignments of error which relate to the admissibility of the plaintiff's husband as a witness, and of his declarations, against her, may be considered together. The action was brought in the name of the husband and wife, but in right of the wife, and for the recovery of damages for an injury sustained by her. It was her action, and she was the plaintiff. The husband was merely joined in his capacity as husband, and to conform to the rules of pleading. In such circumstances, when called to testify against his wife, he cannot be regarded merely as a party to the record in order to make him competent as a party called for cross-examination. He is a formal, and not a real, party; and, as the purpose of the offer was to elicit from him testimony adverse to the claim of his wife, he must be regarded as incompetent to deliver such testimony. The same is true as to declarations made by him. They could not be given in evidence against his wife. This disposes of the second, third, fourth, and fifth assignments.

There was no error in admitting proof of notice to Wilcox, one of the supervisors, of the dangerous character of the road, and therefore the first assignment is not sustained.

The assignments numbered 6 to 14, both inclusive, relate to the subject of proximate cause, and may be considered together. In our judgment, no question involving the distinction between proximate and remote cause arises in this case. The defendant owed a duty to the plaintiff, as one of the public, to keep a reasonably safe road at the place where this accident happened. If that was not done, the omission was an act of negligence; and if, in consequence of that negligence, an injury was sustained by the plaintiff, the defendant is responsible in damages to the plaintiff. It is no answer to this to say that some one else was also guilty of another act of negligence, in consequence of which the plaintiff's injury was suffered. If both the defendants and other parties were derelict, the plaintiff might proceed against either, though of course only one actual recovery of damages for the same injury could be permitted. Between the two alleged acts of negligence in the present case there is no relation of proximity or remoteness in the sense in which the law regards that subject so as to postpone the liability of one because of the liability of another, or because of the intervention of an intermediate agency. The parties who placed the engine by the roadside, and thereby caused the plaintiff's horse to frighten, might readily be held liable for their act of negligence, and it would be no answer for them to say that the unguarded road-side was the immediate cause of the injury, and therefore they should not be held liable. They violated a distinct and independent duty to the public when they placed an object along the road-side which was calculated to frighten reasonably gentle horses. For the breach of that particular duty they are responsible, if injury results in any way by a fright being communicated to a passing horse. And so as to the defendant, if, in consequence of a breach of duty in not properly guarding the side or edge of a public road, an injury is sustained by a passing traveler.

Whether the traveler be a foot passenger who falls over a road-side precipice in the dark, or rides on horseback or in a wagon, and the horse goes over in the dark, or in consequence of a sudden fright, is immaterial; the culpable breach of duty is the same in each event. Whether there be a special cause which induced an accelerated motion on the part of the horse is of no consequence in considering the liability of those whose duty it is to keep the road-side reasonably safe. Their duty is irrespective of the duty of others, and for its breach they are responsible, whether others are responsible for another violated duty or not. Thus in *Shearman & Redfield on Negligence*, 401, it is said: "As a general principle, the fact that an injury to a traveler on a

highway was caused by the combined effect of the unsafe condition of the road, and the negligence of a third person, is no defense to the party who is bound to keep the highway in repair." In section 10 of the same work it is said: "Negligence, however, may be the proximate cause of an injury, of which it is not the sole or immediate cause. If the defendant's negligence concurred with some other event (other than the plaintiff's fault) to produce the plaintiff's injury, so that it clearly appears that but for such negligence the injury would have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible, even though his negligent act was not the nearest cause in the order of time." Id. 46: "The fact that the injury was caused by the joint negligence of the defendant and a stranger is, of course, no defense; and unless the person whose fault is relied upon by the defendant as an excuse was subject to the direction of the plaintiff, his fault cannot properly be charged upon the latter." And in section 403: "The town is liable for any injury of which a defect in the highway is the proximate cause." It is not necessary to multiply quotations or the citation of decided cases; the subject is too simple and too free of doubt. The immediately producing cause of the accident in the present case was the unguarded condition of the road-side at the place where the accident occurred. If that unguarded condition of the road-side was an act of negligence on the part of the defendant, it follows that the defendant is responsible.

Whether it was negligence in the defendant to maintain the road at the place in question without some kind of protection was a question of pure fact, which it was the province of the jury alone to determine. Much testimony was given upon that subject on both sides, and the question was fairly and correctly left to the jury. The verdict in favor of the plaintiff decides the question against the defendant, and it is not possible for us to reverse that finding. We cannot say there was no evidence, or only a *scintilla*, to support the verdict, and on no other principle can we interfere. On another trial, if it were granted, the question would have to be decided by the same tribunal, and, in view of the extreme smallness of the verdict, consequences far more disastrous to the township might easily result. Judgment affirmed.

#### NOTE.

**NEGLIGENCE—CONCURRING ACTS OF DEFENDANT AND THIRD PARTY.** Where the wrongful act or omission of defendant has been an efficient cause of an injury received by plaintiff, it is immaterial that other conditions have conjoined to produce the injury, or how many others may have been at fault. *Campbell v. City of Stillwater*, (Minn.) 20 N. W. Rep. 320; *Railroad Co. v. Cummings*, 1 Sup. Ct. Rep. 493. Where an injury to one is caused by, and is the natural and probable result of, the wrongful act or omission of another, the latter is liable therefor, although other causes put in motion by the act or omission, and which in the absence thereof would not have produced the result, contribute to the injury. *Lowery v. Railroad Co.*, (N. Y.) 1 N. E. Rep. 608. Where injury resulted to plaintiff from a "push car" being left on a railroad track by some one not connected with the railroad, held, that the company was not responsible for the unlawful act of some third party in placing obstructions upon the track without its knowledge or consent, unless it had done some act which it might reasonably have anticipated would lead to the placing of the obstruction upon the track. *Harris v. Railroad Co.*, 13 Fed. Rep. 591.

#### WODDROP v. THACHER.

(*Supreme Court of Pennsylvania*. November 7, 1887.)

#### LIBEL AND SLANDER—JUSTIFICATION—MEASURE OF PROOF—INSTRUCTIONS.

In an action for slander, for saying plaintiff embezzled and stole, the parties agreed that evidence should be admitted, under a plea of "not guilty," to prove the truth of the alleged slanderous words, the same as if under a plea of justification; and thereafter plaintiff requested the court to charge that "defendant, in order to sustain the plea of justification, must prove the same character and weight of evidence as would convict the plaintiff if criminally indicted for larceny and embezzlement."

And the court answered: "Affirmed, with the qualification that this is a correct general statement of the law applicable thereto; but there is no plea of justification filed in this case." *Held* error, as it would naturally lead the jury to believe that while, in other cases, in order to make a successful justification, it was necessary for the jury to be satisfied that the words spoken were true, yet this was a case to which the rule was not applicable, as no plea of justification had been filed.

Error to court of common pleas, Jefferson county.

Action for slander against defendant for saying of plaintiff, "Thacher embezzled and stole from us over eight thousand dollars."

*Jenks & Clark* and *W. P. Jenks*, for plaintiff in error. *Moyné & Nelson* and *W. F. Steward*, for defendant in error.

WILLIAMS, J. This case appears to have been tried with care by the learned judge of the court below. The charge to the jury was a careful summary of the evidence, and the general rules of law applicable to actions of this class; but in one particular the court failed to present the case adequately to the jury. We find in the stenographer's notes of the trial this entry: "By agreement of counsel, the defendant is permitted to introduce evidence under the plea of not guilty with the same force and effect as if introduced under the plea of justification, upon condition that he calls and examines A. J. Maloney," and other persons named. We also find that the plaintiff's counsel, in their third point, requested the court to instruct the jury that "the defendant having attempted to establish a justification, the proof must be as broad as the charge." The answer of the court was: "Affirmed, under the agreement of counsel." It would seem to be very clear, therefore, that one of the most important questions for the jury was whether the words, if spoken, were true. This seems also to have been the view of the plaintiff's counsel, for in their fourth point they asked the court to instruct the jury that the plea of justification, if unsupported, should go in aggravation of the damages; and in their fifth point they asked the further instruction upon this branch of the case, that the "defendant, in order to sustain the plea of justification, must prove the same character and weight of evidence as would convict the plaintiff if criminally indicted for larceny and embezzlement." The answer of the court was: "Affirmed, with the qualification that this is a correct general statement of the law applicable thereto; but there is no plea of justification filed in this case." This would naturally be understood by the jury as equivalent to an instruction that while, in other cases, in order to make a successful justification, it was necessary for the jury to be satisfied that the words spoken were true, and the crime imputed to the plaintiff had actually been committed, yet this case was one to which the rule was not applicable, because there was no plea of justification filed. The agreement of the parties entered upon the minutes of the trial was certainly as effective to open the door to this line of defense as a formal plea filed could have been; and the jury should have been distinctly told that, if satisfied that the words spoken were true, the plaintiff could not recover.

The learned judge had just called the attention of the jury to the evidence tending to show (we quote from the charge) that "Mr. Thacher admitted the accusations were true; said, at first, that the amount was only a few hundred dollars, and he would return it. \* \* \* After a brief negotiation a settlement was effected, whereby Mr. Thacher assigned his interest in the firm of Thacher & Woddrop to the legal representatives of Dr. Woddrop. \* \* \* After leaving the bank Mr. Thacher returned to the store, and, after taking his personal effects, left; but before going he requested Mr. C. W. Woddrop to walk with him to the ferry, a few blocks away. As they walked along, Mr. Thacher said he had admitted doing what he was accused of, but said he was no hardened villain or ordinary thief. He had done these things as he had an expensive place to keep up, and he knew Dr. Woddrop was going to die, and he supposed the boys would want their money out of the firm,

and, if so, he could not carry on the business; so he had been sending goods to auction and selling goods, and had laid away the money to go into business for himself when Woddrop should go out of the firm." Here was evidence upon which, if believed, the jury would have been justified in finding in favor of defendant; but this question was substantially taken from them by the answer to the plaintiff's fifth point; and there is reason for fear that the jury understood that they were to inquire as to the speaking of the words, their effect upon the plaintiff in his business, and the damages to which he was entitled, but that they were not to inquire if the words spoken were true. Indeed it is difficult to see what other conclusion they could have drawn from the answer complained of.

The other errors assigned are not sustained. Judgment reversed, and *venire facias de novo* awarded.

### WALKER and others v. COMMONWEALTH.

(*Supreme Court of Pennsylvania.* November 7, 1887.)

#### CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—ACT FORBIDDING SALE OF OLEOMARGARINE.

Plaintiffs were manufacturers of oleomargarine. They were indicted for its manufacture and sale contrary to the provisions of the Pennsylvania act of May 21, 1885, entitled "An act for the protection of the public health, and to prevent adulteration of dairy products, and fraud in the sale thereof." *Held*, that the act was not in violation of the fourteenth amendment to the United States constitution.<sup>1</sup>

Error to court of quarter sessions, Allegheny county.

Indictment for violating the act forbidding the manufacture and sale of oleomargarine.

The plaintiffs in error were severally indicted for the manufacture and sale of oleomargarine, contrary to the provisions of an act of the general assembly of this state, approved May 21, 1885, entitled "An act for the protection of the public health, and to prevent adulteration of dairy products, and fraud in the sale thereof." The case of the commonwealth was the admissions of the plaintiffs in error, in the following words: "That the defendants sold in Allegheny county, Pennsylvania, on the second day of February, 1887, as an article of food, to S. J. Adamson, the prosecuting witness in this case, one original package of an article manufactured in Allegheny county, Pennsylvania, by the defendants, out of oleaginous substances and compounds other than that produced from unadulterated milk, or cream from the same, and designed to take the place of butter produced from unadulterated milk or cream; that the said package was sold and bought as oleomargarine or butterine, and not as butter produced from pure, unadulterated milk, or cream from the same, and that said defendants had in their possession, with intent to sell the same as an article of food, the said package; and that the said package, when sold, was marked with the words, 'Oleomargarine Butter' upon the lid and side of the package in a straight line in roman letters one-half inch long, as provided in the act of the general assembly of this state, entitled 'An act for the protection of dairy-men, and to prevent deception in the sale of butter and cheese,' approved May 24, 1883." The commonwealth then rested, and the defendants (plaintiffs in error) made certain offers, which the court rejected, under the authority of the case of *Powell v. Com.*, 19 Wkly. Notes Cas. 24, 7 Atl. Rep. 913, and which ruling of the court, with the offers at length, are assigned as error. The defendants also requested the court to charge, in effect, that the said act of assembly was in conflict with the state and the federal constitutions, and the court declined to so charge, which declinations of the court are assigned for error.

<sup>1</sup> See note at end of case.

The rulings of the court below were based on the decision of this court in the case of *Powell v. Com.*, *supra*, and the assignments of error themselves, and the argument on them, show that the question involved in this case is whether such legislation as this oleomargarine act is or is not in conflict with the constitution of Pennsylvania, and also with the federal constitution.

The defendants' fourth and fifth assignments of error were as follows:

(4) The court erred in refusing to affirm the following point, which point and the answer thereto are as follows: "*First.* That the act of the general assembly of the commonwealth of Pennsylvania, entitled 'An act for the protection of the public health, and to prevent the adulteration of dairy products, and fraud in the sale thereof,' approved May 21, 1885, is repugnant to the provisions of the fourteenth amendment of the constitution of the United States, in that it did and does deny to the defendants, persons within the jurisdiction of the state of Pennsylvania, the equal protection of the laws of the state of Pennsylvania." *Answer.* These questions having been passed on by the supreme court of the state, and decided adversely to the contention of the defendants, they are refused.

(5) The court erred in refusing to affirm the following point, which point and the answer thereto are as follows: "*Second.* That the act of the general assembly of the commonwealth of Pennsylvania, entitled 'An act for the protection of the public health, and to prevent the adulteration of dairy products, and fraud in the sale thereof,' approved May 21, 1885, is repugnant to the provisions of the fourteenth amendment of the constitution of the United States in that it did and does deprive the defendants of their liberty without due process of law." *Answer.* These questions having been passed on by the supreme court of the state, and decided adversely to the contention of the defendants, they are refused.

*W. D. Rodgers and D T Watson*, for plaintiffs in error.

The general assembly cannot violate the popular privileges reserved by the declaration of rights. *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 161; *Craig v. Kline*, 65 Pa. St. 413; *Nonnan v. Heist*, 5 Watts & S. 173. The police power is based upon the maxim that every person ought so to use his property as not to injure his neighbors. 2 Kent, Comm. 340; *Slaughter-House Cases*, 16 Wall. 62; *Cooley*, Const. Lim. 715; *Town of Lake View v. Rose Hill Co.*, 70 Ill. 191. The right to follow any of the common occupations of life is an inalienable right. *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 4 Sup. Ct. Rep. 652; *People v. Marx*, 99 N. Y. 386, 2 N. E. Rep. 29; *Bertholf v. O'Reilly*, 74 N. Y. 515; *In re Jacobs*, 31 Alb. Law J. 85; *Munn v. Illinois*, 94 U. S. 142. The oleomargarine act is not due process of law. *Murray's Lessee v. Hoboken Co.*, 18 How. 272; *Davidson v. New Orleans*, 96 U. S. 97; *Gardner v. Newburgh*, 2 Johns. Ch. 162.

*W. D. Porter*, for defendant in error.

All the questions arising out of the various assignments of error in this case were fully considered by this court, and distinctly and definitely passed upon in the case of *Powell v. Com.*, 19 Wkly. Notes Cas. 24, 7 Atl. Rep. 913. The decision was adverse to the theory of the law contended for by the plaintiffs in error.

**PER CURIAM.** This case is ruled by *Powell v. Com.*, 19 Wkly. Notes Cas. 24, 7 Atl. Rep. 913, so far as the question of the police power of the state is concerned. We were of opinion there, as we are now, that the legislature has the power to prohibit the manufacture and sale of an article detrimental to the public health. Whether oleomargarine was such an article was a question of fact, and one which had been determined by the legislature. We are bound to presume that it was done upon sufficient evidence.

The question now presented by the defendants' first and second points (see fourth and fifth assignments) was not directly made in the court below upon the trial of *Powell v. Com.*, and was not pressed upon our attention. We affirm this case *pro forma*, in order that both may go up together. Judgment affirmed.

## NOTE.

**CONSTITUTIONAL LAW—POLICE POWER.** Whenever any business, occupation, rights, franchises, or privileges become obnoxious to the public health, manners, or morals, they may be regulated even to suppression; individual rights being compelled to give way for the benefit of the whole body politic. *Water-Works Co. v. Water-Works Co.*, 14 Fed. Rep. 194. Class legislation discriminating against some, and favoring others, is prohibited; but neither the fourteenth amendment, nor any other amendment, to the constitution of the United States, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations for the promotion of the health, peace, morals, education, and good order of the people. *Barbier v. Connelly*, 5 Sup. Ct. Rep. 357. Statutes prohibiting the manufacture and sale "out of any oleaginous substance, or any compound of the same, other than that produced from unadulterated milk, or of cream from the same, any article designed to take the place of butter or cheese, etc., or from selling or offering to sell the same as an article of food," have been held to be constitutional in *Minnesota*. *Butler v. Chambers*, 30 N. W. Rep. 308. In *Pennsylvania*. *Powell v. Com.*, 7 Atl. Rep. 913. See, also, *In re Brosnahan*, 18 Fed. Rep. 62. But in *People v. Marx*, (N. Y.) 2 N. E. Rep. 23, such a statute was held to be unconstitutional for the reason that simulation of butter was not the act prohibited, and that the object and effect of the statute was to absolutely prohibit the manufacture and sale of any article which could be used as a substitute for dairy butter, however openly and fairly the character of the substitute might be avowed and published, or however wholesome it might be, and by so doing to protect those engaged in the manufacture of dairy products against the manufacture of cheaper substances capable of being applied to the same uses as articles of food. In *People v. Arensberg*, (N. Y.) 11 N. E. Rep. 277, the court distinguishes *People v. Marx*, *supra*, and holds legislation designed to prevent deception in the sale of dairy products, and forbidding the manufacture or sale of products not made from unadulterated milk, "in imitation or semblance or designed to take the place of natural butter," etc., to be constitutional.

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*In re ROAD IN UPPER ST. CLAIR AND SNOWDEN TPS.*

(*Supreme Court of Pennsylvania*. November 7, 1887.)

## HIGHWAYS—PETITION FOR—REPORT OF ROAD-VIEWERS—NECESSITY OF ROAD.

The road-viewers appointed on petition for a road, under provisions of Pennsylvania act of June 13, 1836, reported, *inter alia*, that "after due consideration, and diligent inquiry as to the necessity for said road, they are of opinion that the prayer of the petitioners should be granted, for the reasons set forth in their petition," and "have therefore located and distinctly marked upon the ground, and do recommend for public use, the following described road," etc. Held, that it is not necessary that the report as to the necessity of the road should be made in the very words of the act, and that the report in question was a substantial finding that the road petitioned for was necessary for a public road.

*Certiorari* to court of quarter sessions, Allegheny county.

Some of the inhabitants of the townships of Upper St. Clair and Snowden, in Allegheny county, petitioned the court of quarter sessions for the county for a road. Viewers were appointed under provisions of the act of June 13, 1836, to report whether the road desired was necessary. The viewers reported as follows:

"We, the undersigned persons, appointed at No. 13, September session, 1885, to view a road in Upper St. Clair and Snowden townships, from Upper St. Clair station, in the township of Upper St. Clair, to the intersection of Christian Walthers' private road with the road leading from Bethel Church, in the township of Snowden, respectfully report that having met on the third day of December, 1885, pursuant to legal notice, and being duly sworn according to law, all the viewers being present, we have viewed the route of the above-described road, and part of the country adjacent thereto, and after due consideration, and diligent inquiry as to the necessity for said road, are

of the opinion that the prayer of the petitioners should be granted, for the reasons set forth in their petition. We have therefore located, and distinctly marked upon the ground, and do recommend for public use, the following described road, to-wit: Beginning at Upper St. Clair station, in Upper St. Clair township; thence north,  $76\frac{1}{2}$  deg. east, 38 64-100 per.; thence north,  $80\frac{1}{2}$  deg. east, 11 64-100 per.; thence south,  $76\frac{1}{2}$  deg. east, 6 40-100 per.; thence north,  $71\frac{1}{2}$  deg. east, 9 12-100 per.; thence north,  $64\frac{1}{2}$  deg. east, 9 per.; thence north, 63 deg. east, 16 12-100 per.; thence north,  $51\frac{1}{2}$  deg. east, 10 50-100 per., to the intersection of Christian Walthers' private road with road leading from Bethel Church, in the township of Snowden.

"The undersigned further report that they endeavored to procure from all owners of property over which said road passes, releases in writing from all claims to damages that may arise from opening the same, and failed to procure such releases; and, having taken into consideration the advantages to be derived by said owners, we have assessed the damages sustained by P. Mink at fifty dollars. All of said damages to be paid by the county of Allegheny. We also annex a plat or draught showing courses and distances, and noticing briefly the improvements through which said road passes. All of which is respectfully submitted."

Mink filed exceptions to the report, and the court, MAGEE, J., delivered the following opinion: "This case is before the court on exceptions filed to the report of viewers. It is not the purpose of the court to enter into a discussion of any of the exceptions except the 3d. The 3d exception sets forth that the viewers' report does not state particularly that the road desired is necessary for a public or a private road. It is an essential requisite that the report shall state that the road is necessary, and the omission of the viewers to so find and report is a fatal defect to the proceedings. By the 2d section of the act of twelfth June, 1836, (Brightly, *Purd.* p. 1496, pl. 3,) it is provided that the viewers shall make report, and state particularly, *inter alia*, 3d, whether the road desired be necessary for a public or private road. The language of the report on this subject is as follows: 'And after due consideration, and diligent inquiry as to the necessity for said road, are of opinion that the prayer of the petitioners should be granted, for the reasons set forth in their petition.' Upon referring to the petition for the 'reasons set forth' therein, we find it stated that the petitioners 'labor under great inconvenience for want of a public road,' but find no allegation that it is necessary. In our opinion, the viewers have failed to report the road to be necessary, in conformity to the requirements of law. That the viewers did not intend so to report might, with some force, be contended, in view of the testimony taken upon that point under a rule of court, and filed in the case. The omission may have been accidental, or may have been the full extent to which they were willing to give expression on the subject. However that may be, it requires that the report on that account shall be set aside. Exception sustained. Report set aside."

*Alex. Gufflan*, for petitioners.

It is the duty of this court, if the court below erred in sustaining the third exception, to reverse the order, and reinstate the report, as was done in *Re Hess' Mill-Road*, 21 Pa. St. 217; *In re Southampton Road*, Id. 356; *In re Paradise Road*, 29 Pa. St. 20; and *In re Springfield Road*, 73 Pa. St. 127, in which case a *procedendo* was awarded. It is a sufficient compliance with the law as to necessity, if the report of the viewers show that they have laid out a road for public use. *In re Road from App's Tavern*, 17 Serg. & R. 388; *In re Road in Norriton & Whitpain*, 4 Pa. St. 337; *In re Road in Versailles*, 4 Brewst. 57. Or, in case of a private road, if the viewers return a road for private use. *In re Road in Reserve*, 2 Grant, Cas. 204.

*Morton Hunter*, for exceptants.

The act of assembly requires that the viewers shall state particularly in their report whether the road be necessary for a public or private road. This court has held that the viewers' report must state particularly whether the road desired be necessary for a public or private road, (*vide In re Road in South Abington Tp.*, 33 Pa. Law J. 467;) also that the report laying out a road for public use is a sufficient compliance with the requirements of the statute; and also in the *Case of Spear's Road*, 4 Bin. 174, that it is necessary that it should appear on the record whether the road is to be public or private; that it was not necessary to mention it in the petition; that it was not at the option of the petitioners whether it should be public or private, but was to be judged of by the viewers, who are directed by the act to state particularly in their report whether they judge the same necessary for a public or private road. It is submitted that this case is not a proper case for review. *Vide Fretz's Appeal*, 15 Pa. St. 397, in which the court holds the disallowance of a road rests in the discretion of the quarter sessions, and cannot be reviewed on *certiorari*.

STERRETT, J. While it is undoubtedly the duty of road-viewers, under the act of June 13, 1836, to report, among other things, "whether the road desired be necessary for a public or private road," it has never been held that they must do so in the very words of the act. A substantial compliance with its provisions is all that is required. In this case, the petitioners say they "labor under great inconvenience for want of a public road" between the *termini* designated in their petition; and the viewers report, *inter alia*, that "after due consideration, and diligent inquiry as to the necessity for said road, they are of opinion that the prayer of the petitioners should be granted, for the reasons set forth in their petition;" and "have therefore located, and distinctly marked upon the ground, and do recommend for public use, the following described road," etc. This, as was held in *Road in Sterrett Tp.*, 17 Leg. J. 225, is a substantial finding that the road petitioned for is necessary for a public road. In the same case it was also decided that, as artist in road-viewing, the county surveyor may be represented by his duly-appointed deputy. There is no merit in either of the specifications of error. Order sustaining exceptions, and setting aside report of viewers, reversed, and it is now ordered that the exceptions be dismissed, and report of viewers confirmed absolutely; and it is further ordered that the costs be paid by exceptants.

#### SOUTH-SIDE PASSENGER RY. CO. v. TRICH and Wife.

(Supreme Court of Pennsylvania. November 11, 1887.)

##### NEGLIGENCE—PROXIMATE CAUSE OF INJURY—PROVINCE OF COURT.

Plaintiff's wife was jolted off the platform of a car into the street by a sudden whipping up of the car horses. She alighted on her feet. While standing there she was struck and injured by a runaway horse and buggy. In a suit for damages against the car company, there being no dispute as to the facts, defendant's counsel asked the court to charge that, if there was any negligence on the part of the driver of the car, it was not the proximate cause of the injury. The court refused, saying that it was a question for the jury under the evidence. *Held* error.

Error to court of common pleas No. 2, Allegheny county.

These suits were brought by Mr. and Mrs. Trich, against the plaintiff in error, a passenger railway company in the city of Pittsburgh, to recover damages for personal injuries received by Mrs. Trich on the fifth day of April, 1882. The plaintiff in error was then and still is operating what is known as the "South-Side Short Line," and its cars ran up Third avenue, across Smithfield street, in the city of Pittsburgh. The cars in use on the line were what are commonly called "bob-tailed" cars; having a driver, but no conductor,

but with an ordinary platform at the rear end, with a step and rail at each side. Mrs. Trich, the plaintiff below, was at that time living in the borough of McKeesport. On the morning of the accident she came to Pittsburgh with her father, and while on her way to the South side received the injuries for which this suit is brought. It appears that Mrs. Trich and her father were standing on the lower side of Smithfield street at the corner of Third avenue, and hailed a car coming up Third avenue. Mrs. Trich says that she got on the car with one foot on the platform, and the other on the step, and had hold of the rail with her hand, when the car started. She stayed there on the platform till the car reached the middle of Smithfield street, about 60 or 70 feet away. When the car reached that point the driver saw a runaway horse and buggy coming down Smithfield street, and whipped up his horses to get across ahead and avoid a collision. When he whipped his horses the car gave a bounce or jolt, and Mrs. Trich fell off the platform, alighting on her feet in the street unhurt, and "a moment or two afterwards" was struck by the runaway horse, knocked down, and injured. For the injuries so received she and her husband brought suits in the court below against the street car company. Under this evidence counsel for the railroad company asked the court to instruct the jury that, if there was any negligence on the part of the driver of the car in starting too soon, such negligence was not the proximate cause of Mrs. Trich's injury; she having been hurt by the runaway horse and buggy. The court refused to give the instructions prayed for, (which is assigned as error,) and the jury found verdicts against the company amounting to \$1,310.25.

*John Dalzell and Geo. B. Gordon, for plaintiff in error*

That it is the duty of the court to instruct the jury as to whether the negligence was or was not the proximate cause of the injury, when the facts are undisputed, there can be no doubt. *Township of West Mahanoy v. Watson*, 19 Wkly. Notes Cas. 441, 9 Atl. Rep. 430; *Township of West Mahanoy v. Watson*, 112 Pa. St. 574, 3 Atl. Rep. 866; *Hoag v. Railroad Co.*, 85 Pa. St. 298; *Fairbanks v. Kerr*, 70 Pa. St. 90; *McGrew v. Stone*, 53 Pa. St. 441.

*A. & A. M. Blakeley, for defendants in error.*

That the question of proximate cause had to go to the jury, we cite: *Railroad Co. v. Hope*, 80 Pa. St. 373; *Railroad Co. v. Lacey*, 89 Pa. St. 458; *Railroad Co. v. McKeen*, 90 Pa. St. 122.

GREEN, J. There is no manner of question as to what was the actual and immediate cause of the injury inflicted upon Mrs. Trich. It was an entirely undisputed fact that she was struck and injured by a runaway horse and buggy. All the witnesses who saw the occurrence so testify. Thus, Mr. McCully, the father of Mrs. Trich, who was present with her at the time, and was examined on her behalf, after describing her attempt to get on the car, and saying that she was bounced off, adds: "A moment or two afterwards, here comes a runaway horse and buggy down the street, and the shaft, I suppose it was, caught her under the arm, and dragged her to the street crossing, and she fell away." The only other witness examined for the plaintiffs as to the facts of the occurrence, M. M. Harrington, testified: "There is a banking building there on the corner, and I saw the lady fall,—fall off; and when she fell, to the best of my knowledge, she kind of threw herself back this way, and there was a phaeton or buggy of some kind running,—a horse running down the street with a buggy,—and it struck her, and they picked her up, and carried her into Mr. Johnson's drug store." There was no contradiction of this testimony. But one other witness, Mrs. Vrailing, examined by the defendant, testified to the fact of the injury, and she also said it was done by the buggy striking the woman. The learned court below,

in the charge, said: "The evidence seems to me to preponderate very largely in favor of the fact that the immediate force which caused the injury to this woman was the runaway horse." This was an understatement of the testimony which might have led the jury to suppose that there was an open question, with a preponderance of evidence only as to whether it was the runaway horse and buggy which inflicted the injury. The defendant had presented a point stating that it was the undisputed evidence that Mrs. Trich was injured by being struck by a runaway horse, so that the question was directly before the court. In view of that circumstance, we think the court should have specifically so charged, and not left it as an open question for the jury to determine, with a mere expression of opinion that the evidence preponderated in that direction.

Assuming, then, as we do, that it was the undisputed evidence that the injury was inflicted by the runaway horse and buggy, the only remaining question is whether it was the duty of the court to declare whether this was the proximate cause of the injury. The point presented by the defendant asked for such an instruction, but the court refused it, saying it was a question for the jury under the evidence. In this we think there was error. In the case of *West Mahanoy v. Watson*, 112 Pa. St. 574, 3 Atl. Rep. 866, we reversed the court below for making just such an answer to just such a point, and upon a review of the facts of the case we held that they did not constitute an instance of proximate cause as against the defendant, and therefore decided that the defendant's point should have been affirmed, which took the case from the jury. Mr. Justice PAXSON, in delivering the opinion, said: "While it is undoubtedly true, as a general proposition, that the question of proximate cause is for the jury, yet it has been repeatedly held that where there are no disputed facts the court may determine it." It is sufficient to refer to *Hoag v. Railroad Co.*, 85 Pa. St. 293. In that case this court, following *Railroad Co. v. Kerr*, 62 Pa. St. 353, and *Railroad Co. v. Hope*, 80 Pa. St. 373, laid down the rule as to proximate cause as follows: "In determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act."

Applying this rule to the facts of the present case, can it be said that the injury of Mrs. Trich was the natural and probable consequence of the car-driver's negligence in urging his horses to a faster gait? We think not. There was not a particle of evidence to show that runaway horses and vehicles were frequently, or indeed ever, seen upon Smithfield street, where this accident occurred. There was no evidence upon that subject. It was certainly not a natural consequence of a person being upon that street that he would be struck by a runaway horse. Nor is there the slightest reason for saying that it would be a probable consequence. The utmost that can be said would be that such a consequence might possibly happen. But things or results which are only possible cannot be spoken of as either probable or natural; for the latter are those things or events which are likely to happen, and which for that reason should be foreseen. Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency or regularity as to become a matter of definite inference. To impose such a standard of care as requires, in the ordinary affairs of life, precaution on the part of individuals against all the possibilities which may occur, is establishing a degree of responsibility quite beyond any legal limitations which have yet been declared. We are of opinion that, in the fact of the present case, the direct and immediately producing cause of Mrs. Trich's injury was her being struck by a runaway horse and buggy over which the defendant company had no sort of control, and for which it is not responsible; and therefore we conclude that the proximate cause of the injury, in the legal

sense, was the collision of the horse and buggy with the person of Mrs. Trich and not the negligence of the defendant.

The case of *West Mahanoy v. Watson* came again into this court, and is reported in 19 Wkly. Notes Cas. 441, 9 Atl. Rep. 430. The present chief justice, in delivering the opinion of the court, said: "These facts narrow the case down to the single question, was the upset at the ash heap on the township road the immediate or direct cause of the loss of the horses? As we have seen, the facts themselves answer this interrogatory in the negative, and necessarily determine the case in favor of the plaintiff in error. In the case of *Hoag v. Railroad Co.*, 85 Pa. 293, Mr. Justice TRUNKEY, then president of the common pleas of Venango county, in his charge to the jury on the trial of the above-named cause, said: 'The immediate, and not the remote, cause is to be considered. This maxim is not to be controlled by time or distance, but by the succession of events. The question is, did the cause alleged produce its effect without another cause intervening, or was it to operate through or by means of this intervening cause?' As the principle here stated was adopted by the affirmance of this court, following *Railroad Co. v. Kerr*, 62 Pa. St. 353, we may regard it as the settled law of this state."

In the facts of the present case we find a perfect illustration of this principle. Mrs. Trich herself testified that when she was "bounced" from the car she fell on her feet. Immediately after, she was struck by the runaway horse and buggy, and from them received her injury. The jolting from the car simply landed her on her feet, and inflicted no injury. But another agency intervened, which was entirely independent of any act of the defendant, and that agency alone inflicted the injury in question. Following the doctrine of the last case cited, we feel clearly obliged to hold that the plaintiff's injury was inflicted by the special intervening agency stated, and therefore the defendant is not liable. In all of the cases cited, as in several others not referred to, this court finally determined them upon its own view of the facts, without regard to the verdicts of the juries.

The defendant's point should have been affirmed. Judgment reversed.

#### EVANS v. PHILLIPS.

(*Supreme Court of Pennsylvania. October 17, 1887.*)

##### 1. CONSTITUTIONAL LAW—SPECIAL OR LOCAL STATUTES—COLLECTION OF TAXES.

Const. Pa. art. 3, § 7, prohibits the passing of local or special laws by the general assembly. Act of June 25, 1885, provides for the collection of taxes in the boroughs and townships of the state, and the last clause provides that "this act shall not apply to any taxes, the collection of which is regulated by a local law." There were and are several special laws relating to the collection of school taxes in various parts of the state. *Held*, that the act of 1885 was a general law, applying to the whole state, except in so far as obstructed by special laws passed prior to the new constitution, and was not repugnant thereto.

##### 2. SAME.

Const. Pa. art. 3, § 7, cl. 27, provides that the legislature shall not enact a special law by the partial repeal of a general one. Article 9, § 1, provides that taxes shall be levied and collected under general laws. The act of June, 1885, provides for the collection of taxes in the boroughs and towns of the state, but by the concluding clause was not to apply to any taxes the collection of which is regulated by a local law. *Held*, that the law was general and not repugnant to the above sections of the constitution.

##### 3. TAXATION—COLLECTION OF TAXES—REPEAL OF STATUTE.

Pennsylvania act June, 1885, provides for a general system of levying and collecting taxes throughout the state, but not to apply to any taxes collected by a local law. Act April 21, 1886, (P. L. 67,) provides a method of collecting taxes in certain parts of the state. *Held*, that it was not repealed by the act of 1885.

Error to court of common pleas, Lancaster county.

Evans, petitioner, asked for a *mandamus* to compel Phillips, defendant, one of the school directors in a township in which Evans was elected tax col-

lector, to issue the warrant to collect the tax to him. The writ was denied; whereupon Evans brought this writ.

*E. K. Martin*, for plaintiff in error. *M. Brostus*, for defendant in error.

CLARK, J. The plaintiff in error was, on the sixteenth February, 1886, elected tax collector of the township of Warwick, in Lancaster county, under the provisions of the act of twenty-fifth June, 1885, entitled "An act regulating the collection of taxes in the several boroughs and townships of this commonwealth." He gave bond, which was approved, and now claims to perform the functions of that office. The defendants were the school directors of the same township for the same year; and although, as such directors, they levied a school tax for the year 1886, they refused to issue their warrant to the plaintiff authorizing him to collect the same, but delivered a certified duplicate of the assessment and levy to one E. R. Shirk, treasurer of the school board, pursuant to the act of twenty-first April, 1869, (P. L. 87,) under the provisions of which the board had for several years previously, by resolution, authorized the collection of the school taxes of the said district. This proceeding by *mandamus* was thereupon instituted to enforce compliance with the provisions of the act of 1885.

It is contended, on part of the defendants, that the act of twenty-fifth June, 1885, is in conflict with section 7 of article 3 of the constitution of the commonwealth, prohibiting local and special legislation; that there were at the time of the passage of that act, and still are, local and special acts in force in various parts of the state, relating to the collection of school taxes, some of them relating especially to Warwick township; and that the concluding clause of the last section of the act of 1885, which provides that "this act shall not apply to any taxes, the collection of which is regulated by a local law," necessarily gives to the statute a limited and local effect only. But, if this clause of the last section of the act of 1885 had been omitted, the force and effect of the statute would certainly have been the same. A local enactment, as a general rule, is not repealed by a general statute. "Rarely, if ever," says our Brother TRUNKY, in *Malloy v. Reinhard*, 34 Pittsb. Leg. J. 275, "does a case arise when it can justly be held that a general statute repeals a local statute by mere implication. The constitution of 1874 upon many subjects prohibits local or special legislation, but it changes no rules relative to the repeal by legislation of local laws existing when it was adopted." The clause which we have quoted from the act of 1885, therefore, does not change the effect of that statute in the slightest degree; for, as we have said, the force of its provisions would have been precisely the same if it had been omitted.

The single question, then, is whether or not a statute, although general in form, is to be treated as a local one, simply because of the intervention of some local statute unrepealed, which prevents it from taking general effect. There is an obvious distinction between a statute which upon its face is local and special, and one which, although general in form, is thus obstructed in its application. In the one case, the local law cannot become general, except by a re-enactment in general form; while in the other, by the repeal of the local law, the special subject affected by it is brought under the general law, the operation of which was previously obstructed. Thus the act of twenty-first of April, 1869, could be extended to the whole state only by the re-enactment thereof as a general law; but the act of twenty-fifth June, 1885, upon the repeal of the local statutes obstructing its operation, would *ipso facto* take effect throughout the state. The latter is therefore, in this modified sense, a general law; it was passed for the whole state, and may, upon certain contingencies, become applicable and operative throughout the state, without change or amendment thereof.

Prior to 1874, the legislature, in its wisdom, by special laws, settled the practice of the courts in specified parts of the state, prescribed the form and

requirements of affidavits of defense in actions at law, established methods of procedure in the laying out and opening of public and private roads in certain counties, etc. These, and many other enactments of a similar character, which in the mind of the legislature were by local circumstances made necessary, are still upon our statute books, have been for many years received and acquiesced in by the profession and the people, and their repeal is neither sought for nor suspected. Can it be that no general statute can be constitutionally enacted upon any one of the various subjects embraced in this great body of private legislation, without an express repeal of every local provision which may be construed to prevent its general application? Peculiar and special provisions, too, have been made from time to time by local statutes, prior to the constitution of 1874, for the regulation or prohibition of the sale of intoxicating liquors in many of the townships, boroughs, and counties of the commonwealth, which provisions still remain unrepealed, and are admittedly in full force. Can it be that the legislature has no constitutional power to frame a general law regulating the liquor traffic in the state without repealing all these local provisions? Has any one ever supposed that the general liquor law of twelfth April, 1875, was, upon this ground, an invalid enactment? and is the more recent act of May 13, 1887, popularly known as the "High License Law," to be set aside as unconstitutional and void upon similar grounds?

The prohibitions of the constitution in respect of special legislation are protective only. That instrument did not repeal local statutes whose provisions were inconsistent therewith, in force at the time of its adoption. *Indiana Co. v. Agricultural Soc.*, 85 Pa. St. 359. It merely imposed restrictions on future legislation. *Gas Co. v. Chester Co.*, 97 Pa. St. 476. Nor was it the intent and meaning of the convention that all future legislation was conditioned upon the repeal of these local laws. No such thing can be found in the work of the convention. Such has not been the understanding of the profession throughout the state. All of these local statutes were in conformity with the constitution when enacted, and they are valid until they are repealed; and we think that the legislature, in order to give efficiency to a general law, is not bound to repeal any and all of them which may be supposed to limit its application. We are of opinion, for the reasons we have expressed, that the act of June 25, 1885, must be regarded as a general law applying to the whole state, excepting in so far as its operation is obstructed by existing local statutes passed prior to the new constitution, upon the repeal of which it will take effect throughout the state.

Nor is the act of 1885 obnoxious to clause 27, § 7, art. 3, or to section 1, art. 9, of the constitution. What we have already said is sufficient to show why no such conflict exists. We hold the act of 1885 to be a general law. It is a general law relating to the collection of taxes in the boroughs and townships of the state. Boroughs and townships are created by general laws, and are the proper subjects of appropriate, independent general legislation, as such, and the act establishes a general system peculiarly adapted to the convenience and necessities of the municipal divisions named. But that the act of 1869 is a local statute admits of no doubt whatever. It expressly provides that none of its provisions should apply to the cities of Pittsburgh or Allegheny, or to the counties of Cumberland, York, Franklin, Adams, etc. About one-third of the whole state is permanently excluded from the operation of the act. Nor does it apply to all of the school-districts within the territory which it does embrace, but to such only of them as, by resolution of the board of school directors therein, may authorize the collection of the school tax in the manner therein provided. It is thus limited to the districts that may formally accept its provisions; and according to the doctrine of *Scranton City's Appeal*, 113 Pa. St. 176, 6 Atl. Rep. 158, it must be regarded as a local law. A law is said to be local and special, however, not because of the

new constitution, or of any decision under it, but because it falls within the proper definition of a local law, both before and since 1874.

The act of 1885 had therefore no application to the collection of school taxes in Warwick township for the year 1886. The provisions of the act of 1885 are express to this effect. It would have had no application to that township if the act had not been so expressed. The taxes were collectible under the act of 1869, which was a local law unrepealed and in full force. The judgment is affirmed.

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#### ARNDT'S APPEAL.

(*Supreme Court of Pennsylvania. October 3, 1887.*)

#### JUDICIAL SALES—CONFIRMATION—DELAY IN DISTRIBUTING PROCEEDS—LIMITATION OF ACTION—INTEREST.

In Pennsylvania, when a sale of real estate, for the payment of the debts of an intestate, has been confirmed by the orphans' court, the rights of the parties are then determined, and a debt constituting a valid lien at the time of confirmation will not be barred by delay in distributing the proceeds; and interest ceases to run on so much of the debt as the proceeds of the sale, applicable thereto, are sufficient to pay.

Appeal from orphans' court, Lebanon county.

*Copp & Schock*, for appellant. *J. P. S. Gobin* and *A. W. Ehrgood*, for appellee.

**STERRETT, J.** In May, 1872, John Shand died intestate seized of several parcels of real estate, and letters of administration were duly granted to his widow, Sarah Shand. At the time of his decease Shand was indebted to appellant in a considerable sum on account of mutual dealings theretofore had between them. Appellant's claim was duly presented to the administratrix, but she had no personal assets of the estate with which to pay it. In May, 1874, the orphans' court, on her petition, ordered the sale of several portions of the real estate for the payment of debts, including that of appellant. Pursuant to the order of sale two of the pieces were sold, and on report thereof made to the court the sales were confirmed in November of that year. The fund now in court for distribution is the proceeds of those sales.

It is a fact found by the auditor, and not controverted, that decedent, at the time of his death, was indebted to appellant in the sum of \$1,566.77, which debt then became a lien on the real estate and so continued until the confirmation of sale by the orphans' court in November, 1874. Prior to that date the claim had neither lost its lien nor was it barred by the statute of limitations. The effect of the sale and confirmation by the orphans' court was to divest the lien of the debt as to the land so sold, and also to stop interest on so much of the debt as the fund realized and applicable thereto was sufficient to pay. *Ramsey's Appeal*, 4 Watts, 71. As was said by Mr. Justice ROGERS, in that case: "A sale under an order of the orphans' court for payment of debts is a judicial sale, and has been assimilated, in several cases, to a sale made by the sheriff under process of a court of law. It cannot be doubted that interest ceases from the time of the return and confirmation of a sheriff's sale, and I see no reason, as a general principle, to make a distinction between a sale by the sheriff and a sale by an administrator under order of court. The land is taken from the heirs to pay debts, and it is but reasonable when the money is made by sale of the property, and in the hands of the officers of the law, that the debt should be considered as paid to the extent of the money raised by the sale."

The rights of the respective parties are fixed by the confirmation of sale. Lien creditors who were such at that time are entitled to their respective shares of the fund realized, and delay of the court in decreeing distribution cannot deprive them of their rights. If there is any question as to the lien of

a debt, or whether it is barred by the statute of limitations, the *status* of the claim at the time the sale was confirmed must determine it. Whether it be a debt of record or not, if it was then a lien on the land sold, and was not then barred by the statute of limitations, it is entitled to participate in the distribution of the fund, provided it is not all exhausted by prior liens.

We think, therefore, that the distribution recommended by the learned auditor is correct, and that the court erred in holding that appellant's claim was barred by the statute of limitations because more than six years elapsed between the death of the intestate and the date of distribution. Appellant's claim was not barred by the statute, nor had it lost its lien when part of the land incumbered by it was sold by order of court for the very purpose of paying it and other debts of intestate. By the act of the court in confirming the sales the rights of appellant and others, as they then stood, were fixed, and, so far as the question of limitations is concerned, they were unaffected by the subsequent delay in distributing the fund. The rule established in *York's Appeal*, 2 Atl. Rep. 65, does not apply to the facts of this case.

Decree reversed at the costs of the appellee, and it is now ordered that the funds be distributed in accordance with the report of the auditor.

### VOWINKLE v. JOHNSTON and others.

(*Supreme Court of Pennsylvania*. November 11, 1887.)

#### 1. HUSBAND AND WIFE—TRANSACTIONS IN FRAUD OF CREDITORS—DEED OF TRUST.

The wife of a debtor gave certain notes signed by her husband as her agent, and indorsed by one S., for a stock of goods, and entered into an alleged trust agreement with S., by the terms of which her husband was to conduct the business, at a salary of \$2,000 per year, and upon the payment of the notes indorsed by S. the stock was to become the sole and separate property of the wife. *Held* that, in law and in fact, the transaction was between her husband and S., and the trust was good for nothing, as against creditors.

#### 2. SAME—VALIDITY OF NOTES EXECUTED BY WIFE.

The wife of a debtor gave certain notes signed by her husband as her agent, and indorsed by one S., for certain goods to be used in a business conducted by her husband as her agent. The notes were paid out of the business. *Held* that, as the wife paid nothing for the goods, the notes, as against her, were void.

Error to court of common pleas, Allegheny county.

This was a feigned issue to try the title to property levied on by the sheriff. Charles Vowinkle, the husband of the plaintiff, being indebted to his brother, gave him judgment notes to the amount of \$20,000. He defaulted on the payments, and his brother, Frederick, entered up judgment, and levied on the stock. By an arrangement between the parties, the creditor took the stock, fixtures, and book-accounts, and discharged the judgments. The defendants in this suit, being creditors of plaintiff's husband, sued him, and obtained two judgments against him. Meantime, one Streim, a friend of the insolvent, indorsed notes to the amount of \$5,000, signed by Charles Vowinkle as agent of his wife, in consideration of which Frederick Vowinkle turned over to his brother \$3,000 worth of goods and \$2,000 of fixtures. The name on the sign was changed to Charles Vowinkle, agent. The day of this transfer the following paper was executed:

"Whereas, Charles Vowinkle has been unfortunate in business, and is now in need of aid for the maintenance of himself and family, and I, John Streim, am desirous of aiding him so that he may regain financial standing; and do for this purpose hereby contribute the sum of five thousand dollars, upon the following terms, to-wit: *First*. The said sum of money is to go to Pauline Vowinkle, in trust for the following purposes, to-wit: That she shall use the same in the purchase of the stock and fixtures of the liquor store, No. 634 Smithfield street, (at a price already agreed upon;) that she shall employ her husband, Charles Vowinkle, as her agent to conduct the said business, and

pay him for his services the sum of two thousand dollars per year. *Second.* Accurate books of accounts shall be kept, and I reserve the right to myself to investigate the affairs of the business at any time; and should it become apparent that the concern is a losing one, then I retain the power to enter and possess myself of the entire stock in trade, including books and fixtures, and to declare the trust at an end. *Third.* The said sum of five thousand dollars is evidenced by my indorsement of promissory notes of even date herewith, each payable in thirty days in succession from the note preceding, and upon the payment by said Pauline Vowinkle of the whole of said series of notes, she is to become the entire and sole owner of said stock and fixtures without any control of her said husband, and for her sole and separate use.

"Witness my hand and seal this twenty-sixth day of November, 1884.

"JOHN STREIM.

"I accept the within trust.

"PAULINE VOWINKLE."

The salary of the husband, the expenses of the business, and the indorsed notes as they matured were paid out of the business, as conducted by the husband. The sheriff levied upon the goods thus transferred, and plaintiff claimed them as trustee under the above agreement. After the plaintiff had introduced her evidence and rested, the defendants moved for a compulsory nonsuit, which the court ordered. Plaintiff brings error.

*Montooth Bros. and West McMurray*, for plaintiff in error.

A married woman may be a trustee. *Perry, Trusts*, §§ 48, 49; *Still v. Ruby*, 35 Pa. St. 373; *Dundas v. Biddle*, 2 Pa. St. 160. The situation of the parties and the whole contract are to be considered. 2 Pars. Cont. 499, note 5, pp. 501, 503. A writing should be supported rather than defeated. *Brown v. Slater*, 16 Conn. 192; *Pugh v. Leeds*, Cowp. 714. Trusts are favored by law, doing harm to no one. *Brown v. Williamson*, 36 Pa. St. 340; *Eyrick v. Hetrick*, 18 Pa. St. 491; *Norris v. Johnston*, 5 Pa. St. 289.

*S. Schöyer, Jr., and W. R. Errett*, for defendants in error.

A writing of this character is not proof of the facts set out in it. If sustained by other evidence it may establish the facts. *Gillespie v. Miller*, 37 Pa. St. 248. Whoever has the right to give has the right to dispose of the same as he pleases. *Holdship v. Patterson*, 7 Watts, 548; *Ashurst v. Given*, 5 Watts & S. 323; *Brown v. Williamson*, 36 Pa. St. 338. A married woman may be trustee, but cannot deal with the estate vested in her. *Hill, Trustees*, 48; *Perry, Trusts*, §§ 662, 663; *Eshleman's Appeal*, 65 Pa. St. 313. Without her separate estate is pledged for debt, a married woman cannot buy on credit, or lay claim to her subsequent earnings or her husband's earnings. *Hess v. Brown*, 111 Pa. St. 124, 2 Atl. Rep. 416; *Keeney v. Good*, 21 Pa. St. 355; *Gamber v. Gamber*, 18 Pa. St. 366; *Auble's Adm'r v. Mason*, 35 Pa. St. 261. Her title must be clear, and not admit of a reasonable doubt. Cases *supra*. An arrangement to put a woman forward on borrowed capital to trade for her husband's benefit cannot withstand the scrutiny of her husband's creditors. *Hallowell v. Horter*, 35 Pa. St. 375; *Pier v. Siegel*, 15 Wkly. Notes Cas. 480. See *Blum v. Ross*, 19 Wkly. Notes Cas. 386, 10 Atl. Rep. 32. "We would have to allow the wife to acquire and hold property on her personal credit, and hold and own, as against creditors, the labor and earnings of her husband."

**PER CURIAM.** The deed of trust in this case was a mere sham and worthless. Mrs. Vowinkle paid nothing for the goods in question, and her husband's note to Streim was, as against her, void. The transaction was, in fact and law, between the husband and Streim, and the trust but a flimsy cover, that was good for nothing as to creditors. The judgment is affirmed.

## Appeal of NEEL and others.

*(Supreme Court of Pennsylvania. November 11, 1887.)*

## PRINCIPAL AND SURETY—FORBEARANCE—RELEASE.

A petition to compel the administratrix of a surety on a deceased guardian's bond to sell real estate, to pay a judgment recovered on the bond, was resisted on the ground that the surety had been released by the negligence of a subsequent guardian in not enforcing the claim against the principal, and that the judgment against the principal, upon which the judgment against the surety was founded, was obtained after the latter's release, and without notice to his administratrix. The court refused to dismiss the petition, on the ground that the mere forbearance of the subsequent guardian to avail himself of the means of satisfaction of the claim would not release the surety. *Held* not error.<sup>1</sup>

## Appeal from orphans' court, Allegheny county.

On the thirtieth day of March, 1859, William Oliver was appointed guardian of William and Harvey Neel, minor children of Harvey Neel, deceased. William, appellant's intestate, and uncle of the appellees, became surety on Oliver's bond in the sum of \$20,000. Oliver died June 20, 1875, intestate. William Neel, the surety, died March 18, 1880, intestate. After the death of Oliver, Dr. John A. Stone was appointed guardian in his stead. Some time afterwards he (Stone) entered into a contract with Oliver's administrator, by which he agreed to allow Oliver to retain the balance due the Neel minors until the youngest ward became of age. No security was taken. More than five years elapsed, when the time fixed for payment arrived, and Oliver resisted payment, pleading the statute of limitations. This plea was overruled by the orphans' court, but prevailed in the supreme court. Suit was then brought on the bond of Oliver against the administratrix of the surety, judgment was recovered, and, on writ of error, was affirmed. It was subsequently discovered that William and Harvey Neel, plaintiffs in the suit on the bond, had in March, 1883, assigned their entire claim against the estate of the bondman to Dr. Stone, their guardian. The orphans' court permitted appellees to testify that this assignment to Dr. Stone was without consideration, and only made for convenience in collecting the money for his wards. The court refused to consider the assignment. The answer of Mrs. Nancy Neel, for herself and children, admits recovery of judgment, but denies liability, alleging want of interest or right in the petitioners,—they having assigned all their interest in the claim long before the recovery of judgment to Dr. Stone, as against whom appellants have a complete defense; and further alleging ignorance of these facts on the part of appellants at the time the judgment was recovered, and denying all liability to petitioners. Appellants also asked to have the claim against the estate of Dr. Stone assigned to them in case a recovery was had against them. This the court refused, and entered a decree for the sale of the real estate of William Neel, deceased, to satisfy the claim against his principal.

The court rendered the following opinion: "It may be conceded that the widow and heirs of William Neel, deceased, have a right to raise the same questions here which they could have raised had they been parties to the action at law against the administrator; but the questions raised here, with the exception of that relating to the formal assignment made by William and Harvey Neel to Dr. Stone, which has no merit, are substantially those raised and decided there, and must have the same answer. The liability of William Neel as surety was for the default of William Oliver, as guardian; and while a failure on the part of Dr. Stone to avail himself of the means of satisfaction of his claim would certainly relieve the mortgage, yet mere forbear-

<sup>1</sup> Mere neglect to bring suit or to take active efforts to collect the amount of a note from the principal maker, at the request of the surety, is not sufficient to discharge the latter. *Benedict v. Thoe*, (Minn.) 35 N. W. Rep. 10, and note.

ance to preserve the lien of the claim, which the supreme court held his conduct to amount to, will not relieve. *Kindts' Appeal*, 102 Pa. St. 441. As between Dr. Stone and his wards, this forbearance may amount to negligence which will justify a surcharge, because Dr. Stone was acting in a representative capacity, and his wards incapable of taking care of their own interests except through him; but the surety must answer for his principal's default, and his own security made it his duty to quicken the action of the creditor. For these reasons the prayer of the petition must be granted."

*J. McF. Carpenter*, for appellants. *Weir & Garrison*, for appellees.

PER CURIAM. The opinion of the court below seems to have so thoroughly and correctly disposed of this case as to leave to us nothing to do but concur in it. The appeal is dismissed, and the decree affirmed, at the costs of the appellants.

### DETZEL v. SCHOMAKER and others.

(*Supreme Court of Pennsylvania*. November 11, 1887.)

#### LIMITATION OF ACTIONS—OPEN ACCOUNT—ACKNOWLEDGMENT.

In an action on an account, defendant pleaded the statute of limitations. Plaintiff's evidence was that defendant frequently promised to pay the debt between the time it accrued and the commencement of the suit. Defendant's evidence was that he never denied the debt, but never promised to pay it. The court instructed, in substance, that if defendant, within six years after the debt became due, acknowledged or admitted it, and within six years after the first acknowledgment again acknowledged and admitted the debt, and that the last acknowledgment was within six years before the bringing of the suit, then the debt sued on was never barred; and if there was no uncertainty about the debt and the amount, and the acknowledgments and admissions were clear, distinct, and unequivocal, and consistent with an intention to pay, then they would find for the plaintiffs. *Held* not erroneous.

Error to court of common pleas, Allegheny county.

From March 13, 1884, to September 8, 1885, the defendant below had a running account with the plaintiffs, who are flour merchants, and at that date he had received goods amounting to \$4,688.28, and had paid on account \$4,099.53, leaving a balance of \$588.75. About the latter date the defendant, who ran a baking business in Sharpsburg, failed, and all his property, including his household furniture, was sold out by the sheriff. He continued to keep a little cake shop, and was thus employed when Mr. Langenheim, shortly after the sheriff's sale, called on him, and alleges that Detzel promised to pay the debt. Afterwards, and up to the time the suit was brought, the parties had several interviews, and defendant never denied the debt. On the trial, defendant claimed he never promised to pay the debt, and pleaded the statute of limitations. The only evidence in the case was that of one Langenheim, successor to plaintiffs, and of defendant. There was a verdict and judgment for plaintiffs for \$875.46, and defendant brings error, and made the following assignments: The court erred in refusing to instruct the jury "that, taking all the evidence in this case, the plaintiffs cannot recover." The court erred in affirming the plaintiffs' second point, viz.: "That, if the jury find from the evidence that the defendant, within six years after the debt became due, acknowledged or admitted the same, and within six years after the first acknowledgment again acknowledged and admitted the debt, and that the two acknowledgments occurred within six years of each other, and the last acknowledgment within six years before the bringing of the suit in this case, then the debt sued on in this case was never barred, and the verdict must be for the plaintiffs for the full amount of the debt, with interest to date. Affirmed, if there was no uncertainty about the debt and the amount, and the acknowledgment and admission were clear, distinct, and unequivocal, and consistent with an intention or promise to pay it."

*A. M. Watson*, for plaintiff in error. *George Shiras, 8d*, for defendant in error.

**PER CURIAM.** Langenheim's testimony was sufficient to carry this case to the jury. He swears positively, not only that the defendant, from time to time, acknowledged the rectitude of the account in suit, but also repeatedly promised to pay it. Nor is there any question, from his testimony, but that said acknowledgment and promise were made within six years of the commencement of the present action, and if that testimony was believed by the jury, as it seems to have been, it was sufficient to bar the statute. Judgment affirmed.

### MCFADDEN v. REYNOLDS.

(*Supreme Court of Pennsylvania.* November 11, 1887.)

#### 1. WITNESS—PRIVILEGE—QUESTION TENDING TO CRIMINATE.

In an action for breach of promise, a witness was asked whether the plaintiff was a chaste woman. *Held*, a proper question, which he could answer categorically without criminating himself.

#### 2. SAME—CRIMINAL PROSECUTION BARRED.

A witness was asked in a breach of promise case whether or not he had connection with the plaintiff on a certain day more than two years previous. *Held*, that though, to a prosecution for the crime, he could plead the statute of limitations, he could not be compelled to answer the question.

#### 3. TRIAL—INSTRUCTIONS—DEPRECATING RULINGS OF SUPREME COURT.

The trial court instructed the jury that he gave them, with some regret, the law as it was laid down in the decisions of the supreme court, that, in a suit for breach of promise, the birth of a child might not be proved, to aggravate the damages. He further told them they might consider all the circumstances; that they were allowed to consider the disgrace, the feelings of misery, apart from the child being born; and made many similar comments. *Held*, that a trial judge should not tell the jury that he regrets the state of the law, or practically take away all its effect by observations which inflame the jury into disregarding it.

Error to court of common pleas, Allegheny county.

This was an action on the case for breach of promise of marriage, in which the plaintiff recovered a verdict of \$1,100 on January 22, 1887. During the trial John McConnell, a witness for defendant, was asked if he had not had carnal knowledge of plaintiff on a certain day more than two years previous. He declined to answer, on the ground that the answer might criminate himself. The court declined to compel the witness to answer, but ruled that he need not. It was admitted that no prosecution had ever been instituted against the witness, and at the time the question was asked the statute of limitation had barred a prosecution. The defense in the case was that plaintiff was an unchaste woman both before and after the alleged promise of marriage. The defendant in this case had been criminally prosecuted by the plaintiff for seduction, and had served 15 months in the penitentiary therefor. On his release he was arrested on the writ of *captas* issued by plaintiff in the present action of breach of promise. The charge of the court was as follows:

"Very much evidence has been admitted in this case, and very much has been said with reference to that evidence that has nothing at all to do with the case, under the decisions of the courts of Pennsylvania; and the most of the argument of the counsel for plaintiff, who has just addressed you, was based on aggravating circumstances,—something the law does not allow us to consider. I say very frankly, my own opinion would be different, but I am bound by the decisions of the supreme court of Pennsylvania, which differ very radically from the decisions of the supreme court of some other states. In Massachusetts, for instance, and in some other states, the fact that a woman is seduced, and a child born, and publicity given to the matter, and disgrace and other troubles and annoyances brought about by reason of the seduction and birth

of the child, may be considered by the jury; yet in this case it cannot, and, if objection had been interposed at the proper time and in the proper way, I should have excluded all that testimony.

"At common law a woman could not recover for seduction; no action could be brought by her, and simply for the reason that she was just as much an offender against the moral law as the man, and the law did not take into consideration the fact of their ages. It was an act, generally, which in itself was a moral wrong, and each party was equally guilty; and whether one was fifteen and the other twenty-five made no difference as far as the breach of morals was concerned. The father could maintain an action, and it was based on the loss of services only; but the courts, in their liberality, allowed large damages to be given, away beyond the value of the actual services, with the idea of undertaking to make some compensation commensurate to the damage done. Up until 1843 the seduction of a girl under promise of marriage, or of a girl under twenty-one years of age, was no criminal offense,—not differing from what it would be if it were the seduction of a woman over twenty-one years of age; but in that year the act was passed to which the gentleman has referred, and under which the defendant was tried in the quarter sessions. I will read a short extract from a decision by Judge LEWIS, who was afterwards on the supreme bench, with reference to the passage of that act, and its effect and purpose: 'This indictment contains two counts. The first charges the defendant with the offense of fornication and bastardy; the second charges him with the crime of seduction, under the act of assembly of the nineteenth of April, 1843. By the provisions of that act, the seduction of any female of good repute under twenty-one years of age, with illicit connection under promise of marriage, is made an indictable offense, punishable by a fine of not exceeding five thousand dollars, and solitary confinement in the penitentiary for not less than one year, and not longer than three years. The act of assembly was loudly called for by the frequent perpetration of this great public and private wrong. Its purposes are high and holy, and, in order that it may be preserved upon our statute book as a shield for youth and innocence, it ought to receive such consideration as shall effectually prevent abandoned profligacy from turning it into a weapon of offense for the purpose of accomplishing other objects than that intended by the legislature. Seduction by means of a promise of marriage may not differ in principle from other breaches of solemn engagements, because all breaches of promise are alike forbidden by the law of God and by the rule of sound morality; but there is a great difference in the degree of wrong inflicted upon society, and upon the individual who is induced to confide in the promise, and to surrender to her destroyer all that is estimable in woman, and all that makes her existence even tolerable.'

"There, you see, in a criminal case it must not only be alleged, but must be proven, that the promise of marriage was the inducing cause to the criminal connection, and unless that be shown, although the girl may be under twenty-one years of age, it is not within that statute; but wherever it is the inducing cause, as, to put it plainly and tersely, if a man would say to a woman, 'If you will allow me to have connection with you, I will marry you,' it would be clearly and squarely within the statute. But where that is the case in a criminal action under the civil law, although she be under twenty-one years of age, the woman would not have a right of action in her own name, because it is an immoral consideration, and this, even though the fact be that she submitted herself to the wiles or lusts of a man, and a child was subsequently born, and she was thereby exposed to disgrace, incumbered with his child, and he refused to even recognize or participate in the support of it.

"Now, gentlemen, the first question is, was there a promise of marriage in this case? If there was, was this intercourse allowed because of the promise? That is to say, is it to be treated, under the evidence, as the mere consideration of this illicit intercourse? If it was, we are bound to tell you the

plaintiff cannot recover. Where a man engages himself, either expressly or impliedly, to a girl or woman, and particularly a girl under twenty-one years of age, secures her confidence, and she, relying on the fact that if anything should occur, or having confidence in his honor and integrity, submits her person to his lusts, so far as I know, and so far as I am ready to say in this case, the plaintiff is not precluded from sustaining an action for breach of promise; and although it is true that in such a case we are bound to tell you that the fact that a child was born is itself not to be taken as an aggravation, if you are satisfied that this defendant has acted unfairly and improperly, and taken undue advantage of the position he put himself in, in his treatment of her, you may consider those circumstances, in your verdict,—not that a child was born, not that the woman may have been incumbered with the support of it, not that it would increase her disgrace; but the conduct that he was guilty of, deceiving and duping her in the promise that he made, and his conduct in connection with everything that surrounded the transaction.

"We cannot say to you to give \$100 because this girl has lost \$100. If she had gone to work and bought wedding dresses, had engaged a wedding supper that cost money,—poor miserable compensation as that would be,—it would be some standard of damages. A man is hurt upon a railroad. We say, first, you are to give him his expenses,—money paid for medicine. If he has employed a doctor who charged him twenty, fifty, or a hundred dollars, those things you must allow anyway, because they are direct. But there is a field beyond that in all these cases. In one, it is for the sufferings that a person may have undergone. I mean a case where a party is injured personally,—physically,—and the effect it may have upon his after life. Here you are allowed to consider the disgrace, the feelings of misery, apart now from the child being born,—the suffering that this girl may have undergone by reason of this breach of contract, if one took place, and the humiliation that she endured, and the public stigma that the breach of the contract may have brought to her. Upon this subject I give you the law in its stringency, and, I must say, with some regret, but I cannot help it, and it is your duty to apply it to this case. The supreme court said, away back in 1845: 'The decision of the point before us seems to be founded in the true principles of the action. The mind is indeed at first inclined to doubt it by the inequality of the consequences of seduction which are borne by the feebler party, and produced by her confidence in the promise whose breach is the ground of the action. Still, illicit intercourse is an act of mutual imprudence, and the law makes no distinction between the sexes as to the comparative infirmity of their common nature. A woman is not seduced against her consent, however basely it may be obtained, and the maxim *non fit injuria* is as applicable to her as to a husband whose consent to his own dishonor bars his action for criminal conversation. This maxim runs through a variety of actions, such as those for injury from mutual negligence,' etc.; and goes on to say: 'If a woman cannot make her seduction a ground of recovery directly, how can she make it so indirectly? Parties may show their circumstances and condition in life as a matter of aggravation or mitigation, but these have no connection with their participation in the act complained of, and no court has gone further.' The learned judge may have been right then, but a number of courts of high respectability have gone further since. This case was again affirmed in 1849, when it was held that a promise to marry on an illegal consideration is virtually void; that it was proper that all the evidence should be submitted to the jury, etc. The court charged the jury substantially as I have charged you. The defendant produced a letter on the trial that showed beyond a doubt that the illicit intercourse was had by reason of the promise of marriage, but the court ignored that fact, and submitted it to the jury to say whether, under all the circumstances, it was a case of mere *quid pro quo*, and a consideration for the promise, or whether they might not have been en-

gaged, and an advantage taken of her by reason of her confidence in him, and not by the simple promise of marriage. Although an action for a breach of promise of marriage is an action of contract, yet the circumstances which attend its breach before, at the time, and after, may be given in evidence in aggravation of damages. This I have never known to be disputed; and so far has this principle been extended that Chief Justice PARSONS, in *Paul v. Frazier*, 3 Mass. 71, ruled that, where seduction has been practiced under color of a promise of marriage, the jury may consider it to aggravate the damages in an action on the contract."

*W. D. Moore and F. G. McGirr*, for plaintiff in error.

GREEN, J. We are not prepared to hold that, where a witness is asked upon the stand to say whether he has committed a crime, he shall be compelled to do so simply because he may, if a prosecution for that crime is subsequently instituted against him, plead the statute of limitations in defense. It seems to us he is protected against criminating himself in such a manner as to subject himself even to a prosecution. Were he compelled to answer the question as a witness, his answer would be sufficient, when testified to by others who heard it, to lay before a magistrate, who could commit him to prison to answer the charge, in default of bail. It would be also sufficient to place before a grand jury, who could find an indictment against him upon mere proof of his extorted answer. He could thereupon be compelled to appear in a criminal court to answer the charge, and would be obliged to employ counsel to defend him. He would necessarily undergo all the expense and trouble, besides suffering the shame, perhaps the ignominy, of defending himself against a criminal accusation made by his own mouth against himself, because he was coerced to do so by the peremptory order of a court clothed with power to commit him indefinitely to prison for contempt in case of disobedience. At least, he would be obliged to plead the statute of limitations, and, if the crime were infamous, an acquittal on such a plea would be scarcely better than a conviction. We have never held that a witness might be compelled to criminate himself in such circumstances, and with our present views we decline to hold so now. The first assignment of error is therefore dismissed.

The second assignment is better taken. The witness could have answered the question whether the plaintiff was a chaste woman categorically, without criminating himself necessarily. If he answered that she was not chaste, and was then asked as to his means of knowledge, he could have pleaded his privilege, if the further answer would criminate him. But as he might have known the fact in other ways than by any personal experience of his own, we think he was bound to answer the question as it was put, and we therefore sustain the second assignment.

We sustain the remaining assignments, because they cover a practical admission and application of evidence which, under our well-settled decisions, was not competent. The action was case, for breach of a promise to marry. It is perfectly well settled that in such an action proof of seduction cannot be given in aggravation of damages. *Weaver v. Bachert*, 2 Pa. St. 80; *Baldy v. Stratton*, 11 Pa. St. 316. The learned judge of the court below, admitting this to be so, and in fact instructing the jury to that effect, nevertheless indulged in a line of comment which, it seems to us, tended to influence and mislead the jury. He practically took away all the effect of his statement that the birth of a child might not be proved in aggravation, by telling them that they might consider all the circumstances in their verdict. He included in these circumstances "the conduct that he [the defendant] was guilty of, deceiving and duping her in the promise that he made, and his conduct in connection with everything that surrounded the transaction." Again, he said: "Here you are allowed to consider the disgrace, the feelings of misery, apart

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now from the child being born, the suffering that this girl may have undergone by reason of this breach of contract, and the humiliation that she endured, and the public stigma that the breach of contract may have brought to her. Upon this subject I give you the law in its stringency, and, I must say, with some regret, but I cannot help it, and it is your duty to apply it to this case." He then read a portion of the opinion of this court in the case of *Weaver v. Bachert*, *supra*, but omitted to read the remaining portion, which shows that, notwithstanding all that had been previously said, it was not competent, and properly so, to give evidence of the seduction in an action on the promise. There was much more of similar comment in the course of the charge; and of course, if the learned judge were merely expressing his personal views upon the base and dishonorable conduct of the man who would be guilty of such conduct, to a mere assembly of listeners, they would be entirely proper and just in all respects. But he was charging a jury in a civil action, in which both he and they and we are strictly bound by the limitations of the law; and in such circumstances we think it is not well for the trial judge, either to tell the jury that he regrets the state of the law, or to take away practically all its effect by a course of observations which simply tend to inflame the jury into disregarding it. Such, we think, was the tenor of the charge into which the learned judge was led, no doubt unconsciously, and in the expression of feelings which are very natural in ordinary circumstances, but are inappropriate in legal proceedings. Entertaining these views, we feel constrained to sustain the third, fourth, fifth, sixth, and seventh assignments.

Judgment reversed, and new venire awarded.

### HERSHBERGER v. LYNCH.

(*Supreme Court of Pennsylvania*. November 11, 1887.)

#### 1. MASTER AND SERVANT—LIABILITY OF LIVERY KEEPER FOR NEGLIGENCE OF DRIVER.

In an action for damages for injuries resulting from the collision of a wagon driven by plaintiff and a carriage belonging to defendant, and driven by a servant in defendant's employ, the defendant asked the court to charge the jury to the effect that if the driver was, at the time of the accident, in the employ of the person to whom the carriage was hired, the defendant is not liable; and also that if the carriage and driver were, at the time of the accident, temporarily engaged in the service of the person hiring the same, and under his direction and control, the defendant is not liable for negligence of the driver. *Held*, that the instructions were properly refused, as contrary to the law.

#### 2. SAME—NEGLIGENCE—BURDEN OF PROOF.

In an action for damages for injuries resulting from an accident caused by negligence of the driver of a carriage, the burden is on the plaintiff to establish, to the satisfaction of the jury, that the driver was guilty of negligence.

Error to court of common pleas, Allegheny county; J. H. BAILEY, Judge.

This was an action of trespass on the case, brought by Dennis Lynch against T. P. Hershberger, to recover damages for injuries alleged to have been sustained by Lynch as the result of a collision between a carriage owned by Hershberger and a wagon owned and driven by Lynch. The carriage was driven by a driver in the employ of Hershberger, who was in the livery business. On this day, July 15, 1886, Hershberger had hired the carriage, horses, and driver to Foley & Son, another livery firm, for the purpose of attending a funeral. The testimony showed that Lynch was driving east, along Penn avenue, in Pittsburgh, on the right-hand side of the street-car track; that the carriage of Hershberger was coming westward in the street-car track, and turned out on the same side that Lynch was on to pass another wagon and a street car. A collision resulted, and Lynch was thrown from his wagon, sustaining a fracture of the hip joint.

The judge charged the jury as follows:

"I am requested by the defendant to instruct you upon two points:

"(1) If Withrow, the driver of the horses and carriage, was at the time of the accident engaged in the service of Foley & Son, and under their direction and control, the defendant, Hershberger, is not liable to plaintiff for injury or damages resulting from the alleged negligence which then and there caused or contributed to said accident.' Whether or not this point is law depends altogether upon what is meant by, and what you find with respect to, the expression, 'engaged in the service of Foley & Son, and under their direction and control;' because the language may not convey the same idea to you that it does to the counsel who presented the point, or that it does to me. Of course, if you go to a livery stable, and hire horses and carriage to perform some service for you, to carry you and your family about upon some errand of your own, to a certain extent those horses and the carriage and the driver are in your service, and under your direction and control; but that would not make you responsible for the negligence of the driver, if he were guilty of negligence while in that service. Consequently it all turns upon what is meant by the expression, 'engaged in the service of Foley & Son, and under their direction and control,' and that depends upon the facts in the case. I will embrace what I have to say on this point in the answer to the second point, which goes a little more in detail as to the facts.

"(2) Although the carriage and horses were the property of defendant, and the driver (Withrow) was in his general service, yet if the carriage and driver were, on the day and at the time of the alleged injury to plaintiff, temporarily engaged in the service of Foley & Son, and under their direction and control, the defendant is not legally liable for the alleged negligence of the carriage driver while so employed in the service of Foley & Son.' You will observe that precisely the same phraseology is used in this as in the preceding point; that is, as to the 'employment in the service of Foley & Son, and under their direction and control.' If it was the intention of and the arrangement, between Foley & Son and Hershberger, that Foley & Son were to have the entire control of this vehicle, driver, and horses on that occasion, such that Mr. Hershberger could exercise no control whatever over them,—such that, for instance, Foley & Son could have dismissed the driver, Withrow, and put another driver in his stead, and thus have made the engagement to be other than it appeared upon its face, of driver, horses, and carriage,—then this point would be law, and Hershberger would not be legally liable for the conduct of the driver. But if the engagement was such as I have indicated,—simply an employment from Hershberger of horses, carriage, and driver to go where Foley & Son might direct, and to perform such ordinary service as such a vehicle, driver, and horses usually perform when employed, and Foley & Son interfered in no way with the action and conduct of the driver in the performance of his duty as a driver,—then the point would not be law, but the case would stand as though the employment had been made directly from Mr. Hershberger. To a certain degree the rule of law which makes the employer responsible for his driver has its measure of harshness when the employer, as the facts would seem to indicate here, furnished proper horses and carriage, and a competent driver. If the driver, through his negligence, without any control of Mr. Hershberger, or any possible control, was guilty of negligence by which some person suffered, and for which that person is entitled to receive damages, there is a certain degree of harshness in putting the burden upon the owner of the vehicle and the employer of the driver; but such is the law, from the necessity of the case. The act of the driver is supposed to be the act of the owner of the horses and vehicle, but that consideration is not seriously to weigh with you. It may become a matter of concern, if you come to the question of damages; that is, that the damages should not be stretched beyond the actual limit of the law, the actual compensation the plaintiff is entitled to. But if this employment

was simply, as I have indicated, a hiring of horses, carriage, and driver, as you or I might do it, to have it carry us to some point where we wished to go, exercising no control over the driver in the performance of his duty as a driver, then Hershberger would be liable for the negligence of the driver, so far as the law would cast upon the driver a burden for his negligent conduct.

"We come now to the law bearing upon the case apart from those questions. This action is brought to recover damages for the negligence of the driver, and the burden is on the plaintiff to establish to your satisfaction that the driver was guilty of negligence; that is, a want of the due care, attention, caution, and prudence which should be exercised by a driver under the circumstances where and when this accident to the plaintiff occurred. That burden is on the plaintiff. If he has failed to satisfy you that the driver, Withrow, was guilty of negligence at that time, and under the circumstances, of course your verdict should be for the defendant; or, if you should find from the facts and circumstances detailed in evidence that Lynch, the plaintiff, was guilty of negligence upon his part, which contributed and assisted in bringing about the accident from which he now suffers, your verdict would be for the defendant. The law will not hold the scales between the negligence of the driver of one vehicle and the other; therefore, if Lynch was guilty of negligence which contributed to and assisted in the accident in any degree, he could not recover. \* \* \*

The jury rendered a verdict for plaintiff, assessing his damages at \$502, and judgment was entered thereon. Defendant brings error.

*Joseph Hays* and *A. M. Brown*, for plaintiff in error.

The defendant's two points presented plain and distinct propositions. Neither of them received a direct or sufficient answer from the learned judge. The hiring of the carriage and horses to *Foley & Son* was an entire abandonment of them to the control of *Foley & Son*, and the court should have so held and affirmed the points made by the defendant. It is error not to give an explicit answer to every point submitted by counsel. *Noble v. McClintock*, 6 Watts. & S. 58; *Garrett v. Gontor*, 42 Pa. St. 143. And if the language of the court is such as would mislead the jury, this is error. *Kissinger v. Thompson*, 12 Serg. & R. 44; *Wenger v. Barnhart*, 55 Pa. St. 300; *Railroad Co. v. Berry*, 68 Pa. St. 272; and *Stall v. Meek*, 70 Pa. St. 181. Where the judge assumes a fact which is not in evidence, the judgment must be reversed. *Musselman v. Railroad Co.*, 2 Wkly. Notes Cas. 105. To these citations may be added the cases of *Pennsylvania Co. v. Toomey*, 91 Pa. St. 256; *Tenbrooke v. Jakke*, 77 Pa. St. 392; and *Huddleston v. Borough of West Bellevue*, 111 Pa. St. 110, 2 Atl. Rep. 200,—as especially applicable to the errors in this case. The immediate employer of an agent or servant who causes an injury is alone responsible for such injury. To him alone the rule of *respond-eat superior* applies, and there cannot be two superiors severally responsible. *Wray v. Evans*, 80 Pa. St. 102. It is said in *Bard v. Fohn*, 26 Pa. St. 482, that "where a person, employed by one as a servant, is using the team of his master for his (the servant's) own purpose and benefit, and in the absence and without any directions from the master uses the team so negligently as to occasion injury to a third party, the master is not liable for such injury, although he assented to the servant using the team for his own benefit." The same rule seems to be recognized in *Massachusetts* in *Kimball v. Cushman*, 103 Mass. 194; *Wood v. Cobb*, 13 Allen, 58; and in *Ohio*, in *McGatrick v. Wason*, 4 Ohio St. 566; and in *England*, in *Murray v. Currie*, L. R. 6 C. P. 24.

*Josiah Cohen* and *A. Israel*, for defendant in error.

The court correctly stated the law in its answers to the points submitted by defendant. It is not error to answer several points collectively, provided they

all relate to the same matter, and are answered fairly and fully. *Coates v. Roberts*, 4 Rawle, 100. It is not error for the court, after considering a point affirmatively, to qualify it, by stating that if the facts were different from those assumed the law would be otherwise. *Lloyd v. Carter*, 17 Pa. St. 216.

**PER CURIAM.** The complaint in this case is that the defendant's points were not clearly answered. Those points could not well be answered without some explanation; hence they were so qualified as to give the jury proper instructions on the law governing the case. The charge, as a whole, was certainly clear enough, and by it the jury could not have been misled. Judgment affirmed.

### McDEVITT and others v. VIAL and Wife.

(*Supreme Court of Pennsylvania.* November 11, 1887.)

#### 1. HUSBAND AND WIFE—PRESUMPTION THAT CHATTELS IN HOUSE ARE HUSBAND'S.

Where a husband and wife are living together, the presumption is that the personal property in the house belongs to the husband; and, in order to overcome this presumption, the wife must show that she owned the property before her marriage, or that she acquired it since in a way entirely independent of her husband.

#### 2. SAME—WIFE'S SEPARATE PROPERTY—MONEY DONATED.

Money or property donated to a wife for her use, and for the use of her family, is her separate property, and cannot be levied upon for the debts of her husband.

#### 3. SAME—SUBSCRIPTION-BOOK AS EVIDENCE.

In an action of trespass on the case for wrongful levy and sale, the plaintiff offered in evidence a subscription paper to show that the property was bought with money belonging to the wife. *Held*, that money given to a wife is presumed to be for her separate use, and the subscription paper was properly admitted in evidence.

#### 4. EXECUTION—WRONGFUL LEVY—MALICE—MEASURE OF DAMAGES.

In an action of trespass on the case for wrongful levy and sale, the jury are not confined to the actual damage sustained. They may go beyond that, if the evidence shows a wanton invasion of plaintiff's rights, or any circumstances of aggravation or outrage.<sup>1</sup>

Error to court of common pleas, Allegheny county; J. W. F. WHITE, Judge.

This is an action of trespass on the case brought by Moses Vial, and Sarah Vial, his wife, to the use of the said Sarah Vial, against W. A. McDevitt, A. J. Spiegelmier, and John Rinard, partners as W. A. McDevitt & Co., and George C. Wilcher, a constable, to recover damages for selling property on execution, which they allege was the property of Sarah Vial in her own right, and which they allege had been previously appraised and set apart to her, on a previous execution issued on the same judgment. Moses Vial, and Sarah, his wife, lived together at the borough of Braddock, Pennsylvania, and kept the "Rush Hotel." They bought groceries and other necessaries at the store of W. A. McDevitt & Co., on an account opened in the name of the wife. On the fifth of October, 1886, they had become indebted to the firm in the sum of \$73.58, and refused to pay it. On the tenth day of November, 1886, W. A. McDevitt & Co. entered suit before a justice of the peace, and on the fifteenth of November, 1886, obtained judgment against Moses Vial, and Sarah, his wife, jointly, for \$73.53, and costs. On the tenth of December, 1886, an execution was issued against Moses Vial, individually; and George C. Wilcher, the constable, levied on all property that he could find and had reason to believe belonged to Moses Vial. After the levy had been made, the constable received a notice signed by Moses Vial and Sarah Vial, claiming the

<sup>1</sup>Punitive damages may be given against a defendant, when the injuries received by plaintiff were intended, or occurred through carelessness or negligence amounting to a wrong so reckless and wanton as to be without palliation or excuse. *Ross v. Leggett*, (Mich.) 28 N. W. Rep. 696. See *Spear v. Hiles*, (Wis.) 30 N. W. Rep. 506, and note; *Railroad Co. v. Telephone Co.*, (Tex.) 5 S. W. Rep. 617.

benefit of the exemption laws, and demanding an appraisalment. Appraisers were regularly appointed, and on the twenty-sixth of December, 1886, made an appraisalment. The transcript of the docket of the justice of the peace, which was offered in evidence by the plaintiffs below, shows the following as to the appraisalment. "Defendant claims benefit of the exemption law, and demands an appraisalment; proceedings stayed; appraisers appointed, and appraisalment made, and appraisers return goods found in possession of defendant, but not in amount of three hundred dollars."

As the property of Moses Vial, over and above exemptions, was not sufficient to cover the debt, the firm caused another execution to issue, this time against Moses Vial and Sarah Vial. The firm gave the constable an indemnity bond, and he made a levy and sold goods sufficient to pay the judgment and costs, whereupon this suit was brought. There was no appraisalment demanded or made after the second execution was issued. After the constable made the second levy, he was notified that the goods levied upon were in part the property of Charles Vial, the son, and in part the property of Jane Vial, the daughter; and such part thereof as belonged to Moses Vial and Sarah Vial were claimed under the exemption law; but he testified that none of the property was pointed out to him as the property of any particular person.

The plaintiffs below proved that Moses Vial and family lived at Irwin, Pennsylvania, in 1885, and that in February of that year there was a fire, and all of their goods were burned. Sarah Vial, when asked at the trial in the court below where she got the goods that W. A. McDevitt & Co. sold, testified that she was burned out of everything she had at Irwin; that after the fire a Mr. Highberger handed her \$147 he had collected from the stores and banks, and said to her, "Now when you get a house keep this to buy a few things to go to housekeeping on;" that in addition to the \$147, her father gave her \$50; that other neighbors gave her bedsteads, dishes, lamps, etc.; that she bought the goods which she brought to Braddock with the money that was given to her, together with \$60 which she had earned at washing. Her counsel then showed her a paper, purporting to be signed by various persons, and asked her if she knew what it was. She answered: "Oh, yes; I drew them off the book and saved them." She said it was a list of the people that subscribed to the fund given to her. Her counsel then offered the paper in evidence, for the purpose of showing where she got the means to purchase the goods sold upon execution of W. A. McDevitt & Co. Defendants' counsel objected to the offer. The court below overruled the objection, and the paper was admitted under exception, and marked "Exhibit No. 3." The subscription list was headed as follows: "We, the undersigned, agree to pay the amount opposite our respective names for the benefit of Mrs. S. Vial and family, a sufferer from the late fire."

On the conclusion of the testimony the court instructed the jury as follows: "The claim of the plaintiff Mrs. Vial is for damages for selling property that belonged to her which had been previously set apart for her use. \* \* \* Under our law, a married woman may buy necessities for a family, and a husband is liable and bound to pay for them. But where she makes the contract for necessities for the family, and the husband has nothing, her separate estate may be taken in execution; she becomes in that way liable to pay. That is, under the married woman's act. Before the married woman's act was passed, a woman was not liable for any debts contracted for the family, but the act of 1848 exempted a married woman's separate property from the debts of the husband, and for any debt contracted by the husband her separate property could not be taken. The legislators, however, saw that that might be used in a very fraudulent way. The husband might not have any property, and yet the wife buy goods for the family, and have abundant means of her own; and, unless her estate was liable for it, there would be no way of paying; it would be an injury even to families that the wife's property

should not be liable for necessaries furnished to the family on her own contract. The law, therefore, provides, in a case of that kind, that judgment may be obtained against a husband and wife. Execution first goes out against the husband. If any property can be found of his, it must be taken in execution before any property of the wife can be taken. If no property of the husband can be found, why, then, on the execution, the property of the wife must be taken.

"In this case the defendant obtained judgment against Moses Vial and his wife before a squire for \$73 for necessaries furnished to the family,—groceries and other matters,—on the contract of the wife, and for which the plaintiffs, the defendants here, issued an execution and levied on the household furniture in the house where the plaintiff and her husband were living. The plaintiffs in the execution were bound to do that. The presumption was it was the husband's, because the presumption of the law is that the personal property in a house where a man and woman are living is the property of the husband, and the wife, in order to claim property from the husband's creditors, must prove to the entire satisfaction of the jury that the property was hers, either before she got married, or was given to her after marriage, or that she furnished with money that did not come either directly or indirectly through her husband. The law will not allow a husband to give his money to his wife to buy property to cheat his creditors, and will not allow his property to be put in the name of the wife when he has debts to pay. All the wife's earnings belong to the husband, unless she has obtained some written guaranty allowed to married women under our statute. The husband is bound to support his wife and his family, and is entitled to their earnings. He is entitled to the services of his wife, and, even if she keeps a boarding-house, the proceeds of that the law allows him. If she buys property with her earnings, unless she has obtained a certificate that gives her right to her separate earnings, it is the property of the husband, and not hers. It may be a hard case, you will say, that a washer-woman that washes and makes money in that way, and buys household furniture with it, may have it taken and sold from her for the debt of the husband, yet such is the law, unless a married woman obtains privileges as a *feme sole* trader under our statute, and it is recorded, and the world has notice of it.

"It seems in this case, first, execution was levied against all the furniture in the house. The wife, the present plaintiff, claimed one portion of it, and the son and daughter claimed the other portion; they contending that Moses Vial, the husband of the present plaintiff, had not anything at all. That was the claim set up before the constable. He had no right to levy on the property of the daughter or son on that execution, if he knew it to be the daughter's or son's, yet, being in the house where Moses Vial lived, and where he was carrying on a saloon or a tavern, licensed in his own name, the constable, and the plaintiff in the execution, had a right to presume that all the property in the house belonged to Moses Vial. I say they had a right to presume that, because *prima facie* in law, it was his property. Still, if the wife owned any property, if not derived through her husband, she would have a right to claim it and to establish her claim. So would the son or daughter. The constable having appraised all the property in the house, and the whole of the property amounting to less than \$300, he stopped. If the property had amounted to more than \$300, of course, it would have been his duty to have ascertained more closely what property the wife claimed. But as the claim did not amount to \$300, it seems that he stopped. He had no right to levy on the property of the son or daughter on that execution. He could only levy on the property of Moses Vial or his wife, and as they claimed the whole of the property, of course, he stopped.

"The husband and wife both gave notice, claiming the benefit of the \$300. I doubt not that under it, if there had been some property belonging to the

husband, and some belonging to the wife, the constable might have set aside a part to the husband and a part to the wife, providing the whole amount did not exceed \$300. The constable testified that he set apart this, not as the property of Moses Vial, but claimed by the wife, the daughter, and son. He did not know which property was the wife's and which the son's and daughter's. After that a second execution went out, which was for the purpose of getting at the wife's property. On the first execution he could not sell the wife's property, because he had to make it out of the husband's property, if he had any. On the second execution, he could sell the wife's property. I believe she gave notice again, or rather, I believe, both of them gave notice to the defendants in this case that they claimed the property that had been set aside on the previous execution to be exempt, and that, if they proceeded to sell, they would proceed at their peril. The defendants indemnified the constable to sell, and the constable did sell, and sold, it is alleged, some of the very things that had been set apart for the wife in the previous proceeding. Now, gentlemen, it is immaterial in this case whether these other articles claimed by the son and daughter belonged to them or not. It is not material whether they belonged to the husband. The husband may have had other property. He may have fraudulently removed a great deal of property from the house. It does not affect the wife's claim in this case. If she has a valid claim, it cannot be destroyed by any fraud that the husband may have committed before. The first question, therefore, for you to pass upon is this: Was this property that is now claimed by the wife the property of the wife? She must prove to you, and to your entire satisfaction, that it was her separate property, acquired wholly independent of her husband, and not through him in any way. She testified that, when they lived at Irwin, Westmoreland county, a fire occurred, when everything they had was burned up; that one of the neighbors raised some money for her, and her father gave her \$50,—altogether, I think, \$190,—and that some of the neighbors gave her some articles of furniture; one gave her a bedstead, and one a carpet, and so on, and that she brought those articles to Braddock, in this county, when they moved there, and that the articles she now claims were the articles thus given to her and purchased with the money given to her. That is her claim. The counsel for the defendants has stated a point of this kind: That if that money was contributed to her for her use and the use of the family, it is not her property, but might be levied on for the debt of the husband. I refuse that. If it was given to her, and given to her for her use and the use of her family, it was her separate property, and could not be levied upon for the debts of the husband.

"The next point would be the value of these articles, if set apart for her; but, under the testimony of the constable, I suppose there can be no question about that, unless it might be that he ought to have designated at that time the particular articles of furniture that belonged to her. I do not think that is material. There was nothing claimed by the husband. She, her son, and daughter claimed all in the house. He appraised all in the house, and the whole amount did not come to \$300, so that that covers whatever she had. He would have had a right to have required her to point out specifically what belonged to her and what she claimed. When he went back with the second execution, he levied on, I presume, everything, nearly, in the house. The second execution was issued two days after the other was returned. The defendants claimed the right to protest the validity of her claim, and they indemnified the constable, and directed him to proceed and sell the property. Of course, they did that at their own peril. They ran the risk by that proceeding of a suit to establish their title. The whole amount of property sold amounted to about \$118. Now, I go to the question of damages. If you find all of these facts in favor of the plaintiff, then the next question would be the amount of the damages to which she is entitled. It is true, according to a point presented by the plaintiffs' counsel, that in an action of this kind, where the

jury believe from the evidence that the defendant has acted in an oppressive way, and in a wanton disregard of a party's rights, they are not limited to the actual amount of the value of the property, but may go beyond that, and give what is called exemplary damages,—something in the nature of a punishment for the gross outrage and wrong committed. Before a jury go beyond compensatory damages, they ought to be satisfied that the wrong had been done with a high-handed spirit, and a disposition to oppress and do wrong. Where there is not evidence to sustain that motive or purpose, the jury should not allow anything more than mere compensatory damages; that is, damages equal to all the injury done. \* \* \*

Verdict and judgment were rendered for plaintiffs for \$56. Defendants bring error.

*Edward Duffy*, for plaintiffs in error.

The married woman's act of 1868 provides in clear terms that property which shall accrue to any married woman during coverture shall be owned, used, and enjoyed by her as her own separate property, and shall not be subject to levy and execution for the debts and liabilities of her husband. Property bought by a wife with a fund composed partly of money given to her during her coverture for the benefit of herself and family was not such property as is within the meaning of the act of 1848. There is no presumption that money given to a wife is for her separate use. *Mrs. Vial* could not hold the money given to her for the benefit of herself and family "as her own separate property," to the exclusion of her husband's creditors. *Winter v. Walter*, 37 Pa. St. 155. Whatever may be said of the property purchased by *Mrs. Vial* with the money given to her and that earned by washing, it being mixed and confused with other property purchased with the joint earnings and on the joint credit of herself and husband, so as not to be distinguishable, it was not such property as is exempt from execution for the liabilities of her husband. *Hallowell v. Horter*, 35 Pa. St. 375. To bring the property of a married woman under the protection of the act of 1848, it is made necessary by the letter, as well as the spirit, of the statute to prove that she owns it. Evidence that she purchased it amounts to nothing, unless it be accompanied by clear and full proof that she paid for it with *her own separate funds*. *Keeney v. Good*, 21 Pa. St. 355; *Walker v. Reamy*, 36 Pa. St. 410; *Gault v. Saffen*, 44 Pa. St. 307; *Baringer v. Stiver*, 49 Pa. St. 181; *Lochman v. Brobst*, 102 Pa. St. 481; *Leinbach v. Templin*, 105 Pa. St. 522. Property purchased by a woman during coverture with a fund owned in part by her husband is the property of the husband, as regards his creditors, under the act of 1848. *Hallowell v. Horter*, 35 Pa. St. 375. The husband, as the head of the family, is presumed to be the owner of all the personal property owned by the family, until the contrary is proven. *Topley v. Topley*, 31 Pa. St. 328; *Walker v. Reamy*, 36 Pa. St. 410; *Winter v. Walter*, 37 Pa. St. 155; *Curry v. Bott*, 53 Pa. St. 400; *Pier v. Siegel*, 107 Pa. St. 502.

*Wm. Yost*, for defendant in error.

PER CURIAM. This case was carefully submitted to the jury on the facts, and the points presented were well ruled; hence the assignments of error cannot be sustained. The judgment is affirmed.

#### Appeal of QUINN and another.

(Supreme Court of Pennsylvania. November 11, 1887.)

#### EQUITY—JURISDICTION—REMEDY AT LAW—RIGHT TO USE ALLEY.

Plaintiffs, claiming to own a certain alley, brought a bill in equity to enjoin defendants from using it. Defendants claimed that the alley was a common alley, and that they had a right to use it. *Held*, that equity had no jurisdiction of the matter, and the plaintiff's remedy was at law.

**Appeal from court of common pleas, Allegheny county.**

The plaintiffs claimed to be the owners of an alley in the rear of their lots, which had been used by defendants. Plaintiffs erected a fence at the end of the alley to prevent the use of it by them. They broke it down, and the plaintiffs replaced it, and filed a bill to perpetually enjoin the use of the alley by the defendants, and the breaking down of the fence. Defendants claimed it was a common alley. The matter was referred to the master, who found, as a matter of fact, that the alley was a common alley, but that equity had no jurisdiction, under *Washburn's Appeal*, (April 7, 1884,) 105 Pa. St. 480, until the title of the alley had been determined by law, and the court dismissed the bill.

*Barton & Son and J. S. Ferguson*, for appellants. *D. T. Watson*, for appellees.

**PER CURIAM.** Clearly the equity side of the court of common pleas had no jurisdiction of the matter complained of in the plaintiffs' bill. Their remedy was an action at law. Appeal dismissed, and decree affirmed, at the costs of appellants, without prejudice to their right to maintain an action at law.

**KEYSTONE BREWING Co. v. WALKER and others.**

(*Supreme Court of Pennsylvania*. November 11, 1887.)

**CONTRACTS—BUILDING CONTRACT—EXTRAS—ARCHITECT'S VALUATION.**

Under a building contract, the value of extra work done and materials provided was to be ascertained by the valuation of the architect. In an action to recover a balance due under the contract, it appeared that the architect had given different valuations to both parties. *Held*, that both valuations were properly submitted to the jury to say which was the correct one.

**Error to court of common pleas, Allegheny county.**

This was an action to recover the balance due under a building contract. The facts sufficiently appear in the following charge of the court below:

"Gentlemen of the jury, in this case, as we instruct you and have ruled, there is but one main question of fact for you to consider, and upon that question both sides differ very materially. This claim arises under a clause in the contract which has been read to you, and I will read it again, so that your minds may be directed to that point in the case, and that you may not worry about matters that have very little to do with it, except incidentally: 'It is further agreed that the said parties of the first part may make alterations, by adding, omitting, or deviating from the plans and specifications, or either of them, which they shall deem proper, and in all such cases the said architect shall value and appraise the alterations, and add to or deduct from the amount herein agreed to be paid to said parties of the second part.' You will observe that the parties signed a written agreement that they might make changes, and whatever the difference from the original contract was, should be added to or deducted from the contract price. If the alterations were more valuable than the work called for in the specifications, the defendant company should pay for them; if they were not so valuable, or something was omitted that was in the contract, the brewing company should be allowed it; and that this valuation should be made by the architect.

"Now, if the architect did not choose to perform his duty, then the plaintiff, Mr. Walker, had a right to act. We permitted him to go upon the stand, and proceed with his case. But if it appear that the architect has performed his duty, then both sides are bound to abide by his decision, unless there be some fraud shown; but of that there is no evidence in the case. Now, gentlemen, Mr. Walker testifies distinctly and positively that he had a settlement; that the architect valued these additions, and he tells you what they were, particularly the item changing from common or Rosendale cement to Portland

cement. That is the largest item. He says that after he did that work there was some work which he intended to do under the contract, but the architect instructed him he need not do it, and that work was omitted; that the architect made a valuation of this work; that he took it all into account after the work was completed or about that time; that he had some papers; that he, the plaintiff, took down the balance, in figures \$965, due him on this valuation of the architect. That is Mr. Walker's (the plaintiff's) side.

"Now, the defendants say they have a valuation made by the architect, and they present a paper to you in which the items are set forth and that statement of the architect gives to Mr. Walker only sixty-five cents. You have to determine between the parties. If that paper is genuine, and I see no evidence showing that it is not, then Mr. Walker is only entitled to sixty-five cents. On the other hand, if what Mr. Walker states the architect gave him is true, then he is entitled to \$965, with interest, and that you ought to give him, if that is your view. But if you find the paper presented by the defendants is correct, if that is the real valuation of the architect, then you ought to give the plaintiff only sixty-five cents. This, as far as you are concerned, is all that is in the case. There are some legal questions that will have to be determined hereafter."

The plaintiff recovered \$965 in the court below, whereupon the defendants brought error.

*John S. Ferguson*, for plaintiffs in error.

The evidence received on behalf of the plaintiff below, showing the amount of the architect's valuation, should have been rejected, because plaintiff below did not sue upon that alleged settlement.

*Weir & Garrison*, for defendant in error.

PER CURIAM. As, in this case, the architect made two valuations, one for each of the parties, and as these valuations were essentially different, and were thus inconclusive, we cannot see why, under evidence of the value of the work, they were not properly submitted to the jury to say which was the correct one. The judgment is affirmed.

#### SCHUCK v. CITY OF PITTSBURGH.

(*Supreme Court of Pennsylvania.* November 11, 1887.)

MANDAMUS—TO COMPEL PAYMENT TO ASSIGNEE OF PART OF JUDGMENT.

Petitioner was the assignee, before payment, of part of a judgment against the city of Pittsburgh, and, after the whole amount of the judgment had been paid to the judgment creditor or his attorney of record, petitioned for *mandamus* to compel the city treasurer to pay the amount assigned him. His assignment had been duly recorded on the assignment docket. *Held*, that such *mandamus* was properly refused.

Error to court of common pleas, Allegheny county.

Martin Schuck obtained a verdict against the city of Pittsburgh on March 22, 1887, in the sum of \$400, as damages for personal injuries suffered through negligence of defendant's officers in not keeping a board walk in repair. Judgment was duly entered on the verdict on May 13, 1887. On June 6, 1887, said Martin Schuck, plaintiff, assigned of record \$150 of this judgment to John D. Potter. On July 14, 1887, the defendant city paid the full amount of the judgment to Martin Schuck, the plaintiff, or to his attorney, and declined to pay Potter. Said Potter then petitioned the court, on August 10, 1887, setting out above facts, for a writ of *mandamus* execution, under the provisions of the act of April 15, 1834, directed to the city treasurer, to enforce the collection of his judgment. The court refused to grant said writ of *mandamus* execution, and on September 14, 1887, discharged the rule to show

cause why the same should not issue. To this action of the court in refusing to award said *mandamus* execution, said assignee excepted, and brought this writ.

*W. D. Moore and F. C. McGirr*, for plaintiff in error.

Where there is a judgment, the record is the proper place to give notice of its assignment. *Coon v. Reed*, 79 Pa. St. 240. Payment to plaintiff after notice of the assignment of a judgment is not payment to the proper person. *Guthrie v. Bashline*, 25 Pa. St. 80. Under the decision of this court in the case of *Monaghan v. Philadelphia*, 28 Pa. St. 207, the petition in the present case for a *mandamus* execution directed to the city treasurer was the proper proceeding. And see *Troub. & H. Pr.* § 1467. There was no answer to the petition or to the rule to show cause in this case. It is said in *Com. v. Floyd*, 2 Pittsb. R. 425, that the act of April 15, 1834, gives as a matter of right a *mandamus* execution to enforce a judgment against a county; and *Monaghan v. City of Philadelphia*, *supra*, that it is the proper and only way to enforce a judgment against a city.

*W. C. Moreland*, for defendant in error.

In *Appeal of Philadelphia*, 86 Pa. St. 179, this court said: "The question now presented is whether such a corporation [municipal] is bound to recognize an assignment of a part only of its obligation. If it must one uncertain part, we see no just reason why it must not as many parts as the convenience or whim of the obligee shall induce him to assign. The probable and natural effect of holding the municipality liable to each assignee would subject its officers to vexatious annoyance, and the city to litigation and costs. \* \* \* The policy of the law is against permitting the individuals, by their private contracts, to embarrass the financial officers of a municipality. \* \* \* A municipal corporation should not be subjected to the embarrassments, responsibilities, and costs of adjudicating contracts to which it was not a party." The same doctrine is laid down by this court in *Geist's Appeal*, 104 Pa. St. 854.

PER CURIAM. From all that we have before us in this case, we cannot say that the court erred in refusing the *mandamus* prayed for. The judgment is affirmed.

#### GRAHAM v. TAGGART and others.

(*Supreme Court of Pennsylvania*. November 11, 1887.)

1. PARTNERSHIP—PAYMENT OF PRIVATE DEBT WITH FIRM ASSETS—NOTICE TO CREDITOR. Plaintiff, trustee of a savings bank, took from one of the defendants, in payment of his individual note, a check of the firm of which he was a partner, knowing that the signature and writing in the check was in the handwriting of the maker of the note. *Held*, that these facts were notice to plaintiff that defendant was applying the firm assets to his private use, and they took the risk of the assent of the other partner.
2. SAME—POWER OF PARTNER TO BIND FIRM BY CHECK FOR PRIVATE DEBT. One of the defendants gave a check of the firm of which he was a partner in payment of his individual note. The other defendant, his co-partner, hearing of it, stopped payment of the check. *Held*, that as the transaction was a fraud on him he could not be held on the check.

Error to court of common pleas, Allegheny county.

One of the defendants, John Taggart, Jr., being indebted to the plaintiff, trustee for the Allegheny Savings Bank, upon a promissory note made by him, on the day it was due gave the plaintiff in payment a check in the name of the firm of which he was a partner. The plaintiff knew that the signature and the writing in the check were in the handwriting of the defendant, and

gave the note up to him. The other defendant, John Taggart, was a copartner of John Taggart, Jr., and upon being informed by the teller of the bank that the check had been given, stopped payment, and notified the plaintiff that it had been given in fraud of his rights, and without his knowledge or consent. The plaintiff sued on the check, and the court rendered judgment against John Taggart, Jr., but in favor of John Taggart, and rendered the following opinion, (EWING, P. J.): "We are of the opinion that the facts set forth in the case stated were notice to the plaintiff's bank that John Taggart, Jr., was using the assets of his firm to pay his own private debt, and they thereupon took the risk of the assent of the other partner. The fact is admitted that it was in fraud of the rights of the other partner, Joseph Taggart; consequently he cannot be held." The plaintiff brings error.

*Wm. Mocrum*, for plaintiff in error.

It is immaterial if a partner have the proceeds of a note placed to his individual account. *Tanner v. Hall*, 1 Pa. St. 417, 419. The crediting firm securities to a defrauding partner's account is not evidence of knowledge of the fraud. *Haldeman v. Bank*, 28 Pa. St. 446. The appropriating from time to time of the credits to which the partnership entitles him, is one of the ordinary implied powers of an active partner, (*Deckard v. Case*, 5 Watts, 23;) and the title of one receiving a check under such circumstances is good against the firm and their creditors, (*Fulweiler v. Hughes*, 17 Pa. St. 440.) The holder must have notice of the fraud in the partnership. *Chit. Bills*, marg. p. 48; *Ex parte Bonbonus*, 8 Ves. 542, 544; *Ridley v. Taylor*, 13 East, 175; *Frankland v. McGusty*, 1 Knapp, 274; 3 Steph. N. P. (Amer. Ed.) 2418. Where the party receiving it has no knowledge that it is partnership property, his title is valid. *Looke v. Lewis*, 124 Mass. 1; *Callender v. Robinson*, 96 Pa. St. 454; *Hutkamp v. Wagon Co.*, 121 U. S. 824, 7 Sup. Ct. Rep. 899. The fact that the firm's name was in the handwriting of the maker of the note was no notice of fraudulent purpose. *Miller v. Bank*, 48 Pa. St. 514; *Moorehead v. Gilmers*, 77 Pa. St. 118-123. Nothing but a knowledge of the fraud will impeach the title of a holder of commercial paper. *Phelan v. Moss*, 67 Pa. St. 59; *Battles v. Laudenslager*, 84 Pa. St. 446.

*C. S. Fetterman and S. A. & M. Johnston*, for John Taggart, defendant in error.

When it is known that a partner is using the firm credit for his individual benefit, the firm is not held to the person dealing with him with that knowledge. *Pars. Partn.* 121, 248; 3 Kent, Comm. 43; *Story, Partn.* §§ 102, 132-134. Knowledge that the indebtedness of the partnership has been applied by one partner to his individual debts is not proof of the consent of the other partner, so as to rebut the presumption of fraud in the creditor. *Ex parte Agocs*, 2 Cox, 312; *Elliott v. Dudley*, 19 Barb. 326. If a partner consent that a check of the firm may be applied on individual account, he can withdraw such consent before it is so applied, or the rights of third parties intervene, and after notice it cannot be so applied. *Bank v. Mapes*, 85 Ill. 67; 1 Lindl. Partn. 275, note 4.

**PER CURIAM.** We agree with the court below that the facts set forth in the case stated were notice to the plaintiffs' bank that John Taggart was using the assets of the firm to pay his own private debts, and that, therefore, they took the risk of the assent of the other partner; and also that, the transaction being a fraud on that partner, he cannot be held. The judgment is affirmed.

## Appeal of BRUSH ELECTRIC CO. and another.

(Supreme Court of Pennsylvania. November 11, 1887.)

## CONTRACT—BREACH—DAMAGES.

Defendant agreed to buy all its carbons from plaintiff at list price, less a certain discount. At the time of making the contract, plaintiff sold only one grade of carbons, known as "firsts." A more defective grade, known as "seconds," was used as raw material. From July, 1885, to March, 1887, however, they sold the "seconds," although without a fixed list price, and all the carbons bought by defendant from plaintiff during that period were "seconds." Held, that damages for non-compliance with the contract during the above interval should be assessed according to the profits on "seconds," and before that according to the profits on "firsts."

## Appeal from court of common pleas, Allegheny county.

The Brush Electric Light Company and J. E. Ridall, its agent, brought suit for damages against the Allegheny Light Company for the non-fulfillment of contract. The matter was referred to a master, who reported as follows:

"The only question now before the master is the damage suffered by the plaintiffs under the contract of March 31, 1883, on account of defendant refusing to buy 'carbons' from the plaintiffs as therein provided. After the execution of this contract, the defendant bought from other parties than the plaintiffs four hundred and fifty-eight thousand three hundred and fifty-nine (458,859) carbons. Of these one hundred and fifty-three thousand five hundred (153,500) were half-inch carbons; and the balance, two hundred and ninety-four thousand eight hundred and fifty-nine (294,859) were seven-sixteenths (7-16) inch carbons. These purchases continued from December, 1884, to March, 1887. The agreement of March, 1883, provides that the defendant shall buy all its carbons from the Brush Company at the list price of this company, less a discount of 10 per cent., or such higher rate of discount as may be given to other light companies buying from the agents of the Brush Company. \* \* \* The question of being bound to buy carbons from the Brush Company at its list price was discussed at the meeting of the secretary of the plaintiff company with the directors of the defendant before the agreement was signed, and was the only objection that any of the defendant's directors had to the contract.

"In addition, the master is not able to find from the testimony just what the market price of carbons was. It is true that we have in evidence the price paid by the defendant for all the carbons bought from others than the Brush Company, but there is no evidence to show that they were equal in quality to the Brush carbons, and the master does not think that the price paid by the defendant was the market price. Mr. Duncan, the general manager, testifies that, while the various manufacturers had a price-list that, was nearly uniform, yet the salesmen did not regard this, and, while the dealers all sent out price-lists, he never found an agent that stuck to the price-list. The testimony also shows that the defendant bought carbons as low as eight dollars per thousand, while the cheapest carbon made by the Brush Company cost nine and 40-100 (\$9.40) dollars per thousand to make it, and a very large proportion of the carbons from others than the Brush Company were bought at a price much less than cost price for the manufacture of the Brush carbons. The master, therefore, cannot find that the prices in evidence of the purchases made as above are the market prices, and holds that the list prices of the Brush Company are to govern in assessing the damages in this case.

"Notwithstanding that the master is of the opinion that the price-list of the Brush Company shall govern in assessing the damages in this case, yet it is very difficult to arrive at the damage done. From December 1, 1884, to May 10, 1886, the list price of the Brush Company for carbons was \$34.38 for one-half inch, and \$27.50 for seven-sixteenths inch carbons; and since May 10, 1886, the list price has been \$23.75 for one-half inch, and \$21.25 for seven-

sixteenths carbons. The cost of making these carbons was, from December 1, 1884, to June 1, 1885, \$12.75 for seven-sixteenths inch per thousand; and from June 1, 1885, to January 1, 1886, for same size, \$10.85 per thousand; and from January 1, 1886, to present time, for same size, \$9.40 per thousand. The half-inch carbons cost to make, \$2.00 per thousand more than the prices above during the periods specified. If this were the only element, the computation of the damage would be easy. It seems, however, that in making carbons there are from 10 per cent. to 20 per cent. of the number put into the oven that come out slightly imperfect, but still fit for use; these imperfect carbons are called 'seconds.' Up to the first of July, 1885, the Brush Company did not sell these 'seconds,' but ground them up, and worked the material over again. These 'seconds' are in every way made the same, and of the same material, as the 'firsts,' or perfect carbons; the only difference in the two being that a short piece at the end of the 'seconds' may be burnt too hard, or may not be quite straight. After July 1, 1885, the Brush Company commenced to sell these 'seconds' at a price slightly above the cost of making the 'firsts,' but never made a list price for 'seconds.' It continued to sell these 'seconds' at from \$11.00 to \$14.00 per M. until a short time after the interlocutory decree of your honors, on March 5, 1887. From December, 1884, until the Brush Company stopped selling 'seconds,' after the said decree, the only carbons bought by the defendant from the Brush Company were 'seconds.' Seventeen thousand (17,000) were thus bought during July and August, 1885, and the evidence does not show the number bought after the decree of March 5, 1887, before the Brush Company stopped selling 'seconds.' The plaintiffs claim that the question of 'seconds' should not enter into this case, as they were not sold or considered in March, 1883, when the agreement was signed, and there was no list price for 'seconds,' while the defendant claims that it would have bought nothing but 'seconds' during the period for which an account is ordered, and that the damage should be based on the profit on 'seconds.' The testimony shows that the 'seconds' bought by the defendant from the plaintiffs answered the purpose as well as 'firsts,' except that they required a little more care in setting. The master thinks, therefore, that, if the plaintiffs could have supplied the defendant with all the carbons it needed of the grade of 'seconds,' the defendant had a right to order these after July 1, 1885. The testimony is not full on this point; the plaintiffs show that 'seconds' is an accidental product, varying from 10 per cent. to 20 per cent. of the carbons put into the kiln, and that the demand for them, during the time they were sold, was such that they could not accumulate any stock. They do not show, however, that, at any time, they were unable to fill any order for 'seconds.' The master thinks that if he is right in ruling that the defendant can order 'seconds,' and the plaintiffs were bound to furnish this grade, then it is fair, under the evidence, to presume that the supply would be sufficient, unless the plaintiffs show that it would not.

"The master, therefore, thinks that damages should be assessed to July 1, 1885, according to the list price of the Brush Company for 'firsts,' and since that time according to the profits on 'seconds.' Just what the profits on 'seconds' is, is not clear. The plaintiffs' witness claims the difference between the value of 'seconds,' at the price for which they are sold, and their value as material to grind over, but does not give the data from which this could be accurately ascertained. The defendant claims the profits on 'seconds' is the difference between the cost of 'firsts' and the selling price of 'seconds,' claiming that it costs just the same to make 'seconds' as 'firsts.' This is the correct view of the cost price as given by plaintiff based on both 'firsts' and 'seconds.' As the cost of making carbons decreased \$1.90 per thousand at about the time the company commenced selling 'seconds,' the master concludes that this decrease was probably due to the increased value of 'seconds' as a marketable product over their value as material. The selling price of 'seconds' varied from \$11.00 to \$14.00 per thousand, but, as the plaintiffs



## KNEELAND v. CITY OF PITTSBURGH.

(Supreme Court of Pennsylvania. November 11, 1887.)

## CONSTITUTIONAL LAW—UNIFORM TAXATION—PEDDLER'S LICENSE.

The Pennsylvania Act of June 10, 1881, prohibiting peddling without a license, and the ordinance of the city of Pittsburgh approved December 4, 1886, are not in conflict with section 1, art. 9, of the state constitution, which provides that all taxes shall be uniform upon the same class of subjects.

Error to court of common pleas, Allegheny county.

This was an action to recover \$50, and costs of suit, as a penalty for the violation of an ordinance of the city of Pittsburgh, approved December 4, 1886, and recorded in its ordinance book, (volume 6, p. 47,) imposing a license fee upon peddlers in accordance with the provisions of an act of assembly approved the tenth day of June, A. D. 1881, entitled "An act to prohibit the peddling, selling, or hawking of produce or merchandise in cities of the second and third class within the commonwealth without a license." Section 1, of said act provides as follows:

"Section 1. That no person or persons shall be employed, engaged, or concerned in the business or employment of hawking, peddling, or selling produce or merchandise, or either or any of them, within the limits of any city of the second and third classes within this commonwealth, without having previously taken out a license; and if any person or persons shall go from house to house within the limits of such cities to sell, or offer or expose for sale, such articles, or any of them, without having paid such sum or sums as may be fixed by ordinance of councils of such cities into the treasury thereof, and receive a license therefor, the person or persons so offending shall forfeit and pay for each and every offense the sum of fifty dollars, to be recovered summarily before the mayor of such city wherein the offense shall have been committed; provided, however, that nothing herein contained shall be construed so as to prohibit farmers, gardeners, or dairymen from selling the products of their own farms, gardens, or dairies."

The rates payable for license under the said ordinance are fixed and established as follows: For each first-class license, foot-peddler, \$10 per annum; for each second-class license, one-horse cart or wagon, or other vehicle, \$35 per annum; for each third-class license, two-horse cart or wagon, or other vehicle, \$50 per annum. The defendant was a peddler of produce, but had not paid for a license. The court below was of opinion that the act of June 10, 1881, is constitutional, and that the city ordinance under which the license fee in question was imposed is valid, and therefore ordered judgment on the case stated in favor of plaintiff for the sum of \$50 and costs. Whereupon the defendant brought error.

*Montooth Bros.*, for plaintiff in error.

The object of the act of June 10, 1881, and of the ordinance, is taxation rather than regulation, inasmuch as they do no more than impose the payment of a sum of money under the name of license. The act and ordinance are in conflict with section 1, art. 9, of the constitution, which provides that all taxes shall be uniform upon the same class of subjects. The persons liable to pay this license constituted but one class. *Association v. Wood*, 39 Pa. St. 81; *Banger's Appeal*, 16 Wkly. Notes Cas. 289.

*W. C. Moreland*, for defendant in error.

This is not a question of taxation, but of license. The ordinance was not in conflict with the constitution. *Cutliff v. Mayor of Albany*, 60 Ga. 597. The provisions of the constitution do not refer to licenses by way of regulation. *Anderson v. Draining Co.*, 14 Ind. 200; *Bright v. McCullough*, 27 v.11A.no.8—42

Ind. 223; *Bennett v. Borough of Birmingham*, 31 Pa. St. 17; Dill. Mun. Corp. (3d Ed.) par. 750.

PER CURIAM. We can say nothing concerning this case but what was said by the court below; that is, that the act of June 10, 1881, is constitutional, and that, as a consequence, the ordinance under which the licence fee in question was imposed is valid. Judgment affirmed.

### APPEAL OF CITY OF ALLEGHENY.

(*Supreme Court of Pennsylvania*. November 11, 1887.)

#### GAS COMPANIES—STATUTE AGAINST ENTERING CITY WITHOUT CONSENT—EXCEPTIONS.

Prior to May 29, 1885, without the consent of the councils, plaintiff had begun in good faith to lay its pipes within the city of Allegheny, for the purpose of supplying the city with natural gas. Held, that it came within the exception of Pennsylvania act of May 29, 1885, § 16, which provides that this act shall not be construed to permit any corporation to enter into any city without the assent of councils, except where the corporation had, to some extent prior to the passage of this act, begun supplying natural gas within such city, or had laid pipes for such purpose therein.

Appeal from court of common pleas, Allegheny county.

Bill in equity for an injunction filed by the Chartiers Valley Gas Company against the city of Allegheny, to restrain said city from interfering with the laying of gas-pipes by said company in the streets of the city.

The fourteenth section of the act of assembly of May 29, 1885, provides: "Any association of persons or corporations heretofore engaged in the business of transporting or dealing in natural gas for any purpose, whether under color of a charter or letters patent of the commonwealth, and whether authorized by said charter or letters patent so to do or not, and any corporation by its charter authorized to furnish heat from gas, upon accepting the provisions of this act by writing under seal of the company, filed in the office of the secretary of the commonwealth, and filing therewith its letters patent or charter, \* \* \* shall thereupon be a body corporate hereunder, \* \* \* provided, that this section shall only apply to associations or corporations actually engaged in the transportation and supply of natural gas, or the supply of heat from the same, at and prior to the passage of this act." The sixteenth section is as follows: "That this act shall not be so construed as to permit any corporation, accepting its provisions under and by virtue of section fourteen hereof, to enter into any city or borough without the assent of councils, except where the corporation so accepting under section fourteen had, to some extent prior to the passage of this act, begun supplying natural gas within such city or borough, or had laid pipes for such purpose therein."

The master found the following facts, *inter alia*: "The plaintiff was originally incorporated under the 'Corporation Act of 1874,' by letters patent dated July 31, 1883, with a capital stock of \$2,500, for the purpose of furnishing light, heat, and fuel, by means of natural gas, to the borough of Mansfield, Allegheny county, Pennsylvania. Acting under said charter, the said plaintiff was engaged prior to May 29, 1885, in transporting, supplying, and dealing in natural gas for fuel and heating purposes in the borough of Mansfield; and was also engaged in the same business in the city of Pittsburgh and the territory between it and the borough of Mansfield. Between the first and fifth of April, 1885, the said plaintiff laid a six-inch line of pipe across the Ohio river from the city of Pittsburgh, and into and within the corporate limits of the city of Allegheny, connecting with the private property and iron-mills of the firm of Lindsay & McCutcheon, located on the northerly bank of the river, and bounded on the west by Lighthill street. The first gas was supplied to Lindsay & McCutcheon's mill on April 6, 1885, eighteen furnaces

and the boilers being then supplied. The supply was not at this time sufficient for the entire mill, but it was increased in May, and the entire mill was supplied during the summer of 1885, as fast as the new wells came in. Plaintiff has never requested the assent of the councils of Allegheny City to enter it and to enter upon its streets, nor has the same been given by said council."

The court reached the following conclusions: (1) The act of 1885 confers upon the plaintiff the right to enter upon and lay gas-pipes in the streets of the city of Allegheny, without having previously obtained an ordinance or the consent of the city; (2) that the plaintiff 'had to some extent, prior to the passage of this act, begun supplying natural gas within the city' of Allegheny, and 'had laid pipes for such purpose therein;' and (3) that (if material) the entry of the plaintiff into the city of Allegheny prior to the passage of the act of 1885 was in good faith, with the *bona fide* intention of supplying the public with natural gas to the extent of its ability.

*W. D. Rodgers*, for defendant and appellant. *Kennedy & Doty*, for appellee.

**PER CURIAM.** We think the conclusion reached by the court below is correct. The fact found, and not seriously disputed, is that the plaintiff had "to some extent," prior to the passage of the act of 1885, begun to lay its pipes within the city of Allegheny in good faith, for the purpose of supplying the said city with natural gas. Such being the case, it was within the exception of the act, and might proceed with its work independently of an ordinance. Appeal dismissed, and decree affirmed; costs to be paid by appellants.

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KELLY v. BALTIMORE & O. R. CO.

(*Supreme Court of Pennsylvania*. November 11, 1887.)

**MASTER AND SERVANT—RISKS ASSUMED—INJURY TO BRAKEMAN.**

Plaintiff, a brakeman in the employ of the defendant company, was injured by being crushed between a car, from which he was descending, and the "oil-house," standing at a distance of about two and one-half feet from the rail, and clearing an ordinary car by about eight or nine inches. *Held*, that the cause of the injury was one which was open, permanent, and visible in its character, and the risk of which plaintiff assumed when he entered defendant's service in the capacity in which he was employed, and, *further*, that the injury was the result of plaintiff's own negligence in not paying proper attention to the risk incurred in the performance of the act in which he was engaged at the time of his injury.

Error to court of common pleas, Allegheny county.

Action against a railroad company for damages for a personal injury to one of its brakemen. The plaintiff, a brakeman in the employ of the defendant company, was injured by being crushed between a car, from which he was descending, and the "oil-house," a structure used for storing oil by defendants, and standing at a distance of about two and one-half feet from the rail, and clearing an ordinary car by about eight or nine inches. The accident took place in the yards at Connellsville, Fayette county, Pennsylvania. There were five tracks here. The oil-house stood at the distance above mentioned from a side track or switch in a curve or bend of the track. The plaintiff was engaged, with others, in shifting two cars into the side track next the oil-house. The engine gave the cars an impetus, and was then cut loose from them. The plaintiff, under the belief that there was no one on the cars to ride them, mounted to the top of them to perform this duty; but, seeing a brakeman there, he descended again hastily for the purpose of throwing the switch to let the engine out on the main track, all of which was strictly within the line of his duty. The steps used in descending from the car are nailed against the end of the car so that in dismounting plaintiff's back was necessarily in

the direction the car was proceeding. As he stepped into the stirrup and swung around to step to the ground he was caught by the oil-house, and rolled over and over, first by the car and then by the journal boxes, until he dropped in a greatly injured condition beside the rail. Prior to the accident the plaintiff had been in the employ of the defendant company for about a year. For six months and a half he had been employed as extra man, doing work when others were absent at various points on the line. For the five and a half months immediately preceding the accident, he had been employed on the shift at work on the upper or eastern yards at Connellsville. On the day of the accident he had been ordered to work in the lower or western yard.

May 2, 1887, the defendant moved the court to order a judgment of nonsuit against the plaintiff, for the reason that, under the plaintiff's own testimony, the cause of the injury was one which was open, permanent, and visible in its character, and of which the plaintiff assumed the risk when he entered defendant's service in the capacity in which he was employed; and that, further, the injury was the result of the plaintiff's own negligence in not paying proper attention to the risk which he incurred in the performance of the act in which he was engaged at the time of injury. May 3, 1887, judgment of compulsory nonsuit. *Ex die*, plaintiff moved the court to take off the nonsuit entered in this case. June 1, 1887, on argument, list and motion refused. Plaintiff brings error.

*D. Q. Ewing, Edward Campbell and Thomas Patterson*, for plaintiff in error.

Servants do not impliedly undertake to bear the risk of injury from dangerous constructions which are under the exclusive control of the railway which employs them. *Brossman v. Railroad Co.*, 113 Pa. St. 490, 6 Atl. Rep. 226; *Railroad Co. v. Sentmeyer*, 92 Pa. St. 276; *Patterson v. Railroad Co.*, 76 Pa. St. 389; *Rummell v. Dillworth*, 17 Wkly. Notes Cas. 90, 2 Atl. Rep. 355; *Snow v. Railroad Co.*, 8 Allen, 441. The burden of showing contributory negligence was on the defendants. *Mallory v. Griffey*, 85 Pa. St. 275.

*Johns McCleave*, for defendant in error.

The servant assumes the risk of all dangers, however they may arise, against which he may protect himself by the exercise of ordinary observation and care. *Railroad Co. v. Sentmeyer*, 92 Pa. St. 276; *Railroad Co. v. Stricker*, 51 Md. 47; *Clark's Adm'rs v. Railroad Co.*, 30 Alb. Law J. 252; *Owen v. Railroad Co.*, 1 Lans. 108; *Gibson v. Railway Co.*, 63 N. Y. 450; *Lotejoy v. Railroad Corp.*, 125 Mass. 79; *Brossman v. Railroad Co.*, 113 Pa. St. 490, 6 Atl. Rep. 226.

**PER CURIAM.** The nonsuit in this case was properly ordered for the reasons assigned in the defendant's motion of May 2, 1887. The judgment affirmed.

### Appeal of CZARNIECKI and others.

(*Supreme Court of Pennsylvania*, November 11, 1887.)

#### NUISANCE—BONE-BOILING ESTABLISHMENT—RESTRAINT BY INJUNCTION.

Plaintiffs, residents and owners of property in a thickly-populated neighborhood, filed a bill asking that defendants should be enjoined from erecting buildings for a bone-boiling establishment, and from converting and utilizing the carcasses, bones, and entrails of dead animals. *Held*, that an injunction restraining the use of the buildings as a bone-boiling establishment was properly issued, but that the erection of the buildings themselves was not a nuisance, and the portion of an injunction restraining that must be dissolved.

Appeal from court of common pleas, Allegheny county.

C. Czarniecki was indicted and convicted for maintaining a nuisance in the using a bone-boiling and fertilizing establishment. Under a misstatement as to the use for which the purchase was made, he bought six acres of land in a thickly-settled suburb, and began the erection of works to continue his old business. Plaintiffs being property owners and residents in the neighborhood, filed a bill praying for an injunction to restrain the erection of the buildings, or their use for any such purpose. C. Czarniecki, on the motion for an injunction, filed affidavit, alleging that few people lived in the neighborhood, and that he could carry on the business without disturbing them. The injunction was issued, the court filing the following opinion: "It is fully made to appear to us that the defendant is about erecting a building in a thickly-settled neighborhood for the purpose of boiling bones and the carcasses of horses and other animals. He must be restrained from erecting the building for such purposes. This is a nuisance *per se*. It is true that the defendant alleges that he will conduct the business in such a manner as to be inoffensive, but he has failed to satisfy us that he can do so. Let an injunction issue, as prayed for, in the plaintiffs filing a bond in three thousand dollars." An injunction was issued in accordance with the prayer of the bill, and defendants appealed.

*W. C. Moreland and W. B. Rodgers*, for appellants.

Where defendant asserts that his acts will not cause a nuisance, and there is no reason to discredit him, the court will not interfere. *Kerr, Inj.* 173, 174; *Wood, Nuis.* 918. When it does not appear that the business cannot be carried on possibly without creating a nuisance, the court will not interfere in the erection of a building in which to carry it on. *Cleveland v. Gas-Light Co.*, 20 N. J. Eq. 201; *Attorney General v. Stewart*, 20 N. J. Eq. 418; *Sellers v. Railroad Co.*, 10 Phila. 319; *Baines v. Baker*, 1 Amb. 158. Equity will refuse to enjoin, if it appear it will do greater injury than by leaving the party to his redress by a court and jury. *Richards' Appeal*, 57 Pa. St. 105; *Huckenstine's Appeal*, 70 Pa. St. 102; *Dilworth's Appeal*, 91 Pa. St. 246.

*Lyon & Shoemaker*, for appellees.

Equity will interfere before a nuisance is committed, when it is clear that the act complained of will result in a nuisance. *Rhodes v. Dunbar*, 57 Pa. 286; *Kerr, Inj.* 173; *Bisp. Eq.* 440; *McCallum v. Water Co.*, 54 Pa. St. 52; *Com. v. Rush*, 14 Pa. St. 195; *Hughes v. Hayberger*, 7 Watts & S. 107. Bone boiling in a thickly-populated district is a nuisance *per se*. *Smith v. Cummings*, 2 Pars. Eq. Cas. 92; *Catlin v. Valentine*, 9 Paige, 575; *Bisp. Eq.* 441; *Cleveland v. Gas Co.*, 20 N. J. Eq. 201.

**PER CURIAM.** We concur with the court below so far as its injunction restrains the defendants from using the proposed buildings as a bone-boiling establishment; for every one knows that carrion cannot be gathered together in any populous neighborhood without being offensive. But the erection of the buildings themselves cannot be regarded as a nuisance, and we must therefore, direct a modification of the injunction so far as it regards such erection, and no further. With this modification, the decree is affirmed, and the appellants are ordered to pay the costs.

SMITH v. SEATON.

(*Supreme Court of Pennsylvania.* November 11, 1887.)

1. EXECUTORS AND ADMINISTRATORS—ACCOUNTING—FINAL DECREE AGAINST EXECUTRIX.

Upon the death of an executrix of an estate, an accounting was had which resulted in a decree that she was indebted to the estate for \$402. *Held*, that that decree, being unreversed and unappealed from, was a final decree for a debt due by her at and before the time of her death.

**2. DESCENT AND DISTRIBUTION — WASTE OF PERSONAL PROPERTY — LAND LIABLE FOR DEBTS.**

Certain personal property came into the hands of an executor, who wasted it. *Held*, that the land of the deceased was not thereby discharged of her debts.

**3. SAME—LIABILITY OF DEVISED PROPERTY FOR DEBTS OF DECEDENT.**

A husband succeeded to certain real estate under the will of his wife. *Held*, that he took it subject to its obligation to be applied to the payment of her debts.

**4. SAME—PURCHASER FROM DEVISEE TAKES SUBJECT TO LIEN OF DEBTS.**

The land of a devisee under the will of his wife was sold under execution against him. Three years later it was sold by a decree of the orphans' court to satisfy a debt of his wife. The devisee, being executor of his wife's estate, had full notice of the proceeding to establish the debt of his wife, and the purchaser at the execution sale against the devisee was notified at the sale. *Held*, that the sheriff's sale on the execution against the devisee did not divest the lien of the testatrix's debts, that the estate of the devisee was but an interest in the surplus left after the payment of the debts, and the purchaser at the sheriff's sale took only the interest of the devisee.

Error to court of common pleas, Butler county; A. L. HAZEN, Judge.

One Grubb died, leaving to his widow certain personal property, and "the management of all his personal property until his youngest son came of age." The inventory filed by his wife, executrix, was \$1,564.05. She lived on his farm with the children, and married one Erickson. She died in 1881, leaving her personal property and real estate to Erickson. She had filed no account of her trust as executrix of Grubb. Erickson took out letters on his wife's estate, and filed an inventory amounting to \$1,024.38. An administrator was appointed *d. b. n. c. t. a.* of Grubb's estate, and Erickson was cited to account for his wife as executrix of Grubb's estate. After some three years' litigation, in June, 1884, the balance due Grubb's estate was settled at \$402.26. Erickson had mean time disposed of the personal estate left by his wife, and left the country. In 1883, the real estate which was left to Erickson by his wife's will had been levied upon under certain executions against him, and sold to W. G. Smith. When the balance was found due from Mrs. Erickson's estate to the Grubb estate, an execution was issued for the amount, and a levy was made on the land left by Mrs. Erickson by will to Erickson, and it was sold, and S. M. Seaton, administrator *d. b. n. c. t. a.*, obtained a deed, and brought an action of ejectment against Smith, who had entered into possession under his deed under the sheriff's sale on the execution against Erickson. At the sale under the Erickson execution, Seaton, as administrator of Grubb's estate, gave notice of his claim on the land. Judgment was rendered for the plaintiff. On a motion for a new trial, the court refused it, and rendered the following opinion:

"In examining the reasons assigned for a new trial in connection with the whole record, I am satisfied that the verdict is right, and no injustice to the defendant. Further, I am convinced, on a careful examination of the authorities cited on both sides, that this case is no exception to the general rule, and that it is the law that 'the lands of a decedent, like his goods, are assets for payment of his debts, and that the right of succession has respect only to so much of his estate as remains after his debt has been paid; and, when a man dies in Pennsylvania, his estate, real and personal, comes within the jurisdiction of the orphans' court to be administered, first of all for the benefit of creditors, and next for legatees, devisees, and heirs.' *Horner v. Hasbrouck*, 41 Pa. St. 179. This principle meets the question involved in this motion, and designates the conclusion. The proceedings were in the orphans' court, and regular, and the existence of the debt against the decedent's estate duly adjudicated. It remained unpaid. The land was hers. She devised the land to her husband. The land was sold as his to pay his debt. The defendant became the sheriff's vendee with notice. The devisee took only so much of testator's land as remained after her debts had been paid. Can the sheriff's vendee take more? I am of opinion that he cannot, and that there can be

no reason now to doubt that the land of Mary Erickson, the debtor, was liable for the debts in preference to her devisee, or the sheriff's vendee of her devisee's interest in her lands. Therefore the reasons assigned for a new trial in this case are not sustained, but are overruled and dismissed, and new trial refused."

The defendant appealed.

*A. T. Black*, for plaintiff in error.

Mrs. Erickson left all of the personal property on the farm, when she died, and neither abused her trust nor mismanaged it, and her executor did not become successor in her trust as executrix of Grubb. *Purd. Dig.* p. 509, pl. 15. If assets coming to an executor are sufficient to pay the debts, the land is discharged, though they be wasted by him. *Pry's Appeal*, 8 Watts, 253; *Kelly's Estate*, 11 Phila. 100; *Hanna's Appeal*, 31 Pa. St. 53. Defendant was entitled to show why the sale under the Grubb execution should not have been allowed. *Benner v. Phillips*, 9 Watts & S. 13. The sheriff's sale of the land as the property of the devisee discharged the lien of the debts of the testatrix. *Hanna's Appeal*, 31 Pa. St. 53; *Allegheny City's Appeal*, 41 Pa. St. 60; *Strauss' Appeal*, 49 Pa. St. 353; *Davison's Appeal*, 95 Pa. St. 394; *Woods v. White*, 97 Pa. St. 222; *Bryan's Appeal*, 101 Pa. St. 389.

*Newton Black*, for defendant in error.

The orphans' court has exclusive administration of the real and personal estate of a decedent. *Acts* March 29, 1832, and February 24, 1834; *Ketteras' Estate*, 17 Pa. St. 422; *Whiteside v. Whiteside*, 20 Pa. St. 473; *Horner v. Hasbrouck*, 41 Pa. St. 180. The indebtedness of Mrs. Erickson to the Grubb estate was a lien on her estate at her death, and for five years thereafter. *Purd. Dig.* 525. The right of succession refers to so much of the estate as remains after the debts are paid. *Horner v. Hasbrouck*, 41 Pa. St. 179; *Stewart v. Montgomery*, 23 Pa. St. 412; *Soles v. Hickman*, 29 Pa. St. 345; *Hersey v. Turbett*, 27 Pa. St. 418. It is not a universal rule that a sheriff's sale divests all liens. *Parr v. Bouzer*, 16 Serg. & R. 309; *Mia v. Ackla*, 7 Watts, 316; *Re McKenzie*, 3 Pa. St. 156; *Swar's Appeal*, 1 Pa. St. 92.

GREEN, J. When the proceedings upon the account of Mary Erickson, executrix of her deceased husband, Gideon Grubb, reached a conclusion, they resulted in a decree of the orphans' court that she was indebted to the estate of Gideon Grubb in the sum of \$402.26. That decree, being unreversed and unappealed from, was a final decree, the legal effect of which was that it was a decree for a debt due by her at and before the time of her death, which occurred in 1881. It matters not that the account was filed by her own executor, her second husband, who was also the sole devisee of all her real estate, nor that the final decree was not made until in the year 1884. The delay in ascertaining the debt was due only to the successive stages of the contest which was rendered necessary by the opposition and resistance of Mary Erickson's executor in the settlement of the account. But, when all was finished, the decree was against her estate, and represented her indebtedness. When, therefore, her husband and devisee, J. A. Erickson, succeeded to her real estate by virtue of the provisions of her will, he took title thereto subject to its obligation to be applied to the payment of her debts. In discharge of that obligation, it was subsequently sold upon appropriate execution process issued out of the orphans' court upon the decree above mentioned. The purchaser at that sale claims title to the land in the present contention, and his adversary is one who purchased the same land at a sheriff's sale under a judgment and execution against the same J. A. Erickson for his individual debt. The latter sale was made about a year and a half before the sale upon the de-

cree of the orphans' court, and the question is, which sale passed the true title to the land?

The defendant, Smith, claims that he holds the true title, because he bought at a sheriff's sale upon a judgment and execution against one who, at the time of the sale, was the sole owner of the land, and that by that sale the land was divested of all liens, as well those against Mary Erickson as those against her devisee. There are some decisions of this court which seem to support this contention; but, upon examination, they will all be found to have preceded the case of *Horner v. Hasbrouck*, 41 Pa. St. 179. This case was decided in the year 1861, and it raised substantially the same question that is presented on this record. There, the estate of an heir was sold upon judgment and execution against him, and here it is the estate of a devisee; but the source of the title was the same in both cases,—a decedent whose land passed, in the one case by inheritance, and in the other by devise. In both, the sale of the successor's interest was made before the sale of the decedent's estate. In the present case, the sale was made upon execution process out of the orphans' court, upon petition for leave to issue the same in order to obtain payment of a particular debt, to-wit, the debt recovered against the estate of Mary Erickson, the deceased owner of the land. In the case cited, the sale was made upon an order of the orphans' court, granted upon a petition for an order for the payment of debts. In neither of the cases was the purchaser of the title at sheriff's sale warned by *scire facias* of the proceeding for the sale in the orphans' court. In the present case, the executor of Mary Erickson was also her devisee, and of course had full notice of the proceeding, and was a party to it; and W. G. Smith, the defendant, was expressly and fully notified of the proceeding in the orphans' court at the time of his purchase at the sheriff's sale.

In the case of *Horner v. Hasbrouck*, as in this, it was contended that the sheriff's sale divested all liens, including the debts of the ancestor, and the whole question as to the title taken by the purchaser at that sale was fairly presented, and distinctly decided. The opinion of this court was delivered by Mr. Justice WOODWARD, who discussed the entire subject most elaborately and exhaustively. It was held that the sheriff's sale did not divest the lien of the intestate's debts, that the estate of the heir was an interest only in the surplus left after the payment of the debts of the decedent, and that the purchaser at the sheriff's sale took no other or greater interest than that of the heir. In the course of the opinion, Judge WOODWARD said: "If it be said, as for some purposes it is correct to say, that the estate vests in the heir directly the ancestor dies, it must be understood to be a contingent interest, defeasible in behalf of creditors. What really vests in the heir is a title to the *residuum*, or, in the language of our act of 1834, the surplusage of the estate. This is what the law casts on the heir. It can be nothing else, consistently with our system of administration and distribution." Again, he says: "And that inheritance in Pennsylvania, where the decedent dies intestate and in debt, is limited to the surplusage of the estate after the debts are paid, and does really vest, for any practicable and available purpose, in nothing more than that surplusage. If this were not so, a sheriff's sale on a judgment against an only heir after descent cast would take away the estate wholly from the creditors of the ancestor, and give it to the creditors of the heir. In other words, the principle that lands of a decedent are assets for payment of debts would be eradicated from the foundations of our jurisprudence, in which it was implanted by the hand of Penn himself." In the course of the opinion all the adjudged cases were fully reviewed and considered, and a deliberate judgment was reached, which has remained the undoubted law of this commonwealth to the present day. It disposes of the case now before us, and requires its affirmation.

It was argued for the plaintiff in error that, because there were personal

assets of Mary Erickson which came to the hands of her executor, her lands were discharged of her debts though the assets were wasted. Such is not the law, and none of the cases cited in its support sustain the proposition. The same is true of another argument, that the sale of the land by the sheriff as the property of the devisee discharged the lien of the decedent's debts.

Judgment affirmed.

### MURPHY v. MOORE.

(*Supreme Court of Pennsylvania.* November 11, 1887.)

#### MALICIOUS PROSECUTION—INDICTMENT—ENTRY OF NOL. PROS.

Plaintiff had a lease of a brick-yard which he assigned to defendant as security. A few months thereafter defendant came to the yard, and undertook to claim the ownership and possession, but was driven away. He then had plaintiff arrested, and took possession of the brick-yard. He went before the grand jury, and had plaintiff indicted. Plaintiff attended court ready for trial, and then defendant procured the case to be *nolle pros'd* at his own cost. Held, that the entry of the *nolle pros.*, in the prosecution complained of, was such an ending of that prosecution as to entitle plaintiff to maintain an action for malicious prosecution.<sup>1</sup>

Error to court of common pleas, Allegheny county.

This was an action for malicious prosecution. Murphy, who was in possession of a brick-yard in the Twelfth ward, Pittsburgh, on July 18, 1884, made an information before Alderman Reilly, in which he charged William J. and George E. Moore with willfully and maliciously interfering with his employes, threatening to kill said employes, and by said threats compelling said employes to leave the premises. The defendants were held to answer at court, and on this information the grand jury found a true bill charging that the said Moores did willfully and maliciously enter upon the premises of said Murphy, and did unlawfully, willfully, and maliciously destroy one of his kilns of brick. Afterwards, on February 12, 1885, at Murphy's request, on motion of the district attorney, the court allowed a *nolle pros.* to be entered on payment of costs by Murphy, and thereupon the plaintiff brought this suit. The jury found a verdict in his favor, subject to the question of law reserved, to-wit, whether the entry of the *nolle pros.* given in evidence was or was not such an ending of the prosecution as to entitle the plaintiff to maintain the action. The court below was of the opinion that the court of quarter sessions had no power to enter the *nolle pros.* in question, but nevertheless decided the reserved question against the plaintiff in error, on the ground that the manner of the entry of the *nolle pros.* was equivalent to an abandonment of the prosecution.

On the question of law reserved, the court delivered the following opinion:

"This is an action for malicious prosecution. At the trial the plaintiff offered in evidence *inter alia* the information, bill of indictment found by a grand jury, and the following indorsement thereon:

"February 12, 1885, on motion of district attorney, at request of prosecutor in open court, a *nolle pros.* allowed upon the payment of costs by the prosecutor, Henry Murphy.

BY THE COURT."

"After the evidence was closed the defendant's attorney asked us to charge the jury 'that the entry of the *nolle pros.* given in evidence in the case, in the prosecution complained of, is not such an ending thereof as to entitle the plaintiff to maintain the action.' This we refused to do, and reserved the question of law thus raised for the consideration of the court in bank. The

<sup>1</sup>The right to maintain an action for a malicious criminal prosecution accrues whenever the prosecution is disposed of in such a manner that it cannot be revived, and the prosecutor, if he proceeds further, must bring a fresh indictment. *Casebeer v. Rice*, (Neb.) 24 N. W. Rep. 693. The entering of a *nolle prosequi* is such a final determination. *Woodworth v. Mills*, (Wis.) 20 N. W. Rep. 728. See *West v. Hayes*, (Ind.) 3 N. E. Rep. 932, and note.

jury having found a verdict for plaintiff, subject to our opinion on the question thus presented, it now arises for our determination. It seems originally to have been thought that an acquittal by a jury was necessary before an action for malicious prosecution could be maintained, (2 Starkie, Ev. 677, tit. 'Malicious Prosecution,') and it was said that the entry of a *nolle pros.* was insufficient, because fresh process might be issued upon the indictment. *Godard v. Smith*, 6 Mod. 262.

"A careful examination of the leading case shows that the real point ruled was that a *nolle pros.* entered by the attorney general was not sufficient to sustain the allegation in the narr that plaintiff had been acquitted; but it seems to have been generally understood and recognized as an authority upon the point under consideration. And it has been expressly so decided in Massachusetts. *Parker v. Huntington*, 2 Gray, 124, and *Bacon v. Towne*, 4 Cush. 217, both of which were cited with apparent approbation in *Kirkpatrick v. Kirkpatrick* by Justice THOMPSON, sitting at *nisi prius* in Philadelphia. See 39 Pa. St., 291.

"But while this is so, it seems to me so clear that there is no reason for the rule, and that the only foundation upon which it ever was supposed to rest, to-wit, that the prosecution must be so disposed of as to bar another proceeding for the same offense, has been so entirely swept away by later decisions, both in England and this country, including our own state, that I do not think it can be regarded as law now. Even if we were to consider it as a distinct expression of the views of Justice THOMPSON in the case above cited, it was a mere *dictum*, and not at all necessary to sustain the conclusion reached there. Thus we have it said in *Bernar v. Dunlap*, 94 Pa. St. 331, that in an action against the prosecutor, if the plaintiff proves a discharge by the examining magistrate, it is sufficient, not only to justify suit, but is evidence of the want of probable cause, which casts the burden of proof upon the defendant. And in *Stewart v. Thompson*, 51 Pa. St. 158, the court says: 'A bill was presented to the grand jury which was ignored as to plaintiff, and the prosecution was wholly ended and determined, and the plaintiff discharged.' In both of these cases the prosecution could have been reinstated or renewed, and the subsequent proceedings would not have been barred either by the discharge or the *ignoramus*. A *nolle pros.*, duly entered, is as much a determination of the prosecution as either. But we have quite a number of cases in other states, in which the doctrine that a *nolle pros.* is a sufficient ending of the prosecution to maintain the action is expressly declared. 'Where the prosecuting attorney enters a *nolle pros.*, and the magistrate made such entry on the files, and the defendant was actually discharged, it is sufficient.' *Driggs v. Burton*, 44 Vt. 124, and to same effect cases cited below.

"The grounds for this action are the malice of defendant, the want of probable cause, and injury sustained by plaintiff. The authorities referred to in the main agree that where the particular indictment or charge specifically made is disposed of, and defendant allowed to depart without any obligation to answer further, there is a sufficient termination of the prosecution. It is argued, however, that while a *nolle pros.* properly entered may be sufficient to maintain the action, the one entered in this case was absolutely void, as being contrary to the law of this state. This objection to the sufficiency of the *nolle pros.* seems very well founded, as it was decided in *Berks Co. v. Pile*, 18 Pa. St. 496, that the proviso to the first section of the act of May 3, 1850, from which the twenty-ninth section of the act of 1860, relating to criminal procedure, was taken, did not repeal the act of twenty-ninth of March, 1819, which enacted 'that it should not be lawful for the attorney general to enter a *nolle pros.* upon any indictment found, except in cases of assault and battery, and fornication and bastardy, on agreement between the parties, and in prosecutions for keeping tippling-houses, with the consent of the court.' We know this act is altogether ignored by our criminal court, and has been so for years;

but it appears to still be in force. But looking at this case even in that point of view, and treating the *nolle pros.* as a nullity, so far as its strict legal effect is concerned. I think that it may well be treated as an abandonment of the prosecution by the defendant in this case, and as *prima facie* evidence of an acknowledgment of the fact that he had no sufficient cause for prosecution.

"It is sufficient if the plaintiff be discharged without day by withdrawal or abandonment of the prosecution, not made by arrangement with him. *Brown v. Randall*, 36 Conn. 56. So even in Massachusetts, (*Sayles v. Briggs*, 4 Metc. 421,) it was held that when a prosecution was abandoned before the magistrate, and the defendant discharged, the action could be maintained. On the same line we refer to *Kelly v. Sage*, 12 Kan. 109; *McWilliams v. Hoban*, 42 Md. 56; *Gilbert v. Emmons*, 42 Ill. 143; *Fay v. O'Neill*, 36 N. Y. 11; *Leever v. Hamill*, 57 Ind. 423; and particularly *Low v. Wartman*, 1 Atl. Rep. 489, (decided by the supreme court of New Jersey, November, 1885,) where it is summed up as follows: 'A criminal prosecution may be said to have been terminated, (1) where there is a verdict of not guilty; (2) where the grand jury ignore the bill; (3) where a *nolle prosequi* is entered; and (4) where the accused has been discharged from bail or imprisonment.' Here the entry of the *nolle pros.* must be taken from the record (as was the actual fact) to have been without plaintiff's knowledge or consent, while he was under bail and waiting for trial. The first thing he knew, the cause was, so far as the charge contained in the indictment is concerned, disposed of, and he turned out of court without day. I think it manifest that a due regard for personal safety, and a proper discrimination of the rules of law involved in this case, justify the entry of judgment for plaintiff upon the question of law reserved, upon payment of verdict fee; and it is now so ordered."

Defendant brings error.

*John S. Ferguson*, for plaintiff in error.

The entry of the *nolle pros.* was not such an ending of the case as to entitle the plaintiff to sue for malicious prosecution. *Parker v. Huntington*, 2 Gray, 124; *Bacon v. Towne*, 4 Cush. 217; *Kirkpatrick v. Kirkpatrick*, 39 Pa. St. 291; *Parker v. Farley*, 10 Cush. 279; *Cardinal v. Smith*, 109 Mass. 158; *Bernar v. Dunlap*, 94 Pa. St. 331; *Stewart v. Thompson*, 51 Pa. St. 158; *Bixby v. Brundige*, 2 Gray, 129.

*Geo. E. Moore* and *D. D. Bruce*, for defendant in error.

A *nolle pros.* authorizes the party arrested to commence a suit for malicious prosecution. *Graves v. Dawson*, 130 Mass. 82; *Cardinal v. Smith*, 109 Mass. 158; *Graves v. Dawson*, and 133 Mass. 420.

PER CURIAM. The opinion of the court below on the reserved question is, in our opinion, unexceptionable; hence we adjudge that the assignments of error are not well taken. Judgment affirmed.

## MERCANTILE LIBRARY HALL CO. v. CITY OF PITTSBURGH.

(Supreme Court of Pennsylvania. November 11, 1887.)

### TAXATION—EXEMPTION—REPEAL BY CONSTITUTION.

The defendant, Mercantile Library Association of Pittsburgh, owned stores which the city of Pittsburgh assessed for taxation. The act of April 18, 1864, exempted its property from state taxation. The constitution of 1874, art. 9, § 1, provided that " \* \* \* the general assembly may, by general laws, exempt from taxation public property held for public purposes, \* \* \* and institutions of purely public charity. \* \* \* All laws exempting property from taxation other than the property enumerated shall be void." Held, that the statute exempting its property was rendered void by the adoption of the constitution.

Error to court of common pleas, Allegheny county.

Action to collect city taxes on property of the Mercantile Library Association not used for library purposes.

On receipt of the following notice by the treasurer of the Mercantile Library, a case stated was drawn up as hereinafter printed:

**"OFFICE OF BOARD OF ASSESSORS.**

**"PITTSBURGH, February 27, 1886.**

**"L. H. Williams, Esq.—**DEAR SIR: The board of assessors claim that the Mercantile Library Association is liable for city tax, excepting that portion of their building used exclusively for library purposes. In support of that claim they cite section 9 of the new constitution, passed in 1873.

**"Very respectfully,**

**M. CLARK, for Assessors."**

By agreement of the parties the issuing and service of a writ was waived, and the following case stated for the opinion of the court in the matter of a special verdict:

The Mercantile Library Hall Company was incorporated under and by virtue of an act of assembly, March 18, A. D. 1859; section 1 of the said act being as follows: "Be it enacted by the senate and house of representatives of the commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, that George W. Jackson, James McCauley, Thos. M. Howe, James Park, Jr., William Holmes, William M. Lyon, Isaac M. Pennock, J. K. Moorhead, Alex. Nimick, James M. Cooper, William Bagaley, John F. Singer, George Darsie, George Black, Geo. W. Case, Wm. F. Johnston, Allen Kramer, John H. Schoenberger, Nathaniel Holmes, and Felix R. Brunot, all of the county of Allegheny, and their associates and successors, are hereby enacted into a body corporate, in deed and in law, by the name, style, and title of the 'Mercantile Library Hall Company,' for the purpose of erecting a hall for the use and benefit of the Young Men's Mercantile Library and Mechanics' Institute of the city of Pittsburgh;" to which act a supplement was passed the eighteenth day of April, A. D. 1864, and made a part of the charter thereof; section 2 of the said supplement being as follows: "For the encouraging and fostering of institutions for the education of and elevation of the people, the real and personal property of the Young Men's Mercantile Library Association and the Mercantile Library Hall Company is hereby exempted from taxation, except for state purposes." The question for the court to decide is whether, under the constitution and laws of Pennsylvania, those portions of the real estate and building of the said company not used exclusively for library purposes are liable to taxation for city purposes.

Article 9, §§ 1, 2, of the new constitution, are as follows:

"Section 1. All taxes shall be uniform upon the same class of subjects within the territorial limit of the authority levying the tax, and shall be levied and collected under general laws; but the general assembly may, by general laws, exempt from taxation public property held for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity."

"Sec. 2. All laws exempting property from taxation, other than the property enumerated, shall be void."

The act of May 14, 1874, exempts from taxation "all hospitals, universities, colleges, seminaries, academies, associations, and institutions of learning, benevolence, or charity, founded, endowed, and maintained by public or private charity."

The property of the mercantile library consists of a lot 120x160 feet on Penn avenue, extending to the corner of Barker alley. Upon said lot is erected the four-story stone structure known as the "Library Hall Building;" the first story of the said building being rented to Joseph Horne, for a retail dry goods store. The second story is occupied by the mercantile library and art-room, the

third story by the mercantile library and the Masonic lodge, and the remainder of the building by a theater. The rents derived therefrom are applied to the purposes of the library company. If the court shall be of the opinion that the said property is liable for a tax on that portion of the premises not actually occupied and used for the purposes of the said association, then, by agreement between the above parties, a tax shall be levied in proportion to one half of the assessed value, and judgment be entered for the sum of \$745.20. Otherwise judgment to be entered for the defendants; costs to follow and abide by the judgment. The right is reserved to either party to take out a writ of error to the supreme court.

The court (EWING, P. J.) delivered the following opinion:

"The defendant corporation is the owner, and by its tenants the occupier, of a large and valuable lot and building on Penn street, Pittsburgh. From the rent of its building for stores and other purposes, neither public nor charitable, it derives a considerable revenue. Under the general law, and the ordinances of the city of Pittsburgh, this property is subject to taxation for city purposes, unless a valid existing statute can be shown exempting it from the burdens common to real estate in the city. The defendant corporation was chartered by act of assembly approved eighteenth March, 1859, (P. L. 1860, p. 813.) By the act of assembly of third May, 1855, by the constitutional amendment of 1857, and by the eighth section of its act of incorporation, the state had a right to repeal, alter, or amend the charter of this corporation. By an act of assembly approved eighteenth April, 1864, the real and personal property of this and another corporation was exempted from taxation except for state purposes, and under this act the defendant claims exemption from city taxation. The constitution of 1874, art. 9, § 1, provides that 'all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, but the general assembly may, by general laws, exempt from taxation public property held for public purposes, actual places of religious worship, places of burial not owned or held for private or corporate profit, and institutions of purely public charity.'

"The learned counsel for defendant, reading no further, argues that this does not repeal any then existing law; and cite *Gas Co. v. Chester Co.*, 97 Pa. St. 476, and numerous other similar cases, in support of the position that these constitutional provisions are prospective only. 'That the convention framing the constitution purposely avoided a repeal of local and special laws, fearing the utter confusion into which the state would have been thrown by an indiscriminate repeal of such laws.' This is undoubtedly true, as a general proposition; but it has several exceptions. It is eminently true of the provisions of the first part of section 1 above quoted, relating to the manner of assessing and collecting taxes; but there was no fear or danger of confusion or wrong in repealing special laws in existence, exempting property from taxation other than that authorized by the first section to be exempted. The public grievance and injustice of many of these exemption acts was notorious, and, with the express and avowed purpose of ending the wrong, the second section of the same article was adopted, as follows: 'All laws exempting property from taxation, other than the property enumerated, shall be void.' To say that this section is merely prospective, is to say that it is utterly without meaning or good sense. Any statute thereafter passed in violation of any of the provisions of section 1 would necessarily be void. The intention was to save the existing laws in relation to the manner of assessing and collecting taxes for the discretion of the legislature as to the time of their repeal; but to wipe out at once all exemptions of property from taxation other than that enumerated in section 1. All such laws 'shall be void,' not when the legislature may see fit to repeal them, but immediately on the adoption of the constitution.

"The fundamental law of the state cannot properly be interpreted as though it were but a penal statute. This obvious and only reasonable interpretation of the first and second sections of the constitution disposes of the defendant's claim to exemption. The statute exempting its property was rendered void by the adoption of the constitution.

"We are also of the opinion that, even if the second section of article 9 is to be ignored, the act of assembly of May 14, 1874, (P. L. 153,) is a repeal of the exemption of defendant's property from taxation. The title of an act of assembly does not necessarily include a schedule of its provisions. Reading the charter of the defendant's corporation, it is not an institution of purely public charity, nor is the property rented for stores, a theater, and other sundry purposes within the exemptions authorized by the constitution or act of 1874."

Defendant brings error.

*George Shiras*, 3d, for plaintiff in error.

In cases of doubtful intent, a general law should be construed prospectively rather than retrospectively. *Gas Co. v. County of Chester*, 97 Pa. St. 481; *County of Erie v. City of Erie*, 18 Wkly. Notes Cas. 309; 6 Atl. Rep. 136; *Ruth's Appeal*, 10 Wkly. Notes Cas. 498; *Iron Co. v. Lower McCungie Tp.*, 81 Pa. St. 482; *Indiana Co. v. Agricultural Soc.*, 85 Pa. St. 357. The act of May 14, 1874, is an act to exempt for the future, and not to repeal as to the past. If it were double, it would be unconstitutional. *Union Pass. Co.'s Appeal*, \*81 Pa. St. 91; *Dorsey's Appeal*, 72 Pa. St. 192; *Township of Cumru v. Directors of Poor*, 112 Pa. St. 264; 3 Atl. Rep. 578; *Malloy v. Reinhard*, 7 Atl. Rep. 790. A general statute without negative words will not repeal a prior special act, though their provisions be different. *Brown v. County Com'rs*, 21 Pa. St. 37; *Bounty Accounts*, 70 Pa. St. 92; *University v. People*, 99 U. S. 309; *Robinson v. Ferguson*, 78 Ill. 539; *Dickinson v. Dickinson*, 61 Pa. St. 401; *Erie v. Bootz*, 72 Pa. St. 196; *Somerset & Stoytown Road*, 74 Pa. St. 61; *In re Barber*, 86 Pa. St. 392.

*W. C. Moerland* and *Thos. D. Carnahan*, for defendant in error.

The act of May 14, 1874, repeals the exemption clause. *Young Men's Christian Ass'n v. Donohugh*, 7 Wkly. Notes Cas. 208; *Erie v. Commissioners of Water-Works*, 18 Wkly. Notes Cas. 810, 6 Atl. Rep. 138; *German Soc. v. Philadelphia*, 8 Wkly. Notes Cas. 483.

PER CURIAM. We can perceive nothing wrong in the judgment of the court below, and the opinion of the learned judge has so fully disposed of the legal questions involved in this controversy that we deem it unnecessary to add anything thereto. The judgment is affirmed.

### FULLER v. DEMPSTER.

(Supreme Court of Pennsylvania. November 11, 1887.)

#### 1. COVENANT—PRIVILEGE TO RESCIND CONVEYANCE—COVENANT NOT PERSONAL.

Decedent purchased, on November 29, 1875, a mine of defendant with the understanding that if, within a year, he should be dissatisfied with his purchase, defendant would refund the money. Decedent died August 12, 1878, intestate. *Held*, that this agreement was not a personal one, but could be taken advantage of by the representatives of the decedent.

#### 2. FRAUD, STATUTE OF—PROMISE TO ANSWER FOR DEBT OF ANOTHER.

Defendant sold a mine to decedent with the understanding that, should decedent prove dissatisfied within a year, he would refund the money. Decedent died within the year, and his administrator notified defendant that the estate did not wish the mine. Defendant agreed with the administrator and widow to refund the money. *Held*, that this promise was not within the statute of frauds.

## 3. LIMITATION OF ACTIONS—ISSUANCE OF WRIT STOPS RUNNING OF STATUTE.

A writ was issued within six years from the time the right of action accrued, but returned *n. e. i.* An *alias* was issued and served within six years from the first, though more than six years from the time when the right of action accrued. *Held*, that the statute of limitations is not a good defense.<sup>1</sup>

Error to court of common pleas, Allegheny county.

On November 29, 1875, James Fuller made an agreement with his brother-in-law, R. D. Beatty, which agreement was as follows:

"Article of agreement made and entered into the twenty-ninth day of November, 1875, between James Fuller, of the city of Philadelphia, and R. D. Beatty, of the city of Pittsburgh, witnesseth, that the said James Fuller, of the first part, agrees to sell the said Beatty, of the second part, the four and one-half ( $4\frac{1}{2}$ ) tenths of the Franklin Silver Lode, in Deer Lodge county, and territory of Montana. The said Franklin Lode consists of one thousand feet in one body, including discovery claim, is situate about eight hundred feet south-east of the 'Speckled Trout,' and is in the same general formation. On this claim are two shafts, one twenty feet deep, the other fifty feet deep. Both show a well-defined lead, with ore averaging about \$160 per ton. The choicest ore will assay from \$600 to \$1,000 per ton. The full amount of money to be paid by the said party of the second part for the four and one-half ( $4\frac{1}{2}$ ) tenths is ten thousand dollars; for which, when paid, the said party of the first part agrees to make a good and warranty deed for the same. Also if the said party of the second part, R. D. Beatty, is dissatisfied with his purchase of the said four and one-half ( $4\frac{1}{2}$ ) tenths of the said Franklin Silver Lode at the expiration of one year from this date, the said James Fuller, and Bell C., his wife, agree to pay back the full amount, ten thousand dollars, with interest on the same.

JAMES FULLER.

"BELL C. FULLER.

"By Attorney in Fact, JAMES FULLER.

"Witness: JAMES ROBINSON."

On the day of the execution of this contract Fuller received from Beatty \$4,000 on account of purchase money, and receipted for the same on the written agreement. On the eleventh day of December, 1875, the remaining \$6,000 were paid, and receipted for on the agreement. On August 12, 1876, R. D. Beatty died intestate, leaving a widow, Nannie C. Beatty, and two minor children. Alexander Dempster was subsequently appointed administrator of Beatty's estate, and James Fuller was appointed guardian of the children. On September 25, 1880, Fuller filed his first and only account, and about the same time, on his own petition, he was discharged from his position as guardian, and Thomas S. Bigelow was appointed his successor. The latter filed exceptions to Fuller's account, on the alleged ground that the accountant had credited himself with certain payments made on an outstanding mortgage of the decedent; whereas he should, as alleged, have charged himself with the \$10,000 purchase money of the Montana property, and applied the same to the payment of said mortgage. These exceptions were based on the allegation that, after the death of Beatty, Fuller had agreed with the widow and administrator to repay the purchase money of the Montana property, and to apply the amount to the payment of an outstanding mortgage upon Beatty's real estate, situate in Pennsylvania. Fuller denied that he had so agreed, but the orphans' court sustained the exceptions, and surcharged Fuller with the \$10,000. This decree of the orphans' court was reversed by the supreme court. On June 3, 1882, Dempster, as administrator of R. D. Beatty, deceased, sued out a writ in *assumpsit*, returnable to the first Monday of June, 1882. This writ was returned *n. e. i.*; as was also an *alias* summons returnable to first Monday of November, 1886. A *pluries* summons to first Monday of February, 1887, was

<sup>1</sup>See *Insurance Co. v. Haws*, (Pa.) *ante*, 107, and note.

returned served. The plaintiff, in his affidavit of claim and declaration, alleged that, shortly after the death of Beatty, Fuller promised the widow and administrator to take back the land, and apply the purchase money to the payment of the Woods mortgages, and the widow and administrator so testified. This Fuller wholly denied; and he also proved that, after he had resigned the guardianship, and after Bigelow had been appointed, he did, on the fourteenth of February, 1887, execute a deed of conveyance to Beatty's heirs, and tendered the same to the guardian. The court permitted the case to go to the jury on the question whether Fuller promised and agreed with the widow and administrator, after the death of Beatty, to repay the purchase money, and reserved the questions of law arising upon defendant's prayer for instructions.

The jury found for the plaintiff for \$14,710, and also found the following facts: *First*, that under the contract of November 27, 1875, a copy of which is attached hereto, Beatty paid the consideration in full, \$10,000, but no deed for the property was delivered or tendered to him during his life-time, and none was tendered until after the bringing of this action; *second*, that Beatty died August 12, 1876, intestate, leaving a widow and two minor children; Alex. Dempster was appointed administrator of the estate, and the defendant, in the fall of 1877, appointed guardian of the minor children; *third*, that Beatty, during his life, never expressed to Fuller any dissatisfaction with his purchase. After his death, before and at the time of the expiration of the year from the date of the contract, the administrator, and the widow, on behalf of herself and minor children, who then had no guardian, did express to the defendant their dissatisfaction with the purchase, and demanded the return of the purchase money; *fourth*, that upon such specification the defendant did agree to refund the purchase money received under the contract.

The court, in its decision on the questions of law reserved, said:

"The writ was issued within six years from the time right of action accrued, and an *alias* duly issued, and served within six years from the first. Although the *alias* was not served until more than six years from the time the right of action accrued, the statute of limitations is not a good defense. *McClurg v. Fryer*, 15 Pa. St. 293; *Hemphill v. McClimans*, 24 Pa. St. 367; *Curcier's Estate*, 28 Pa. St. 261.

"The main contention arises on the clause in the agreement between James Fuller and R. B. Beatty: 'If the said party of the first part, R. B. Beatty, is dissatisfied with the purchase of the said four and one-half ( $\frac{1}{2}$ ) tenths of the said "Franklin" silver lode, at the expiration of one year from this date the said James Fuller and Bell C., his wife, agree to pay back the full amount, ten thousand (\$10,000) dollars, with interest on the same.' Is that a personal privilege to R. D. Beatty, which ceased to exist when he died, when he died within the year, or did it survive to his heirs or legal representatives? As an abstract question of law, based upon the agreement alone, it is not easy of solution. But I think this defendant has put a construction upon it which relieves the case from difficulty. The parties were brothers-in-law. The agreement of twenty-ninth November, 1875, is very brief and informal for the amount of money involved. Evidently the parties had entire confidence in each other, and that Beatty thought the provision about the return of the money was ample to protect him in any event. It is not likely either contemplated the contingency of the other's death. Perhaps, if that had been suggested, both would have said, 'The agreement binds each of us and our legal representatives,' for both were laymen. And there is nothing in the agreement inconsistent with that idea.

"As a general rule, all covenants in an agreement, in case of the party's death, become binding upon his legal representatives without their being named. So, as a general rule, all privileges or advantages granted the other party descend to his heirs or legal representatives without their being expressly named. To take a case out of this general rule, there would be some pecul-

iarity in the circumstances, or the language used, to show that such was the intention of the parties. I see nothing in this case to indicate such an intention. To give a strict, technical construction to the word 'dissatisfied,' and limit it to R. D. Beatty, would destroy the mutuality of the agreement, deprive Beatty of the most essential part of it, and make it a contract which might be most disastrous to his estate. He might have died one day after the agreement was signed. The stock might have been worthless, yet Dr. Fuller could have kept the \$4,000 he had, have collected the remaining \$6,000, and Beatty's estate been without remedy. Beatty had one year in which to investigate the matter, and determine whether he would keep the stock or demand the return of his money. It is very unreasonable to say that, if he died before he had time to investigate or determine, that privilege should not be exercised by his heirs or representatives. Certainly he never understood the agreement in that light. Nor did his representatives after his death, or Dr. Fuller, so understand it. The jury have found that after the death of Beatty, 'before and at the time of the expiration of the year from the date of the contract, the administrator, and the widow on behalf of herself and minor children, who then had no guardian, did express to the defendant their dissatisfaction with the purchase, and demanded the return of the purchase money.' And they further found 'that upon such notification the defendant did agree to refund the purchase money received under the contract.'

"This notification was given, and demand made, in pursuance of and under this agreement. When thus notified, and the demand made, the defendant agreed to refund the money. That, I think, was a virtual admission by Dr. Fuller that the administrator and widow had a right, under the contract, to give that notice and make that demand. It was his construction of the contract. It was tantamount to saying, 'Mr. Beatty and I so understood it.' It was not a voluntary promise to refund money which he was under no obligation to refund. Such a promise, being without consideration, would have had no legal validity. It was a promise to refund what he believed he was legally bound to refund. The promise, however, is not the foundation of this suit. The suit is on the agreement with Beatty, and this promise is only important to show, with the other facts, what he understood and admitted was the true construction of the agreement with Beatty.

"In this view of the case there is no difficulty on another point pressed at the trial, and on the argument on the reserved question, viz.: That Beatty's interest in the silver lode, being real estate, descended to his children, and neither the widow nor administrator could give it up without their consent. Beatty never had any deed for the interest, and no deed back was necessary if the administrator had the right to disaffirm the contract, and require the return of the money. If he had that right as administrator, whether he acted properly or not would be a question for the orphans' court on settlement of his account. The administrator is the legal representative of R. D. Beatty, and the suit is properly brought in his name.

"And now, July 6, 1887, after argument and consideration of the questions of law reserved, as stated in the special findings of the jury, they are decided in favor of the plaintiff, and it is ordered that judgment be entered for the plaintiff on the verdict, on payment of the verdict fee."

Defendant brings error.

*George Shiras, Jr.*, for plaintiff in error.

The right to rescind the agreement cannot pass to the administrator and the widow. The right was personal to Beatty, and not communicable to others. *Nelson v. Von Bonnhorst*, 29 Pa. St. 352, shows this. The case of *Barnard v. Cushing*, 4 Metc. 232, is to the same effect. See, also, *Robson v. Drummond*, 2 Barn. & Adol. 303. The promise to repay the money,—admitting that such promise was made,—and apply it in payment of another debt,

was a promise to answer for the debt of another, and consequently void under the statute of frauds. The action is barred by the statute of limitations. See *Jones v. Orum*, 5 Rawle, 249; *McClurg v. Fryer*, 15 Pa. St. 295; *Curcier's Estate*, 28 Pa. St. 262.

*Bruce & Negley and D. T. Watson*, for defendant in error.

It is a presumption of law in cases of specialties and simple contracts that the parties bind, not only themselves, but their personal representatives also, (1 Chit. Cont. 98;) except contracts for services requiring personal skill or intellectual capacity, (2 Add. Cont. 639; *Siboni v. Kirkman*, 1 Mees. & W. 423.) The case at bar has not a single characteristic of a personal contract. If a year was allowed Beatty in which to express his dissatisfaction, why should his death within the time shorten the period, and give Fuller an advantage that had not been agreed upon? Plaintiff in error claims the statute of limitations as a defense to this action. This case falls directly under the rule laid down in *McClurg v. Fryer*, 15 Pa. St. 295. The other cases cited by plaintiff in error are not pertinent.

PER CURIAM. This is a case stated, and every fact and point in it has been so well disposed of in the opinion of the learned judge of the court below that nothing is left for us but our concurrence, and that we give without hesitation. Judgment affirmed.

#### FOSTER and others v. McKENNA.

(Supreme Court of Pennsylvania. November 11, 1887.)

WILL—DEVISE—"CHILDREN"—RULE IN SHELLEY'S CASE.

The devising clause of the will of testatrix was in these words: "And to each of them [the plaintiffs] I devise the income of one undivided half of all my real estate for her life only, and on the decease of either of my daughters her share in my estate to go to her children in fee-simple." Held, that the word "children" is a word of purchase, and not of limitation, and plaintiffs take only a life-estate.

Error to court of common pleas, Allegheny county.

This is a case stated for the construction of a will. The facts as shown by the agreement of counsel are as follows: On May 18, 1875, Julia Foster, deceased, then a resident of Philadelphia, made her last will and testament, the same being in her own handwriting. This will contains, among others, the following provisions: "After any debts I may have at the time of my death are paid, I give to my daughters Julia and Rachel all my personal estate of every kind whatsoever, to be equally divided between them, and to each of them I devise the income of one undivided half of all my real estate for her life only, and on the decease of either of my daughters her share in my estate to go to her children in fee-simple. In case of the death of either of my daughters without children, her interest in my estate to go to her sister for life, and to the children of that sister in fee. I especially make it a condition of the foregoing devise to my daughters that all property of whatever sort willed by me to them cannot be controlled, inherited, or even a life-interest claimed, by their husbands. I further provide that in case neither of my daughters are living at the time of my death, or children of theirs living to inherit the property which I give to my daughters, I then give to the three sons of my son Heron, respectively named James Heron, Herbert Spencer, and Ralph Gordon, the interest, but not the principal, of my estate, to be equally shared by them." Julia Foster, the testatrix, died seized of a certain lot, part of the real estate devised to her daughters, both of whom are living and unmarried. The daughters Julia and Rachel made a contract to sell this lot to Thomas McKenna, and it was agreed that, if any defect was discovered in the title, the contract was to be canceled. McKenna contends that the daughters have only a life-estate in the real estate under the will. This action is agreed upon between the parties to decide what

estate the daughters take under the will. On this statement of facts the court rendered the following opinion:

"There is no doubt that the will of their mother gives to the plaintiffs a freehold estate in the lot of ground in question. The devise to them of the income for life is a devise of the possession for the same period. The devising clause of the will is in these words: 'And to each of them [the plaintiffs] I devise the income of one undivided half of all my real estate for her life only, and on the decease of either of my daughters her share in my estate to go to her children in fee-simple.' If the word 'children' is to be read as heirs of her body, then, under the rule in *Shelley's Case*, the devise vests a fee-simple in each of the daughters of the testatrix. *Guthrie's Appeal*, 37 Pa. St. 13. In the same case, Justice STRONG says that he 'has read no case where the primary sense of the word "children" had been changed by the context, excepting where it was followed by some such word as "issue."' This to show how well established is the rule that the primary sense of the word 'children' is that it is a word of purchase, and not of limitation. No one will doubt that, standing alone, the words of Mrs. Foster's will above quoted would devise a life-estate to her daughters, and the remainder to the children as purchasers, and not as heirs. Unless the primary sense of the word is clearly overcome by the other portions of the will, the devise is to be held as vesting the remainder in the children as purchasers. If it is so overcome, and if it is evident from the whole will that the testatrix by 'children' intended heirs of the body, the contention of the plaintiffs must prevail. *Haldeman v. Haldeman*, 40 Pa. St. 29.

"Counsel for plaintiffs have argued very ingeniously that the whole will shows that the testatrix by children meant the heirs of her daughters—*First*, by the use of the words 'to go to her children in fee-simple;' *second*, by the provision that the 'husbands of her daughters should not control, inherit, or even claim a life-estate therein;' and, *third*, the use of the words 'to inherit' in the following clause. We can see nothing whatever in the first reason. In the second it is simply the expression of an extreme caution to prevent any future husband controlling any of the property, real or personal, which she gave to her daughters. As to the third reason, these words, 'to inherit,' occur in this clause of the will, to-wit: 'I further provide that in case neither of my daughters are living at the time of my death, or children of theirs living to inherit the property which I give to my daughters, I then give,' etc. The word 'inherit' in this clause is not used by the testatrix in its technical meaning. If the daughters died before their mother, their children would not inherit any of this property. In that case, they would have taken as devisees of their grandmother, the testatrix; they would be in as purchasers. These clauses and expressions in the will, taken separately and together, do not seem to us to vary the meaning of the word 'children' as used in the devising clause above quoted. On the other hand, there are other expressions, and the careful use of the word 'children,' to the exclusion of the words 'issue' or 'heirs' in other parts of the will, which, in our judgment, overbalance any of the expressions that might raise a suspicion that the testatrix did not use the word 'children' advisedly. In each of the recent cases of *Jones v. Cable*, 7 Atl. Rep. 791, and *Affolter v. May*, 8 Atl. Rep. 20, there was much more in the will to indicate that the word 'children' was but a word of limitation than in this case, and it was held to be insufficient to control the primary meaning of the word. We conclude, therefore, that the plaintiffs have but a life-estate in the property described in the case stated, and the law is with the defendant."

*J. S. Williams and J. A. Emery*, for plaintiffs in error.

A devise of the income of land is a devise of the land itself for so long as the income is given. *France's Estate*, 75 Pa. St. 221; *Potts' Appeal*, 30 Pa.

St. 168. Plaintiffs have at least a freehold in the real estate. The word "children," used in the will, is primarily a word of purchase, but this signification may yield if it appears the testatrix intended otherwise. The intention of the testatrix must first be ascertained, as the rule in *Shelley's Case* is a rule of construction, and not interpretation. *Yarnall's Appeal*, 70 Pa. St. 335. In this case, "children" is used as a word of limitation, and not of purchase. Where it appears that the issue is to take by inheritance from the first devisee, the inheritable estate vests at once in the devisee. *Potts' Appeal*, 30 Pa. St. 170; *Physick's Appeal*, 50 Pa. St. 135; *Steacy v. Rice*, 27 Pa. St. 75. When terms of limitation can be interpreted to mean "heirs," an estate of inheritance will be presumed to have been intended. *Dodson v. Ball*, 60 Pa. St. 500; *Haldeman v. Haldeman*, 40 Pa. St. 29. The fact that "children" to whom remainder is given are unborn, has always been held to evince an intention to use the word in the sense of "heirs of the body." *Smith, Ex. Int.* 537; *Haldeman v. Haldeman*, 40 Pa. St. 35.

*David W. Bell*, for defendant in error.

The word "children" is a word of purchase, and not of limitation. *Guthrie's Appeal*, 37 Pa. St. 13; *Haldeman v. Haldeman*, 40 Pa. St. 29; *Robins v. Quinliven*, 79 Pa. St. 333; *Huber's Appeal*, 80 Pa. St. 348; *Jones v. Cable*, 7 Atl. Rep. 791; *Affolter v. May*, 8 Atl. Rep. 20.

**PER CURIAM.** An inspection of the opinion of the court below satisfies us beyond doubt that a true and legal construction of the will of Mrs. Foster is therein contained, and we therefore adopt it as the law of the case.

The judgment is affirmed.

#### MCKNIGHT v. MATHEWS.

(*Supreme Court of Pennsylvania.* November 11, 1887.)

#### SALE—OF MACHINE WITH PATENT APPLIED FOR—FAILURE TO OBTAIN PATENT.

Plaintiff purchased a machine on which there was an application for a patent. Defendant claimed the price was \$500, the manufacturer to pay the inventor. Plaintiff claimed the price was \$200 to the manufacturer, and that he was to pay the inventor when the patent was obtained. The defendant asked the court to charge the jury "that the question of patent or no patent of the coke-crusher is not involved in this case, and that, if the jury believe that the agreed price of the machine was \$500, a failure to obtain a patent afterwards would not affect the contract." *Held*, that the refusal to give such instruction was not error.

Error to court of common pleas, Allegheny county; CHRISTOPHER MAGEE, Judge.

Plaintiff was a coke producer in the city of Pittsburgh. Defendant is an engine builder and founder in the same city. In December, 1885, one Daniel Stewart was the inventor of a certain machine, called a "coke-crusher," and had applied for letters patent on the same, and claimed the right to its exclusive use under the laws of the United States. The plaintiff wished to buy one of these machines for use in his coke business, and entered into negotiations with the inventor therefor. They met at defendant's office by appointment, for the purpose of consummating the negotiation. There the inventor, Stewart, asked \$200, and 18 cents per ton royalty. Mathews refused this, and, after some differences, Mathews settled on \$300 for the use of the machine forever, the said sum to be paid when letters patent were issued to Stewart. This arrangement was made, and the coke-crusher was built by Cavitt & McKnight. The defendants, Cavitt & McKnight, began taking coke from Mathews at the time the machine was ordered, and received coke to the amount of \$657, and after rendering a bill for one Stewart coke-crusher, \$500, extras, \$130, on January 1, 1886, and being replied to by Mathews that their bill would be for \$200 for one coke-crusher and \$130 for extras, he ceased taking

coke, and refused to pay the difference between the coke bill, \$657, and \$380, to-wit, \$327; hence this action. On the trial the defendant's counsel asked the court to instruct the jury that the question of the patent or no patent of the coke-crusher is not involved in the case, and that if the jury believe that the agreed price of the machine was \$500, a failure to obtain a patent afterwards would not affect the contract. This instruction the court refused, and this refusal is assigned for error.

*W. S. Pier*, for plaintiff in error. *C. H. McKee* and *O. D. Thompson*, for defendant in error.

**PER CURIAM.** The exceptions in this case are principally to the charge of the court below; but, on looking over that charge, we are satisfied that the learned judge fairly submitted the facts to the jury. Hence we cannot sustain the complaint of the plaintiff in error. The judgment is affirmed.

### CORCORAN and others v. TRICH.

(*Supreme Court of Pennsylvania.* November 11, 1887.)

#### 1. PARTNERSHIP—ACTION AGAINST—PARTNER NOT APPEARING—INTERLOCUTORY JUDGMENT.

A writ of summons was issued against two defendants, as partners, both of whom were served. One of them neither appeared nor pleaded, and no interlocutory judgment was entered against him. The jury were sworn generally as to both defendants, under objection, but without exception; and a verdict was taken and judgment entered against both. *Held*, such judgment was invalid against defendants, either individually or as partners.

#### 2. SAME—AFFIDAVIT OF DEFENSE—DENIAL OF PARTNERSHIP.

The defendant who appeared filed an affidavit of defense, denying the partnership, and that any indebtedness was due by him to plaintiff, either individually or as partner, and the trial court, on the theory that the affidavit of defense was not a sufficient denial of the indebtedness, admitted in evidence plaintiff's affidavit of claim as an admission by both defendants of the amount due. *Held* error. The affidavit of defense being a sufficient denial of the partnership and the amount due, the affidavit of claim for that reason was inadmissible in evidence as an admission by the defendant appearing, and, though an admission of the partnership and the amount due by the defendant who did not appear, the same was not binding upon the defendant appearing.

Error to court of common pleas, Allegheny county.

*Levi Bird Duff* and *L. B. D. Reese*, for plaintiffs in error. *T. C. Jones* and *J. S. Ferguson*, for defendant in error.

**GREEN, J.** In this case a writ of summons was issued against two, as partners. Both defendants were served. As to one of them no appearance was entered, no plea was pleaded, and, of course, no issue was joined. The jury were sworn, generally, as to both defendants. Under objection, but without exception, a verdict was taken and judgment entered against both. Error is now assigned to the entry of the joint judgment, and, as all the matters above stated appear upon the record, we are bound to take notice of it. The question as to the validity of this judgment is clearly ruled by the case of *Donnelly v. Graham*, 77 Pa. St. 274. There four were sued; three were served; the declaration was filed against the three, charging them as partners together with the one not served; one of the three did not appear nor plead; two pleaded; and the verdict and judgment were against the three generally. We held that, in order to obtain a judgment against the two who pleaded, an interlocutory judgment must first be entered against the one who neither appeared nor pleaded, and that the general judgment against the three was not only bad against the three, but also against the two, and therefore must be reversed. The case is precisely parallel with the present, and requires the reversal of the latter.

We think also that Gumbert's affidavit of defense was a sufficient denial of the plaintiffs' claim, and therefore that the affidavit of claim was not admissible against him, either because Corcoran filed no affidavit of defense, and thereby admitted the claim so far as he was concerned, or because Gumbert's affidavit can be treated as an admission of anything. When Gumbert denied the partnership and all or any indebtedness due by himself to the plaintiff, either as a partner with Corcoran or individually, he cannot be regarded as having admitted any part or the whole of the plaintiff's claim. The second and third assignments of error are sustained.

Judgment reversed, and new venire awarded.

### FINDLEY v. CITY OF PITTSBURGH.

(*Supreme Court of Pennsylvania.* November 11, 1887.)

#### 1. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—PAYING FOOTWALK—NEGLECT OF OWNER.

When the owner of a footwalk on a public street within the city of Pittsburgh, on notice of the street commissioner, neglects or refuses to pave the same, he is bound to submit to have such paving done for him by the contract of that officer.

#### 2. SAME—COMMISSIONER NEED NOT ADVERTISE FOR BIDS.

On the neglect or refusal of the owner of a footwalk within the city of Pittsburgh to pave the same, the street commissioner, in the absence of any law or ordinance to the contrary, is warranted in having the work done without advertising for bids.

#### 3. SAME—DEFENSES TO COMMISSIONER'S CONTRACT—PRICE AND QUALITY OF WORK.

The only defenses that can be interposed by the owner of a footwalk within the city of Pittsburgh to the contract of the street commissioner for paving the same are the price and quality of the work.

Error to court of common pleas, Allegheny county.

*Bruce, Negley & Shields*, for plaintiff in error. *W. C. Moreland*, for defendant in error.

**PER CURIAM.** It is a mistake to suppose that the law governing the paving of streets applies to footwalks. The owner of the latter, on notice of the street commissioner, is bound to pave it, or submit to have it paved for him by the contract of that officer; nor is the commissioner obliged to advertise for bids, in the absence of any law or ordinance specially requiring him so to do, for such an act would subserve no good purpose. The whole matter concerns the individual owner, and not the public. He may and ought to do it himself; but if he neglects or refuses so to do, and it is done for him, still he has the right to defend, both as to the price and quality of the work. This is all the defendant in this case could fairly ask, and, as these grounds of defense were open to him, he is without just cause of complaint. The judgment is affirmed.

### WILSON'S APPEAL.

(*Supreme Court of Pennsylvania.* November 11, 1887.)

#### EXECUTORS AND ADMINISTRATORS—ACCOUNTS—SURCHARGE—INTEREST PENDING APPEAL.

On the audit of an executor's account, the same was surcharged. On appeal by the executor, this surcharge was somewhat reduced, though there was still left a large balance of the amount found against him. This balance he neither tendered to, nor offered to distribute among, those to whom it belonged. *Held*, the account was properly charged with interest during the time his appeal was pending. *Hoopes v. Brinton*, 8 Watts, 73, and *Dietterich v. Heft*, 5 Pa. St. 87, distinguished.

Appeal from orphans' court, Allegheny county.

The following statement and opinion, rendered by the orphans' court, (*HAWKINS, P. J.*) sufficiently shows the facts:

"The controversy in this case is whether or not petitioners are entitled to interest on the principal sum decreed them by the court. The material facts

are these: On September 5, 1885, this court surcharged D. M. Wilson, surviving executor of the will of William Noble, deceased, on the audit of his account, in the sum of \$22,448.95, and entered a decree against him for \$54,690.73, of which amount the sum of \$3,550.47 was appropriated to the petitioners. To this decree exceptions were filed, and were dismissed on January 6, 1886. In February following negotiations looking towards a compromise were initiated; but it was known to the respondent about April 1st that petitioner would not accede to the terms offered. In May citation was awarded at the instance of this complainant to show cause why execution should not issue, and execution was subsequently issued. In ———, D. M. Wilson took an appeal to the supreme court, and the surcharge was reduced by amount of \$15,991.65, and the present application is for *vend. ex.*

"The seventeenth section of the act of twenty-ninth March, 1832, (P. L. 198,) fixed the date from which interest should be computed on the surplusage in the hands of executors, as when his accounts are or ought to be settled and adjusted in the register's office. No provision is made for the pendency of exceptions; but the supreme court, proceeding apparently upon the line of analogy, extended the date to the final confirmation of the account by the orphans' court. Thus, in *Hoopes v. Brinton*, 8 Watts, 73, that court said: 'The fund did not bear interest in the hand of accountant during the pendency of the report in the orphans' court or exceptions, because it could not be paid over before final confirmation, or consequently be said to have been vexatiously detained. Besides, the case is in other respects like the verdict of a jury, during the pendency of a motion for a new trial, on which, if the motion be denied, there is judgment for the principal and interest previously found, without regard to intervening time.' So in *Withers' Appeal*, 16 Pa. St. 151, the court said: 'That an account is chargeable with interest from the decree, cannot be doubted. In that respect a decree is like a judgment to which interest in this state is a necessary incident. To the same effect in *Bruner's Appeal*, 57 Pa. St. 46.' In all these cases judgment was ordered by the supreme court for the principal, with interest from the date of the judgment below, notwithstanding the appeal.

"It is not clear that the case of *Dietterich v. Heft*, 5 Pa. St. 87, cited by respondent, is inconsistent with this view. The court states the question raised to have been whether accountant ought not to be charged with interest while the matter of settlement was pending in the orphans' court, and bases its rulings upon *Hoopes v. Brinton*. The decree is that interest stop at the time exceptions were filed to the account, and the whole matter is referred to an auditor to report to that court. The final disposition of the matter by the supreme court on the report of its auditor does not appear. If the decree here recited was intended to stop all further interest, it is inconsistent with the reason in the opinion, with the authority cited therein, and with subsequent case. It can very readily be seen that where any appeal is taken by a distributee, that injustice would be done an accountant by surcharging him with interest on funds in his hands pending an appeal. But here the accountant himself takes the appeal and fails; the injustice of depriving the distributees of interest on their fund in the hand of accountant in the mean time is just as obvious.

"His appeal was a voluntary act, and he took the risk of failure. The fund became payable upon the final decree of the court. *Hoopes v. Brinton*, *supra*. And no appeal having been taken therefrom within twenty days, there is no *superseedeas*. Suppose the amount really due in accordance with the principal afterwards applied by the supreme court had been collected by execution after the expiration of twenty days from the decree of the court, could the appellant have recovered interest on such amount from the date of collection? Surely not. The fund would have been in the hands of the owner. The pendency of negotiations for compromise has no legitimate bearing on the ques-

tion of interest, because it had no bearing on the duration of the litigation. They had practically terminated long before the case could have been submitted to the supreme court. If the petitioner had prevented payment by the part which he took in these negotiations, by reason of which loss had resulted to respondent, this might have been made a ground of equitable defense to payment of interest; but there is no recordance of such a state of facts. In common law a tender is necessary to stop interest, and equity is said to follow the law. Here there was not even a tender of the amount admitted to be due. It is not apparent that respondent had any equity to the remission of interest."

*Hayes & Noble*, for appellant. *George W. Guthrie* and *Kennedy T. Friend*, for appellees.

**PER CURIAM.** We think there is a clear distinction between the case in hand and that of *Dieterich v. Heft*, 5 Pa. St. 87. In the latter it was held, on the authority of *Hoopes v. Brinton*, 8 Watts, 73, that a guardian was not chargeable with interest during the time exceptions to his account filed by his ward were pending in the orphans' court. In the pending controversy, however, the appeal was taken by the accountant; and though he succeeded in reducing the surcharge, there was a large balance found against him, and this balance he neither tendered to, nor offered to distribute among, those to whom it belonged. We are therefore of the opinion that the appellant was properly charged with interest.

The appeal is dismissed, and the decree affirmed, at the costs of appellant.

#### DOLAN v. KELLY.

(*Supreme Court of Pennsylvania*. November 11, 1887.)

##### GIFT—OF REALTY—BY PAROL—VALIDITY AS AGAINST BONA FIDE PURCHASER.

The evidence to sustain a parol gift of a lot was that the donor had had the lot staked off, and had told a third person to tell the donee that he had given it to him, and that the donor had stood by and watched the donee build a house on the lot. The donor afterwards sold the lot. Held that, as against the vendee of a purchaser without notice, the gift was void.

Error to court of common pleas, Allegheny county.

Edward Kelly, Sr., was on the tenth day of November, 1874, the owner of the premises in dispute. On that day he conveyed it, *inter alia*, to Edward Kelly, Jr., by an absolute deed. He afterwards attacked the validity of that deed, claiming that it had been obtained from him by fraud. That dispute was settled and compromised, and in pursuance of such agreement Edward Kelly, Jr., reconveyed the premises, together with the other property therein mentioned, to Edward Kelly, Sr., with a covenant of warranty, and the property so conveyed thereafter became vested in the plaintiff through several conveyances. Edward Kelly, Sr., subsequently attacked this compromise by bill in equity filed at No. 16, January term, 1879, in the court of common pleas No. 2, of Allegheny county, and said compromise was sustained by the supreme court. Mrs. Kelly, the plaintiff, had a perfect and unbroken title, so far as the records in the recorder's office of Allegheny county disclosed. The defendant, to sustain his title, set up,—*First*, a parol gift from Kelly, Sr.; and, *second*, an alleged trust created by Kelly, Jr., in favor of his (Dolan's) mother for a piece of property, including this lot, and a quitclaim deed for this lot by her to him, made two months and seven days before the case was tried in the court below. The evidence to sustain a parol gift by Kelly, Sr., of the premises in dispute, was that he had had the lot staked off, and had told one Patrick Doloughty to tell Dolan, the defendant, that he had given him the lot, and that he stood by and watched him build a house on that lot; that the house had cost Dolan \$475, and some labor of his own, while it was

worth \$212 a year rent, and he had had it 10 years. The court instructed the jury to bring in a verdict for the plaintiff. The defendant brings error.

*A. M. Brown*, for plaintiff in error. *John Dolzell* and *Geo. B. Gordon*, for defendant in error.

PER CURIAM. The parol gift to Edward F. Dolan was good for nothing; and even admitting, which we are not ready to do, that the deed of trust by the elder Kelly to the younger might have been good and irrevocable *inter partes*, yet, as there was no notice of it to Bridget Kelly, she, of course, took the title executed to her free from that trust. The court below was therefore justified in directing a verdict for the plaintiff. The judgment is affirmed.

NELSON *et al.* v. BOUND BROOK MUT. FIRE INS. Co.<sup>1</sup>

(Court of Errors and Appeals of New Jersey. December 22, 1887.)

INSURANCE—BY MORTGAGEE—COMPANY NOT ENTITLED TO ASSIGNMENT OF MORTGAGE.

A vendor, who had not completed the sale of her property, held a policy of insurance on the house situated thereon. She had given a deed to the vendees, her sons, and had received a mortgage from them, which required the signature of the wife of one of them. Upon her signing, the balance of purchase money was to be paid, and future insurance, as collateral to the mortgage, was to be adjusted. The house was burned. Held that, upon payment of the loss, the insurance company was not entitled to an assignment of the mortgage.

Appeal from court of chancery; BIRD, Vice-Chancellor.

The Bound Brook Mutual Fire Insurance Company, complainant, sued E. A. Nelson, G. N. Nelson, and A. E. Nelson, defendants, to compel the assignment of a mortgage to them after a loss by fire. Decree for complainant, (see 5 Atl. Rep. 590,) and defendants appeal.

*R. V. Lindabury*, for appellants. *Gaston & Bergen*, for respondent.

KNAPP, J. Mrs. Nelson, the appellant, took out from the respondent company a policy of insurance against loss by fire on certain buildings on the farm owned and occupied by her at the time. The buildings were burned, and the company paid to her the amount of the loss. Before the destruction of the buildings the appellant, Mrs. Nelson, by a verbal agreement with her two sons, bargained for a sale to them of the entire property for \$3,000, one-half to be paid in cash or its equivalent, the balance to be secured to her by bond and mortgage on the property. It was further stipulated between them that, upon the execution of the conveyance, the vendees should have an assignment of the policy to them as owners, and reassign it to her as collateral security upon her mortgage. In the interim the policy should remain for their joint protection on the building; the vendees engaging to pay all subsequent assessments on the policy. No time was appointed for concluding the transaction; but the parties, chancing to meet at the office of a conveyancer, had the deed and mortgage drawn. The deed was signed and acknowledged by the vendor, and left by the parties with the county clerk to be recorded. The mortgage was signed and acknowledged by the vendees, and the wife of one of them who was present, and its custody given to the vendor to hold until the absent wife could be brought to sign it, when the balance of the purchase money was to be adjusted, and the insurance, as arranged for, effected in completion of the bargain. Before the parties met after the execution of the papers the fire occurred. Upon paying the insurance money by the company, an assignment of this mortgage to it was formally demanded of Mrs. Nelson. She refused to assign it, and the respondents filed a bill praying subrogation to her rights under the mortgage, and that she be decreed to assign it to the company. The

<sup>1</sup> Reversing 5 Atl. Rep. 590.

court below so decreed, and from that decree the defendants below appealed.

The policy which Mrs. Nelson held was the ordinary one, insuring her as owner against loss by fire. It expressed no undertaking on her part to assign to the underwriters, in any event, the whole or any part of the property insured, or any interest in or security which she might hold against it. The respondent's right to such decree, not resting upon express contract, must be based upon special circumstances such as give it just claim to that advantage. To decree it, when not founded in conventional right, is the ministration of a pure equity, and one claiming it must show that it is due him, and is not unjust or inequitable to other parties in interest. *Kernochan v. Insurance Co.*, 17 N. Y. 428.

The respondent does not rely upon the terms of its contract to support its present claim, but bases it upon changes in the relation of the assured towards the property, through the contract of sale, which it alleges creates other rights and duties between the insurer and the insured, out of which comes this resulting equity. It is said that through the sale to her sons she ceases to be owner, and became mortgagee for part of the consideration; thereby cutting down her insurable interest as owner to that of a lien for the payment of her debt, and reducing the obligation of the insurer from an undertaking of absolute indemnity against loss on the property to a special indemnity against loss on her mortgage debt; that, as an insurer of the interest of a mortgagee, the right to subrogation to the security arises on payment of the debt.

Conceding that a mortgagee who, on his own behalf and for his own protection solely, takes out a policy to secure his mortgage debt, may be called upon to assign his security to the insurer who pays his debt on the occurrence of a loss, it becomes an essential fact for the complainant to establish in maintenance of its theory that Mrs. Nelson had changed her character as owner to that of mortgagee. If the treaty between herself and her sons for the conveyance of the property was at the time of the loss by fire in an incomplete and inchoate state, a mere executory contract, no steps in its progress towards final execution can be seized hold of to determine her real *status*. She remained, in legal contemplation, the owner, until within the intention of the parties the contract became executed in all its essential terms. Until then, loss on the property in risk was her loss, and under the terms of the policy the company was bound to pay in discharge of its contract obligation. The parties to the contract of sale appear to have been fully agreed upon the terms of their bargain. Those terms have already been recited in sufficient detail for our purposes, and they meet with no substantial contradiction in the evidence. The transaction was intended by the parties to be an entire one, and in their mind was not regarded as an executed agreement when the deed and mortgage were exchanged, nor was it to become so until the execution of the mortgage was perfected as stipulated for, the balance of the consideration money paid and adjusted, and the building protected by insurance for the interest and benefit or both. The execution of the papers needed in the transfer of title was for the convenience of the parties, who lived at a distance from each other, and it was between those whose relations suggest trust and confidence. What was done respecting the conveyance was not regarded by the parties as the conclusion of their bargain, nor was the bargain considered by them as attaining completion until the balance of the consideration should be paid and insurance effected. I think that it is clear that at the time of the fire the treaty for the sale of the property, which on its execution would change Mrs. Nelson's rights as owner to those of mortgagee, was *in fieri*, and her ownership remained. This conclusion is not disturbed by the suggestion of counsel that the appellant, Mrs. Nelson, has a vendor's lien for the balance of the purchase money, which she can enforce in equity against her vendees. In the contract to sell she did not contemplate any such reliance for payment. She bargained for cash, and cancellation of notes held against her, which were the equivalent

of cash; and this is a very different thing from a vendor's lien, if that be her right. This, instead of showing an executed agreement, tenders to her a means, through litigation with her vendees, for the enforcement of unperformed stipulations.

But if it be conceded that the transfer was complete, so as to vest the title in the grantees in the deed, and to convert her interest in the lands to that of mortgagee, the case is not one in which subrogation can be claimed. It is not a case where the insurer reserves in the provisions of his policy the right to an assignment of the mortgage upon payment of a loss, as in *Foster v. Van Reed*, 70 N. Y. 19. There the right resting upon express contract cannot be defeated or impaired by any private arrangement between the assured and the owner of the equity of redemption. Nor is it of that class of cases where a mortgagee insures his mortgage interest "at his own expense, upon his own motion, and for his sole benefit." "In such cases," says Judge FOLGER in *Insurance Co. v. Insurance Co.*, 55 N. Y. 359, "the insurer in making compensation is entitled to an assignment of the rights of the assured." The remarks made by the learned chancellor in *Sussex Ins. Co. v. Woodruff*, 26 N. J. Law, 541, were in respect to insurance of a like interest by the mortgagee without the knowledge or concurrence of the mortgagor.

Under a contract of insurance made by a mortgagee entirely on his own behalf and at his own expense, for indemnity against loss by destruction of the pledge, the owner of the equity of redemption can have no interest, and payment of the loss does not go in satisfaction of the debt. Subrogation can in such case harm no one; and without it the mortgagee might collect his debt twice. The right does not rest on the relation of suretyship. Mr. Justice BRADLEY says: "Where a creditor effects insurance on property mortgaged or pledged to him as security for the payment of his debt, the insurers do not become sureties of the debt, nor do they acquire all the rights of sureties. They are insurers of a particular building only." *Insurance Co. v. Stinson*, 103 U. S. 25. If such were the true character of the insurer, it would place serious impediments in the way of contracts between mortgagor and mortgagee in respect to insurance of the mortgaged premises, which are held to be entirely legitimate. The ordinary insurance clause in mortgages may be mentioned as an instance. A more reasonable ground for subrogation in these cases lies in the fact that insurance by the mortgagee, such as gives the debtor no benefit of money recovered on a loss, would, without subrogation, convert what is designed as a contract of indemnity into a wager policy. The mortgagee could demand payment of the loss to the extent of his mortgage without reducing the mortgage debt. Public policy condemns such contracts. But there is neither reason nor good policy in compelling a mortgagee to assign his security where, through an arrangement between the mortgagor and mortgagee, insurance on the mortgaged premises is effected for their common benefit, although the policy be taken in the name of the mortgagee. Where a policy is so taken out, under the insurance clause in a mortgage, payment of a loss to the mortgagee inures to the benefit of the mortgagor, and it is immaterial under such stipulation in whose name the policy be procured. *Waring v. Loder*, 53 N. Y. 586, and cases cited. A policy effected under such an agreement, in the name of the mortgagee, to secure the mortgaged premises against loss by fire, will protect the mortgagor, and payment to the mortgagee, *pro tanto*, discharges the debt. Such an agreement between the mortgagor and mortgagee is not regarded as any infringement upon the rights of the underwriters. The mortgagee becomes bound to give the credit to his mortgage debtor. His right is not to withhold it, and subrogation is only to such rights as he has.

In *Sheldon on Subrogation* (section 235) it is said: "If the mortgagee has procured the insurance, though in his own name, at the request and expense and for the benefit of the mortgagor, as well as for his own protection, though

this by a parol agreement unknown to the insurers, the mortgagor will have the right, in case of loss, to have the avails of the policy applied for his relief towards the discharge of his indebtedness." This statement of the rule is well supported by numerous cases cited by the author. *Kernochan v. Insurance Co.*, 17 N. Y. 428; *Hay v. Insurance Co.*, 77 N. Y. 235; and *Clinton v. Insurance Co.*, 45 N. Y. 455,—fully support the rule as stated in the text.

In *Clinton v. Insurance Co.*, just cited, it was applied to a state of facts in close similarity with the present case. The owner of the property had taken out a policy on buildings, and personalty contained therein, and, while it was running, agreed to convey the property to a vendee, who paid part of the purchase money. The vendee agreed to hold the policy for their mutual benefit, the vendee agreeing to return the vendor the unearned portion of the premium on the policy. The case in one of its aspects was considered by the court in the light of an executed sale, and the court denied the right of the insurer to subrogation to the vendor's claim for balance of purchase money, because of the agreement in the contract of sale to hold the policy for their mutual benefit. The court say: "If, as between the parties to the contract of sale, the vendee was entitled to the benefit of the insurance moneys in case of loss, the defendant [the company] can assert no equity in hostility to that arrangement. The equity of the defendant is the equity of the vendors, and an arrangement between the vendors and vendee in respect to the application of the proceeds of the insurance did not violate any contract between the insurer and the insured. The defendant, on payment of the indemnity promised, simply performs his contract."

The rule above exemplified has the support of authority, and is, as I think, based upon good reason and sound policy. The principle is not that the right of substitution arises where the underwriter pays loss on a policy of insurance effected by a mortgagee upon the mortgaged premises. The insurance contract imports no such equity in the insurer. If it be awarded to him, it is entirely in virtue of some train of circumstances that render the claim an equitable one. The contract with Mrs. Nelson on the part of the company was an indemnity against loss in the destruction of the buildings, for which the usual premium and obligation required by the company for such insurance was demanded and received. On this policy, unchanged in its terms, the loss was paid. Now, the respondent claims a different *status* from that assumed in its contract, and claims its liability to be of a different nature, because of the new attitude which the insured assumed through her contract to sell. Yielding that to the respondent, certainly it must take its new position not upon a partial view or selected part of her contract. When it puts itself on her agreement, it does and must accept it as a whole; because her rights under that agreement are those of her vendees,—are to be determined on the entire terms of it. Among these, she engaged to hold her policy for the joint protection of herself and her vendees, and the latter assumed to pay all subsequent assessments upon it. She cannot, under her contract with them, refuse to allow the proceeds of the insurance to reduce, *pro tanto*, her claim against them, and her rights in this regard are the respondent's rights. For these reasons the decree below should be reversed, and the bill be ordered dismissed, with costs.

TROXALL *et al.* v. SILVERTHORNE *et al.*

(Court of Chancery of New Jersey. December 30, 1887.)

1. MORTGAGES—PAYMENT BY THIRD PARTY TO MORTGAGEE—SUBROGATION.

A married woman gave her debtor his note for \$868, which she owned, on condition that he pay her note of \$128 at a bank, and a note of her husband for \$1,000, which he had indorsed. The debtor had a mortgage given by the husband as secu-

rity for the indorsement, which had been conveyed to trustees for the benefit of creditors. *Held* that, in absence of an agreement, she was not subrogated to the interest of her debtor in the mortgage.<sup>1</sup>

2. SAME—PROCEEDS OF FORECLOSURE PAYABLE TO THIRD PERSON.

One S. gave to her debtor his note, which she owned, for \$866, on condition that he pay her note for \$125, and her husband's note for \$1,000, which he had indorsed. A mortgage made by her husband, as security for the indorsement, had been assigned to trustees under an agreement that from the proceeds of foreclosure they should, after paying a small note, pay the balance to the indorser, if he paid the note. *Held*, that any balance he received, after repaying any money he paid out on the two notes, belonged to S.

Bill to foreclose. On cross-bill by Elizabeth Silverthorne.

*L. De Witt Taylor*, for complainants. *J. N. Roseberry*, for defendants.

BIRD, V. C. William Silverthorne, the husband of Elizabeth, in April, 1879, gave two bonds,—one for \$1,500, to his brother David B. Silverthorne; and one for \$3,464, to Elizabeth, his wife, or, if not to her, she now holds it in her own right. At that time William Silverthorne was indebted to the Phillipsburgh Bank upon a note of \$1,000, on which Moses A. De Witt was liable as indorser. He was also indebted to the Belvidere Bank on a note of \$500, on which his brother David B. was indorser. The bond for \$1,500 was given to secure Moses A. De Witt and David B. Silverthorne against all liability as such indorsers, and both of said bonds were secured by a mortgage upon the real estate of the said William Silverthorne. In February, 1887, David B. Silverthorne assigned all his interest in the said bond and mortgage to the complainants Lorenzo Troxall and David A. Brands, together with his other estate and assets, empowering and authorizing them to make sale and disposition thereof for the purpose of raising money to pay his debts, as far as the proceeds thereof would extend. February 18th, the next day after such assignment to them, they filed their bill to foreclose said mortgage, acknowledging the rights and interests of Elizabeth Silverthorne in the said mortgage, and making her a party defendant. Process of subpoena was presented to her by Mr. Taylor, the solicitor of the complainants, who requested her to acknowledge service, which she did, and who informed her that the object of the suit was to foreclose said mortgage. Afterwards her husband requested her to come from Newark, where she was then living, to Belvidere, where he was still living, to meet Moses A. De Witt and the solicitor of the complainants, for the purpose of an interview, and of coming to some understanding with respect to their business relations; Mrs. Silverthorne being interested in the said bond which she held in her own right, and having some interest in Mr. Moses De Witt, because she held a note against him of \$866, with nearly one year's interest due upon it at that time, and he being indorser on her note for \$125. She came to Belvidere, and met Mr. De Witt, Mr. Taylor, and her husband, in the office of Mr. Taylor, with whom at that place she had a protracted interview, of an hour and a half to two hours, on the fifth day of March, 1887. The result of this interview was an agreement in writing between Moses A. De Witt and Mrs. Silverthorne, in which it was recited that she held a note for \$866 against said De Witt, and that he was liable on said bank note for \$1,000, and also upon a note given by Elizabeth Silverthorne for \$125; and in which it was further recited that said De Witt held a certificate for stock of certain slate property in Pennsylvania, and also recited that an agreement had been entered into between said Troxall and Brands and said David B. Silverthorne and William Silverthorne, concerning the proceeds to be raised out of the property then under foreclosure, being the property men-

<sup>1</sup> Concerning the principles that govern subrogation, and their application, see *Blake v. Bank*, (Mass.) 12 N. E. Rep. 414; *Binford v. Adams*, (Ind.) 3 N. E. Rep. 753, and note; *Knoblauch v. Foglesong*, (Minn.) 33 N. W. Rep. 866, and note; *Bush v. Wadsworth*, (Mich.) 27 N. W. Rep. 532, and note; *Bank v. Thompson*, (Iowa,) 34 N. W. Rep. 184; *Bolton v. Lambert*, Id. 294; *Pearce v. Coal Co.*, (Ill.) 13 N. E. Rep. 561.

tioned in these proceedings of William Silverthorne, whereby the said De Witt, in case he should pay the said Phillipsburgh Bank note, was to have the proceeds received from the sale of the property so under foreclosure; after reciting which, it was agreed between the said De Witt and the said Elizabeth that she would deliver up the note that she so held against the said De Witt, and that, in consideration thereof, the said De Witt agreed to pay the amount of her note in the Belvidere Bank of \$125, and also to pay the note in the Phillipsburgh Bank of \$1,000. It was further agreed that the said De Witt should retain the said certificate of stock, and also his interest in the bond, secured by the mortgage on the property named in this bill of complaint, out of both of which he was to be repaid the amount he should pay in excess of the amount of the note which Elizabeth should deliver up to him; but upon payment of the amount of such excess, as aforesaid, whatever remained the said Elizabeth was entitled to, and to her it was to be assigned; however, "subject to the conditions regarding said bond as set forth in the agreement made between Troxall & Brands and D. B. & Wm. Silverthorne."

The said Elizabeth claims that she was misled, deceived, and defrauded in that transaction. She now insists that if she had understood it, she would not have signed that agreement. The result of her contention, as expressed in the cross-bill, which she has been permitted to file, is that she is entitled to the proceeds of the sale of the property under foreclosure to the extent of the \$1,000, the value of De Witt's interest therein. In other words, she says that the result of that agreement subrogates her to the rights and interests of Moses A. De Witt, and that as that \$1,500 bond was given to secure Moses A. De Witt against all liability upon the payment of the \$1,000 note in the Phillipsburgh bank, and that, as such indorser, after paying the note, he had a right to enforce his claims, she is now entitled, to the extent of the money that she advanced to De Witt under this agreement, to the same rights, and to be protected in those rights in equity in this suit. Has she a right to be so subrogated? She admits that there was no agreement that she should be so subrogated. She insists, however, that it was her understanding that that bond and the mortgage, to the extent to which it secured the bond, were to be assigned to her. But according to her own testimony, an understanding upon her part was the extent of it; nothing more. There is no evidence of Mrs. Silverthorne, or any one else, going to show that a word was said at that meeting upon which she could reasonably found any such expectation, except as contained in the agreement between them. The agreement which has been recited, seems, to my mind, to embody the entire transaction fully, in the whole and in every part. To this agreement I will again refer.

It is insisted that Mrs. Silverthorne, being a married woman, will be protected by this court in the same manner and to the same extent that the court of chancery protects infants. There is no doubt but the court of chancery, or any other court, would consider with very great care, and would scrutinize with exceeding nicety, the conduct of parties dealing with a married woman, unaccustomed to business and unskilled in the management of affairs, when it should be made to appear that some decided advantage had been gained over her, and especially so when it is alleged that those engaged in the transaction with her had been depended upon by her as her counsel or otherwise, or when it should be alleged that her husband, while pretending to be a friend, was really hostile. From this stand-point I shall consider this case, although I do not desire to let the occasion pass without remarking that, since the statutes of our state have conferred upon married women the rights, powers, and privileges which they have, permitting them to hold property in their own name, and to transact business independently of their husbands, the courts must, necessarily, to a greater extent than formerly, place married women upon the same plane and hold them amenable to the same rules that it does others; what may amount to deception or fraud in one case being equally ap-

plicable in the other, giving no more force or effect to it because the party complaining or resisting is a married woman than in the other. In every such case, the only question is: "Has fraud been practiced?"

The testimony has not satisfied me that Mrs. Silverthorne was in any sense deceived or misled, or that she had any grounds to expect anything in return for what she did, or agreed to do, than what is expressed in the writing which she signed. It is true, the transaction concerned her husband's affairs, as well as her own and Mr. De Witt's; but it is equally true that the object of the meeting was a settlement or a compromise of the matters pending between them. She voluntarily agreed to surrender to Mr. De Witt the note which she held against him, upon consideration that he would pay off and discharge the note, upon which he was liable as indorser, given by her husband to the Phillipsburgh Bank for \$1,000, and upon his paying the \$125 note in the Belvidere Bank, for which she was to have all the surplus that would arise from the sale of the slate stock, and from the proceeds of the \$1,500 bond after De Witt was fully paid, which bond was, however, subject to the rights of Troxall and Brands, under the assignment to them made by David B. Silverthorne, which it is very important to bear in mind, and also the fruits if any of a suit then pending in the court of errors and appeals.

To get at the legal principles involved, or rights of Mrs. Silverthorne, we must first understand the exact situation. At the commencement of these negotiations, in the office of Mr. Taylor, she was simply a creditor of Mr. De Witt. She had no interest whatever at that point of time in the \$1,500 bond. In surrendering her note of \$866 to Mr. De Witt, she enabled him the better to pay the note of her husband for which he was liable as indorser in the Phillipsburgh Bank, and her own note in the Belvidere Bank. Up to that point, certainly, she was not a surety or indorser, and had no equitable rights to stand upon. Up to that point she could not claim any benefit of the principles of subrogation; for she had done nothing that would warrant her in claiming to stand in the place of another. Had she voluntarily advanced to Mr. De Witt the amount due upon her husband's note, and the amount due upon her own note, being \$1,125, with interest, she could not then have claimed that she was entitled to the proceeds of this bond, as Mr. De Witt could have claimed, had nothing more appeared than her voluntarily advancing such an amount of money. She was not under any obligations to advance the \$1,000 of that money. By no possibility could she have been compelled, in case of the failure of William Silverthorne, to make such payment. Hence the general principles controlling the law of subrogation do not embrace Mrs. Silverthorne in this particular instance, unless some agreement by the parties interested, which they were capable of making, placed her on a different footing. Was any such agreement made? Mrs. Silverthorne herself admits that there was no such express agreement. As before stated, all that she insists upon is that it was her understanding that this bond, and the mortgage, so far as it secured the bond for \$1,500, was to come to her. But the agreement which she signed expressly states that, at that time, this bond and mortgage had been assigned by David B. Silverthorne to the complainants, so that she fully understood that, so far as the parties were concerned with whom she was then dealing, they acknowledged the rights of the complainants, and through them the rights of the creditors of D. B. Silverthorne for whom they (the complainants) held the said bond and mortgage. And besides this, the agreement which she signed shows that other considerations than that of subrogation controlled her. It shows that her husband's note was to be paid; that her own note for \$125 was to be paid; that she was to have any surplus that arose from the sale of the slate stock, which was valued at between \$400 and \$450; and that she was to have an equal interest with other creditors in the arrangement made with the complainants in this suit. It is also shown that a suit was pending on appeal, from which, in case the

appellant (her husband) was successful, he would recover over \$600, which the said Elizabeth was also to have the benefit of. But the appellant was not successful, and she gained nothing from that source. Thus it appears that an effort was made to secure Mrs. Silverthorne against loss, although unsuccessful. Has she any means of redress? Can she make any claim on the ground of fraud? None whatever that I can discover. It has not been shown that anything was misrepresented, or that any fact was concealed.

From the evidence presented, and from the tenor of the discussion, I have felt myself obliged to consider the question of fraud. But there is another view of the case which I cannot disregard. It arises out of the agreements in evidence,—one between the complainants and David B. Silverthorne, and one between Elizabeth Silverthorne and Moses A. De Witt. The former agreement shows the terms on which the complainants took the assignment of the said \$1,500 bond, and the mortgage which secured it. One of those terms was that, after paying the costs of said suit on appeal, and a note of \$146 of said David B. Silverthorne, "the balance remaining, whatever that sum may be, is to be applied by the said party of the second part [the complainants] to the payment of a certain note, [the said \$1,000 note,] and if said note is paid by said Moses A. De Witt before said mortgage is canceled, then the balance, if any there should be from said mortgage so assigned, to be paid over to said Moses A. De Witt." The agreement between said Moses A. De Witt and Elizabeth Silverthorne expressly provides, as above stated, that it is made subject to the agreement between these complainants and the said D. B. Silverthorne. Now, has Elizabeth any rights, considering the two agreements, and also the fact that she advanced to De Witt the amount due upon the note of \$866 she held against him, less the amount due upon the note of \$125, which he had indorsed for her? De Witt used that money to discharge those notes; and the bond of \$1,500, and the mortgage made to secure it, were made expressly to secure De Witt against the payment of the \$1,000 note. And the agreement by which the complainants took and held said bond and mortgage directed them to pay to said De Witt a certain balance thereof in case he should pay the said \$1,000 bank-note, and made no other disposition whatever of the said balance. As the said bond and mortgage were originally given to secure De Witt, so this agreement expressly directed that he should be reimbursed. The complainants can do nothing else with it. It is conceded that De Witt has paid the \$1,000 note.

Who, then, in equity, is entitled to the balance of that money? De Witt is not, for he has been fully reimbursed; the complainants are not, for they have contracted only to hold it for De Witt; the mortgagee, David B. Silverthorne, is not, for he assigned away all the interest he had. Who, then, in equity, as the proof stands, is entitled, leaving Elizabeth out of view? Beyond doubt, the mortgagor, William Silverthorne. He it was who gave the mortgage, and he gave it to secure his brother, David B., and Moses A. De Witt against liability as indorsers. In the case of De Witt, that liability has been discharged, in a great part, if not wholly, by Elizabeth, the wife of William, and most plainly at the special instance and request of William. The proof is as full as can be desired that she surrendered her note against De Witt at the solicitation of her husband, and to enable De Witt to pay the said note, which he had indorsed for her husband. At that time, too, De Witt still possessed all his rights to said bond and mortgage. He had never assigned nor surrendered them in any way, until he signed the agreement with Elizabeth, in which it was expressly provided that it was made subject to the agreement made between D. B. Silverthorne and the complainants, which gave said balance to De Witt, and without which he would have been entitled to the \$1,000 and the accruing interest.

On the ground last presented, I think Elizabeth Silverthorne is entitled to the \$1,000 due on the said \$1,500 bond, with interest, less the amount of her

said note for \$125 and the interest which accrued thereon, and less the note of David B. Silverthorne for \$146 which De Witt paid, and less the costs of the said appeal which, it is said, were paid by complainants. I will so advise.

NYE v. BURLINGTON & L. R. Co.<sup>1</sup>

(Supreme Court of Vermont. December 21, 1887.)

PLEADING—MOTION TO DISMISS—RAILROAD “COMPANY.”

Defendant was sued as the “Burlington and Lamoille Railroad Company, a company duly organized under the laws of this state.” The service of the writ was as required by the statute on a corporation by leaving a copy with the clerk. A motion was filed to dismiss on ground that the service was illegal; but the motion did not specify any error, or the method of correcting it. *Held*, that as there is a general law under which railroad corporations can be organized, it is presumed that the defendant is a corporation organized under this law; and that the motion is faulty in not pointing out both the defect and its correction.

Exceptions from Lamoille county court.

Motion to dismiss a writ on the ground that the service was illegal. Heard and overruled at the December term, 1886, Lamoille county; VEAZEY, J., presiding. The substance of the motion was that the writ had not been legally served. It appeared from the officer's return that he attached one car, and that he lodged a copy of the writ in the town clerk's office, where the car was attached, and that he also left a copy with the clerk of the defendant company.

*E. R. Hard*, for defendant.

The defendant in the mandatory part of the writ is described as “the Burlington and Lamoille Railroad Company, a company,” etc., and there is nothing anywhere in the record which varies this description, or indicates what sort of a “company” the defendant is. The question presented by this motion to abate must be determined by what appears upon the face of the process, unaffected by any extraneous fact or inference; and the motion should prevail unless it appears by the record that the requirements of the statute respecting the service of attachment process have been strictly complied with. It does not appear from the record in this case that the defendant is a corporation, an “association or joint-stock company consisting of five or more members,” or a “partnership composed of five or more persons,” in which cases, only, service can properly be made by copy to a clerk, etc., as provided by section 873, R. L., and by the act of 1882, (Acts 1882, No. 71.) The suit must therefore be treated as one against a plurality of natural persons, insufficiently described; and the writ could be served only in the manner prescribed by sections 871 and 881, R. L., if, indeed, any service of so faulty a process could be effectual. The service, therefore, by copy to the clerk, is insufficient.

*B. A. Hunt*, for plaintiff.

The writ was legally and sufficiently served. R. L. § 873; Acts 1884, No. 99. It was personal property that was attached, and should have been attached as such. *Stevens v. Railroad Co.*, 31 Barb. 590; *Bement v. Railroad Co.*, 47 Barb. 104; *Randall v. Elwell*, 52 N. Y. 521; *House v. McCormick*, 57 N. Y. 314.

Ross, J. Conceding, without deciding, that the objection is available on motion, instead of plea, we do not think it is well taken. The defendant, as alleged in the writ, is the “Burlington & Lamoille Railroad Company, a com-

<sup>1</sup> Reported by Messrs. Senter & Kemp, of the Montpelier bar.

pany organized under the laws of this state." The name of the defendant, "Burlington and Lamoyille Railroad Company," as well as the qualifying clause, "a company organized under the laws of this state," is consistent with the defendant being a corporation upon which service of process can be legally completed only by delivering a copy to its clerk. Pleas in abatement are not favored, and no presumptions are made to uphold them. We have, and for several years had, a general law under which railroad corporations could be legally organized. It is to be presumed, if any presumption is to prevail, that the defendant is a corporation organized under this law. It is alleged to be a railroad company. The duties of such a company are more or less of a public nature, and of such a character that it is difficult to conceive of their exercise by a partnership. Nor have we any statute authorizing the organizing of copartnerships for the exercise of the functions required for the full construction, operation, and transaction of the business of a railroad company. This company is alleged to have been organized under the laws of this state, clearly referring to the general law enacted for the organization of railroad companies as corporations. The rule, applicable alike to motions and pleas in abatement, is that they must give the plaintiff a better writ, in that they not only point out his error, but also the method of correcting it. 1 Chit. Pl. 446. The motion is faulty in both of these requisites. It neither alleges nor denies the corporate existence of the defendant, nor in what respect the supposed service of the writ upon it is defective, nor in what manner it can be corrected.

The *pro forma* judgment of the county court is affirmed, and cause remanded to be further proceeded with.

#### WORTHEN *et al.* v. PRESCOTT.<sup>1</sup>

(Supreme Court of Vermont. December 19, 1887.)

##### BAIL—SURRENDER OF PRINCIPAL INTO COURT—JUSTICE OF THE PEACE.

Defendant in an action of *scire facias* was bail on a writ issued as a *capias* against M. in an action of *assumpsit* in favor of plaintiffs, and on the return-day of the writ surrendered M. into court, and was discharged. Judgment was rendered against M. for \$139.55, and M. submitted himself to be examined on his application to take the poor debtor's oath, according to R. L. Vt. § 1488, and, after a partial hearing, the justice, at M.'s request, continued the case nine days, and at that time took the recognizance in question for \$200 for M.'s personal appearance on the continuance day, and, in default thereof, for the payment of the judgment. *Held, first*, that the bail had a right to surrender his principal into court as he did in discharge of himself; *second*, it was the duty of the justice, under R. L. § 1469, unless M. procured bail for his appearance on the continuance day, to order him committed to jail; *third*, that the bail so taken should be co-extensive with the bail on the original writ.

Exceptions from Orange county court.

*Scire facias*. Heard on demurrer to declaration by the county court, Orange county, December term, 1886; WALKER, J., presiding. Demurrer overruled, and declaration adjudged sufficient. It was alleged in the declaration that the plaintiffs commenced an action of *assumpsit* against one Morey on the twenty-ninth day of December, 1885; that the writ was made returnable before a justice of the peace on the twenty-ninth day of February, 1886; that an affidavit setting forth that the defendant was about to abscond from the state, and had property of more than \$20 secreted about his person, was duly filed with said justice before the issuing of the writ; that said writ was made to run against the body of the said Morey; that he was arrested by a proper officer on said writ, and that the defendant became his bail by indorsing his name on the back of said writ; that, on the return-day of said writ,

<sup>1</sup>Reported by Messrs. Senter & Kemp, of the Montpelier bar.

judgment was rendered in favor of the plaintiffs for the sum of \$189.55, damages and costs; that the defendant delivered his principal, the said Morey, at the time of the trial, into court, in discharge of himself as bail, and was discharged; that, after judgment had been rendered, said Morey submitted himself to be examined on his application to be allowed to take the poor debtor's oath, in accordance with R. L. § 1488; that, after a partial hearing, the case was continued, at the request of the said Morey, for nine days for a further hearing; that the defendant became surety before said justice in the sum of \$200 for the personal appearance of said Morey on the continuance day, and, in default thereof, that he should satisfy said judgment; that on the continuance day M. did not appear; that the justice adjudged that Morey was not entitled to take the poor debtor's oath, and adjudged the bail of said Prescott forfeited; that execution was issued, and placed in the hands of a proper officer, who made a return of *nulla bona* and *non est inventus* on said execution; and that said writ of execution and the judgment aforesaid remain in full force, not reversed, annulled, or set aside, or in any way paid or satisfied to the plaintiffs. Exceptions by defendant.

*John H. Watson*, for plaintiffs.

After the defendant had delivered his principal into court in discharge of himself as bail, he (the defendant) became surety for Morey's appearance on the eighth day of March, in accordance with the provisions of section 1469, R. L.

*A. M. Dickey*, for defendant.

It is insisted that it was error in the court below to overrule the demurrer. The justice had no common-law right to take such a recognizance; all his powers are statutory, and certainly the statute confers no such authority upon a justice in a civil suit, as this was. If it should be held that section 1469 applies to a justice, then we say that the statute provides that when the principal is delivered into court, unless the principal procures sufficient surety for "his appearance, the court shall order him committed to jail, and such commitment shall be deemed a commitment on the original writ." Then we say, if he procures a surety, it shall be upon the original writ; however, if the commitment is on the original writ, the surety should be so too. In section 1407 the statute provides that the justice may take a recognizance in case of judgment against an absent defendant. *Abells v. Chtpman*, 1 Tyler, 377. In section 1062, the power is expressly given to justices to take recognizances in civil suits appealed to the county court. Chapter 46 defines the power of justices generally; no such power is given. When one becomes surety on a justice's writ issued against the body, the statute provides that the officer shall give the bail a bail-piece, and with that the bail may take the principal anywhere, and bring him into court; but in this case there is no provision for a bail-piece, and the bail is powerless to bring the principal. This alone is sufficient to show that the recognizance is good for nothing. In all other cases, the statute makes provision for the bail, but none in this case. *Strong v. Edgerton*, 22 Vt. 249.

The justice had no authority to declare the recognizance forfeited. The whole proceedings against this defendant after he surrendered Morey into court were of no binding effect.

We insist that the case had been adjourned by the justice before the recognizance was entered into, and therefore is void. *Converse v. Washburn*, 43 Vt. 129.

If, by the common law, a justice of the peace has power to take recognizances in any cause pending before him, why has the legislature in all the cases, both criminal and civil, made provisions whereby a justice may take recognizances? It is plain that no authority is vested in a justice to take recognizances, except what is given by the statute.

The justice required the principal, Morey, to give a recognizance in the sum of \$60 more than the law required. This is irregular, and defendant now moves to discharge this bail. *Jennings v. Sledge*, 3 Ga. 128. It is expressly decided in that case that the irregularity may be taken advantage of by motion to discharge the recognizance. *Washburn v. Phelps*, 24 Vt. 506.

ROWELL, J. This is *scire facias* on a recognizance entered into by the defendant for one Morey before a justice. The declaration is demurred to, which brings in question the validity of the recognizance. The defendant was bail for Morey on a writ issued as a *capias* against him in an action of *assumpsit* in favor of the plaintiffs, and on the return-day he surrendered his principal into court in discharge of himself, and was discharged. Such proceedings were thereupon had in the case that judgment was rendered against Morey for \$139.55, damages and costs; whereupon, and within two hours from the rendition of judgment, Morey submitted himself to be examined as to his situation, circumstances, and property, according to the statute in that behalf; and, after a partial hearing on that question, the justice, at Morey's request continued the case nine days for further hearing, and at the same time took the recognizance in question for \$200, conditioned for Morey's personal appearance on the continuance day, and, in default thereof, for the payment of the judgment.

The defendant had the right to surrender his principal into court in discharge of himself as he did. R. L. 1468; *Abells v. Chipman*, 1 Tyler, 377; *Chase v. Holton*, 11 Vt. 347. The continuance of the case for further hearing on Morey's application to take the poor debtor's oath suspended the judgment, and kept the case open and in hand, until that question was disposed of, and execution could not issue till then. *Chase v. Holton*, 11 Vt. 347. Hence it was the duty of the court, under section 1469 of the statute, which is unquestionably applicable to justices' courts, unless Morey procured bail for his appearance on the continuance day, to order him committed to jail, that he might be had if needed to be taken on execution. And, although the statute says that such commitment shall be *deemed* to be a commitment on the original writ, yet it is not so in fact, but only in legal effect, for the original writ is returned into court, and cannot be taken out for the purpose of commitment; but the court, if the commitment is to be beyond its then present session, certainly must issue a *mittimus*, upon which the commitment must be made. This is the course pointed out in *Abells v. Chipman*, 1 Tyler, 377, for a justice to pursue. From all which, it follows that bail like this is not literally taken on the original writ, as the defendant claims it must be; but, as the commitment is deemed to be on the writ, the obligation of the bail should be, and in this case by the condition of the recognizance is made to be, co-extensive with that of bail on the writ.

It is strongly urged, as a reason why the justice had no power under the statute to take this recognizance, that there is no provision for issuing a bail-piece in such a case, so that the bail is powerless to bring in the principal. But the bail here is the same as special bail, or bail above, or to the action at common law, and the right of such bail to apprehend their principal is not at all dependent upon their having a bail-piece, which is not process, nor in the nature of process, but is only evidence that the surety has become bail. At the common law, the bail-piece seems not to have been delivered to the person becoming bail, but it was signed by a judge, and filed in the court in which the case was pending. Lord Coke says that, "in truth *bailly* is an old Saxon word, and signifieth a safe-keeper or protector, and *baile* or *ballium* is safe-keeping or protection; and thereupon we say, when a man upon surety is delivered out of prison, *traditur in ballium*, he is delivered into bail,—that is, into their safe-keeping or protection from prison." Co. Litt. 61b. Blackstone derives the word "bail" from the French *bailler*, to deliver.

Some derive it from the Greek *βαλλειν*, to deliver into hands. Hence a defendant who is delivered to special bail is looked upon in the eye of the law as being constantly in their custody. They are regarded as his jailers, and have him always, as it were, upon a string, that they may pull at pleasure, and surrender him in their own discharge. They may take him on Sunday, which shows that it is not an original taking, but that he is still in custody. *Bac. Abr. tit. "Bail in Civil Cases;" Pyewell v. Stow*, 3 Taunt. 425; *Payne v. Spencer*, 6 Maule & S. 231. They have a right to be constantly with the principal, and to enter his dwelling when they please to take him. *Sheers v. Brooks*, 2 H. Bl. 120. Their authority arises more from contract than from the law, and, as between the parties, neither the jurisdiction of the court nor of the state controls it; and so the bail may take the principal in another jurisdiction or another state, on the ground that a valid contract made in one state is enforceable in another according to the law there. *Nicolls v. Ingersoll*, 7 Johns. 145; *Com. v. Brickett*, 8 Pick. 188. This shows that the authority need not be exercised by process, but that it inheres in the bail themselves; and they may exercise it personally, or depute to another to exercise it for them. See the cases last cited, and *Pyewell v. Stow*, 3 Taunt. 425; 1 Tidd Pr. 218.

But it is said that the recognizance, being larger than the judgment, is larger than the law requires, and therefore irregular, and that the bail should be discharged on motion. But the statute does not fix the amount of the recognizance in such cases. The recognizance is conditioned for the payment of the judgment in default of the principal's appearance, and so the liability upon it is limited to the amount of the judgment, though the recognizance be for more. R. L. § 942.

The judgment of the county court overruling the demurrer, and adjudging the declaration sufficient, is affirmed; but, as no final judgment was rendered below, the cause is remanded.

#### FARRANT v. BATES.<sup>1</sup>

(*Supreme Court of Vermont.* December 20, 1887.)

#### APPEAL—EXCEPTIONS NOT RESERVED BELOW.

An exception to the rendition of a judgment upon a special verdict does not reach back to any question arising during the trial to which no exception was reserved.

#### Exceptions from Orleans county court.

This was an action of *trespass quare clausum fregit*. Trial by jury, county court, Orleans county, February Term; Ross, J., presiding. The plaintiff claimed on the trial that defendant trespassed on her close—*First*, by going upon her land and cutting down and carrying away trees and shrubs growing thereon; *second*, by rolling his logs across her land, and breaking down her fence and bushes standing upon the same. The jury found, under instructions from the court, to which neither party excepted, that the defendant did not commit the trespasses first above mentioned. The alleged trespasses second above mentioned, were committed, if at all, under the following circumstances: The Newport & Richford Railroad runs across the premises in question, and along near Lake Memphremagog, as shown by the plan used on the trial made by Albion Grandy, and the testimony of said Grandy explaining the same, both of which are referred to. The defendant was at that time the owner of a veneer mill situated near the said close, and it was in bringing the logs intended for use in his mill over said railroad, and rolling them from the cars onto the dump, and from thence into the lake, that the supposed trespasses were done. The evidence of the plaintiff tended to

<sup>1</sup> Reported by Messrs Senter & Kemp, of the Montpelier bar.

show that the supposed trespasses were committed at various times between July 1, 1883, and December 27, 1884, and it was conceded that the plaintiff was the owner of the premises described in the declaration, of which she claimed that the strip in controversy formed a part, during all that period.

The evidence of the plaintiff further tended to show that the aforesaid railroad was built in the spring and summer of 1872; that previous to and at the time of the building of the same there was a strip of land between the line where the fence in question stood and low-water mark; that this strip varied in width from one to four rods, and was of considerable value for the purposes of cranberry culture and a mill-site, and that it was covered with alders and other bushes six to ten feet high, and one to three inches through; that the year after the road was constructed, the husband of the plaintiff, who then owned the premises, built a high fence both sides the railroad, through the premises, along the foot of the dump, and between the dump and the lake, from two to six feet from the dump, and nearer the dump than the limits of the survey; that this fence was maintained until 1878 to 1880, but finally disappeared against this strip, for the most part, except the remains of posts in the ground, and that the plaintiff, soon after the giving of the deed hereafter referred to, caused the fence in question to be constructed substantially where the original fence had stood; that the supposed trespasses were committed both before and after the construction of this last fence, for the destruction of which, among other things, the plaintiff claimed to recover. The evidence, of the defendant tended to show that at the time of the construction of the said railroad there was no land between the line where the fence in question stood and low-water mark; that after the building of said railroad, there was only a narrow strip (in some seasons none at all) exposed for a few days between the foot of the dump and low-water mark, and that this had been entirely formed by the spreading out of the dump in the soft bottom at that point, and the action of the waves in washing down the sand from the dump, and carrying it out into the lake; that this strip could be of no use for any agricultural purpose, nor for any other purpose, except to pass over in going from the railroad dump to the lake.

The plaintiff gave no evidence tending to show that she had ever done anything to reclaim or alter the character of the shore at that point, or that she had ever attempted to use that strip of land for any purpose, but gave evidence tending to show that she and her husband intended it for future use, and she did testify that she built the fence in question to prevent the defendant from rolling his logs into the water at that point. The evidence of the defendant tended to show that Lake Memphremagog was a navigable lake; that its waters varied in height from four to six feet between high and low water, and that during the greater part of the year the waters of the lake washed the foot of the railroad dump at this point, so that row boats could be and were run onto the dump itself, and so that persons could and did pass directly from the dump to the lake, and that the trespasses in question were committed by rolling the logs from the cars onto the dump, and from the dump onto the ice or into the water which then came nearer the dump than the fence in question, and so floating them out into the water without ever actually touching the strip of land which the plaintiff claimed to own. The plaintiff's testimony tended to show that the defendant rolled some of the logs across said strip of land when not covered with water, broke down the fence and bushes, and that he boomed his logs against and upon said strip, attaching the end of his boom to the railroad dump. It was admitted that the aforesaid railroad was originally built by the Missisquoi & Clyde Rivers Railroad Company; that the said company had mortgaged its road-bed and franchise; that said mortgage had been foreclosed, and the Newport & Richford Railroad Company organized by the mortgage bondholders on the ninth day of December, 1880; that the Newport & Richford Railroad was afterwards leased to the South-

eastern Railroad Company of Canada, and that the Southeastern Railroad Company afterwards mortgaged, including its leasehold interest in the Newport & Richford Railroad; that the conditions of the mortgage were afterwards broken, and that the trustees named in said mortgage went into the management of the Newport & Richford Railroad, and were operating it at the time of the commission of the supposed trespasses; and the defendant claimed, and his evidence tended to show, that he committed said trespasses by the consent and direction of said managers. The evidence of the defendant tended to show that the Missisquoi & Clyde Rivers Railroad was originally surveyed to embrace a width of 41 feet and 3 inches from the central line of the survey across the premises in question; that said survey was duly made and recorded, and that the road was constructed on the line of the survey. It further tended to show that the original entry and construction were with the consent of the plaintiff's testate, Thomas Farrant, and the evidence of the plaintiff tended to show that no consent to build the railroad across the premises was given; that the fence on the lake side of the dump was extended near the foot of said dump along the spot in question, and that this was the original fence hereinbefore referred to. On the other hand, the defendant claimed that there never had been a fence on the lake side of the dump at the point in controversy until the one destroyed was built, and introduced evidence tending to show that there had been no remains of any such fence for several years before the fence which was destroyed had been built. It was not claimed that the railroad companies acquired any title to, or right in, the land, except such as they might have acquired by the survey and entry above set forth, nor that anything by way of damages was ever paid until the twenty-eight day of October, 1884, when the Newport & Richford Railroad Company purchased the right of way shown by, and took from the plaintiff a deed dated October 28, 1884. It was admitted that the fence destroyed was not built until after the giving of this deed.

The question whether or not the lot extended into the lake was in no way presented to the jury. The court did not require the jury to return any general verdict, both parties consenting thereto; but submitted instead the special verdict hereafter set forth. The court nowhere instructed the jury that it was material to inquire whether the original fence was built as the plaintiff claimed, or whether there was, or had been for many years before the giving of the deed, any fence or remains of a fence along the spot in controversy. Neither was the jury instructed to inquire whether a strip of land, if any there was, between the low-water mark and the fence which was destroyed, except merely to pass and repass from the lake to the dump, not whether from the character of the land itself, and the length of time in each year that it was covered with water, was not for all practical purposes a part of the lake itself; nor were these questions in any way submitted to the jury.

The jury returned the following special verdict: "*Question*. 1. Where was the low water mark of the lake between the point to which the defendants boom was attached, and where the line of the plaintiff crosses the knoll when the railroad dump along there was constructed,—nearer at or further from the lake than where the plaintiff's fence, or remains of such fence, were October 28, 1884, when the plaintiff and others deeded to the railroad company? *Answer*. Nearer the lake. *Q*. 2. Where was the low-water mark of the lake, at the same place as stated in question one, from July 1, 1883, to December 27, 1884,—nearer at or further from the lake than the fence, or remains of fence, were October 28, 1884? *A*. Nearer the lake. *Q*. 3. If question two is answered "Nearer the lake," was the low-water mark of the lake at that place made by building the dump of the railroad along there? *A*. In part. *Q*. 4. Where was the low-water mark of the lake at the place stated in question one, when the railroad company entered upon the land now owned by the plaintiff to construct its road,—nearer or further than forty-one and

one-fourth feet from the center line of the railroad as constructed? A. Nearer. Q. 5. When the railroad dump was constructed, did the high-water mark of the lake come to the fence located as claimed by the plaintiff on the lake side? And if so, how much of the time each year did it reach the line of said fence? A. It did it for nine months in the year. Q. 6. Has the defendant committed any trespasses upon the plaintiff's premises, other than on the strip of land in controversy, between July 1, 1883, and December 27, 1884? A. No. Q. 7. What damages, if any, has the plaintiff sustained by the trespasses of the defendant, on the strip of land in controversy, between July 1, 1883, and December 27, 1884? A. \$5, (five dollars.) Q. 8. What damages, if any, has the plaintiff sustained by the trespasses of the defendant on her premises at places other than on the strip in controversy, between July 1, 1883, and December 27, 1884? A. Not any." And on this verdict the court gave judgment for the plaintiff in the sum of five dollars damages, and for her costs. Exceptions by defendant.

*Edwards, Dickerman, & Young, for plaintiff.*

The plaintiff had such an interest in the land between high and low water mark that she could maintain trespass for an injury upon it. *Clement v. Burns*, 43 N. H. 609. She could have erected a wharf on this strip of land. *King v. Russell*, 13 E. C. L. 271. "The public have no common-law right of bathing in the sea," and cannot cross the sea-shore on foot for that purpose. *HOLROYD, J., in Blundell v. Catterall*, 7 E. C. L. 152, (5 Barn. & Ald. 268.) In the same case *BAYLEY, J.*, said: "But if it hath the *ripa* or bank, of the port, the king may not grant a liberty to unlade upon that bank or *ripa* without his consent, unless custom had made the liberty free to all, as in many places it is; for that would be a prejudice to the private interest of it." Lord *HALE* was quoted as saying the same; and *ABBOTT, C. J.*, said: "Now such consent, as applied to the natural state of the *ripa* or bank, would be wholly unnecessary, if every man had a right to land his goods on every part of the shore at his pleasure." "The owner of the soil of the shore may also erect such buildings or other things as are necessary for carrying on of commerce." *Blundell v. Catterall, supra*. And *T. W. GREEN, J.*, says in *Gough v. Bell*, 22 N. J. Law, 441, "that most of the Atlantic states had adopted the principle that extends the riparian owner to low-water mark;" and this was affirmed by the court of appeals. 23 N. J. Law, 624. The riparian owner has the right of quarrying stone between high and low water mark, (*Hart v. Hill*, 1 Whart. 187;) to use a spring, (*Railroad Co. v. Trone*, 28 Pa. St. 206;) to sea-weed cast upon the shore, (*Emans v. Turnbull*, 2 Johns. 322;) and he may maintain trespass for an entry upon the shore to carry off a wreck, (*Barker v. Bates*, 13 Pick. 255.) Such owner's rights extend so far as they do not interfere with the public interest in navigation. *Frink v. Lawrence*, 20 Conn. 117. It is a settled rule, "assumed and acted on," says *SHAW, C. J.*, in *Barker v. Bates, supra*, that the soil in the sea-shores and flats of our maritime frontier is the property of the riparian owner, subject to certain modifications. *Storer v. Freeman*, 6 Mass. 435; *Parker v. Smith*, 17 Mass. 413; *Lapish v. Bank*, 8 Greenl. 85. If any land was made outside the fence by the railroad by placing the dump there, it belonged to the plaintiff. *Nichols v. Lewis*, 15 Conn. 143. The owner of land bounded on Lake Champlain has a right to low-water mark. *Austin v. Railroad Co.*, 45 Vt. 244; *Jakeway v. Barrett*, 38 Vt. 316. "A grant bounded by a great pond or lake, which is public property, extends to low-water mark." *GRAY, C. J., Paine v. Woods*, 108 Mass. 160. See *East Haven v. Hemingway*, 7 Conn. 203; *Gould, Wat.* 156; *Railroad Co. v. Valentine*, 19 Barb. 491; *Waterman v. Johnson*, 13 Pick. 265; *Wood v. Kelley*, 30 Me. 55; *Canal Com'rs v. People*, 5 Wend. 423; *West Roxbury v. Stoddard*, 7 Allen, 158; *Fletcher v. Phelps*, 28 Vt. 257; *Fay v. Aqueduct Co.*, 111 Mass. 27; *State v. Gilmanton*,

9 N. H. 461; *Yates v. Milwaukee*, 10 Wall. 497; *Dutton v. Strong*, 1 Black, 23; *Barnes v. Racine*, 4 Wis. 486.

*T. Grout, J. C. Burke, and C. A. Prouty*, for defendant.

The first question is whether the owner of land bordering on a navigable lake has the same title to the strip between high and low water mark that he has to the land above high-water mark, or whether his title is of a qualified character. There is no evidence that the plaintiff's lot extended into the lake, or at least that question was not submitted to the jury. In navigable waters the state holds title to land between high and low water mark. *Gould v. Railroad Co.*, 6 N. Y. 552; *State v. Mayor*, 25 N. J. Law, 525. In England only those waters were termed navigable in which the tide ebbed and flowed; but in the United States all those waters are called navigable which are navigable in fact. *Barney v. Keokuk*, 94 U. S. 324; *Martin v. Waddell*, 16 Pet. 367; *Pollard v. Hagan*, 3 How. 213; *Goodtitle v. Kibbe*, 9 How. 471. These cases related to tide-water, but the principles enunciated in them apply to all navigable waters. The tendency of recent decisions seems to be that a riparian owner of land bordering on a navigable lake holds to the ordinary water line. *Seaman v. Smith*, 24 Ill. 521; *Diedrich v. Railway Co.*, 42 Wis. 248. The defendant had a right to occupy this shore as he did, it being a part of the lake itself for nine months in the year. *President, etc., v. Stearns*, 15 Gray, 1. The owner of soil, which in its natural state is covered with navigable water during the greater part of the time, holds his title subject to the public right of navigation. *Martin v. Waddell*, *supra*; *Blundell v. Catterall*, 5 Barn. & Ald. 268; *Olson v. Merrill*, 42 Wis. 203. One is not liable in trespass, who enters upon a strip like this, when it is not covered by water, and digs up the soil for the purpose of taking shell fish. *Peck v. Lockwood*, 5 Day, 22. One who leases the right to anchor a raft opposite his land on a navigable stream, cannot recover the contract price; because he had no right to lease. *Moore v. Jackson*, 2 Abb. N. C. 211. The court in this state has apparently denied the right to wharf out into deep water. *Austin v. Railroad Co.*, 45 Vt. 215. But if the rule should hold otherwise, then the defendant is entitled to a new trial, because, if the court omitted to submit any question, or give any instructions, which ought to have been submitted or given, it is cause for a new trial. *Goodenough v. Huff*, 53 Vt. 482. The defendant's evidence tended to show that he rolled his logs directly from the dump into the water, and this question ought to have been submitted to the jury.

**TAFT, J.** The only exception taken upon the trial below was to the rendition of judgment upon the special verdict. There was no general verdict. No exception having been taken to the action of the court in ruling upon any question which arose prior to or at the time the special verdict was returned, there is no question in this court for revision, save the one taken to the rendition of the judgment; and there was no error therein, if the facts established by the special findings are sufficient to support the judgment rendered. The special verdict, as we construe the answers, established the facts that the plaintiff owned, and was in possession of, a strip of land uncovered by water, between the old fence and low-water mark, over which the defendant rolled his logs, and in so doing became a trespasser. Such facts were sufficient to support the judgment. The many questions discussed by counsel at the hearing are not properly before us, no exception having been taken to the action of the court in passing upon them. It is claimed by counsel that if the court below "omitted to submit any question which ought to have been submitted, or to give any instructions which ought to have been given," a new trial should be granted, and cite the case of *Goodenough v. Huff*, 53 Vt. 482. To entitle the party to the benefit of such questions they should have been reserved in the court below; and an exception to the rendition of the

judgment upon the verdict does not reach back to questions arising during the trial. The judgment should stand, if facts, sufficient to base a judgment upon, were established by the answers to the questions which were submitted; and *Goodenough v. Huff*, *supra*, is not in conflict with this view of the question. In that case the plaintiff sought to recover the amount of a promissory note. One question was whether there was a consideration for the giving of it. The issue was made by the pleadings and the evidence. The court did not submit that question to the jury, only submitting the ones when the note was signed, as that became material under the plea of the statute of limitations, and the amount due upon it. The special verdict established the facts that the defendant signed the note within six years prior to the bringing of the action, and the amount due upon it.

It was incumbent upon the plaintiff, under his claim as to when the defendant signed the note, to show a consideration for the signing. The judgment was rendered, not on the special finding alone, but also on the undisputed facts as to the circumstances under which the defendant signed the note, as shown by the plaintiff's testimony. The exception of the plaintiff reached every ground of the judgment, one of which was that there was no testimony tending to show a consideration; and as the supreme court held there was such testimony, the rendition of the judgment was error. The case, therefore, only amounts to this: that every question involved in the rendition of a judgment is reached by an exception to its rendition, and we think the converse of the proposition is true, that the exception does not reach a question, although raised upon trial, that it was not necessary to determine in order to render a valid judgment.

The counsel have thoroughly argued a question involving the rights of riparian owners; but as a majority of the court think the question is not presented by the record, we refrain from any discussion of it. The duty of the court is to pass only upon questions presented by the record. Judgment affirmed.

#### RUTTER v. SMALL *et al.*

(Court of Appeals of Maryland. December 16, 1887.)

##### 1. ADVERSE POSSESSION—DISSEIZIN—CONVEYANCE BY TENANT IN COMMON.

The owner of a fractional part of the reversionary interest in a life-estate conveyed the whole of the estate, by metes and bounds, to another, in fee, with covenant of general warranty. The grantee and his successors had remained in exclusive possession for more than 20 years when the joint owner of the reversionary estate sought to recover his interest of those in possession. *Held*, that the possession of defendants under the deed of the whole estate in fee was adverse to the title and possession of the co-tenant, and amounted to a disseizin, and that plaintiff's title was barred.

##### 2. SAME—EVIDENCE—DEFENDANT'S KNOWLEDGE OF PLAINTIFF'S TITLE.

In an action against one who has maintained 20 years' adverse possession of the real estate in controversy, the refusal of the court to admit competent evidence respecting defendant's and his grantor's knowledge of plaintiff's title is error without prejudice.

Appeal from Baltimore city court.

Action by Philip J. C. Rutter against Maria L. Small and others, to establish his title to a fractional part of a parcel of ground, claimed by defendants under a deed in fee from plaintiff's co-tenants, and by virtue of 20 years' adverse possession thereunder. There was a judgment for defendant, and plaintiff appealed.

*James Pollard* and *H. W. Latane*, for appellant. *Joseph Packard*, and *Mr. Duffy*, for appellees.

**ROBINSON, J.** The plaintiff is the only surviving child and heir at law of Philip Rutter, and as such is entitled to an undivided one-sixth interest in

the lot of ground in controversy, unless his title thereto is barred by the adversary possession of the defendants. The lot originally belonged to his grandfather, Thomas Rutter, who in 1815 conveyed it to Mary C. Clark for life, and after her death to James Henning and Judge Clark, during their lives, and to the survivor of them. Thomas Rutter died in 1817, leaving six children, one of whom was Philip, the father of the plaintiff. In 1829 all the children of Thomas, with the exception of Philip, conveyed their reversionary interest in the lot to Peter Stein, the deed upon its face reciting an outstanding title in Philip; and in the same year Stein purchased the life-estates of James Henning and Judge Clark, the surviving life-tenants. Being thus entitled to the life-estate, and to an undivided five-sixths in the reversion, Stein entered into possession of the lot, and built thereon a brick dwelling-house and stable, and continued in the exclusive possession and enjoyment of the property until his death, in 1859, and after his death his heirs and devisees continued in the exclusive possession of the property until 1865, when they conveyed it in fee to John Small, Jr., under whom the defendants claim.

Now, whether Stein and the devisees under his will were, upon the determination of the life-estate, in possession merely as tenants in common, and their possession, therefore, in legal contemplation, the possession of the co-tenant, the plaintiff, or whether their possession and acts of ownership amounted to an ouster or disseizin of the plaintiff, are questions which we shall not now stop to consider, for the reason that the possession of Small, and that of the defendants claiming under him, is, in our opinion, a bar to the plaintiff's title. Stein, as we have said, died in 1859, and in 1865 his heirs and devisees conveyed the lot in question by metes and bounds to Small in fee, with a covenant of general warranty. Under this deed Small entered into possession, and continued in the exclusive possession and enjoyment of the property until his death, in 1878; since which time it has been in the exclusive possession and enjoyment of the defendants, claiming under him, a period of more than 20 years. Now, we take the law to be well settled that where one tenant in common conveys the whole estate in fee, and his grantee enters and claims and holds the exclusive possession, the conveyance and entry and possession must be deemed adverse to the title and possession of the co-tenant, and amount to a disseizin, and such possession, if continued for 20 years, will bar the title of such co-tenant.

In *Townsend's Case*, 4 Leon. 52, where the coparceners were in the use of a manor under the statute of 1 Rich. III., and one of them enters and makes a feoffment in fee of the whole manor, all the justices held that this feoffment not only passed the moiety of such coparcener, which she might lawfully part with, but also the other moiety of the other coparcener by disseizin. And in the later case of *Reed v. Taylor*, 5 Barn. & Adol. 575, it was held that, although the general rule is that, where several persons have a right, and one of them enters generally, it shall be an entry for all, for the reason that the entry shall always be taken according to right, yet that any overt act or conveyance, by which the party entering or conveying asserted a title to the entirety, would amount to a disseizin of the other parties, whether joint tenants or tenants in common, or parceners. We may also refer to *Clymer v. Dawkins*, 8 How. 674; *Kittredge v. Locks*, 17 Pick. 247; *Clark v. Vaughan*, 3 Conn. 19; *Clapp's Case*, 9 Cow. 530; and *Thomas v. Rickerling*, 13 Me. 337. These cases rest on the ground that the conveyance in fee, and entry under it, and possession, are notorious and unequivocal acts of ownership of such a nature as to give notice to the co-tenant that the entry and possession are hostile and adverse to his title.

In this case, the undisputed facts show that Small entered into possession under a deed from the devisees of Stein, conveying to him the entire lot in fee, and that he, and the defendants claiming under him, have been in the exclusive possession and ownership of the lot from that time to the present,

a period of more than 20 years. It can hardly be necessary to say that, where one thus enters under a deed conveying the entire property by metes and bounds, his entry and claim of title and possession are to be construed as co-extensive with the terms of his deed. *Prescott v. Nevins*, 4 Mason, 330. Such, then, being the case, we are of opinion that the entry by Small, and the possession by himself, and by the defendants claiming under him, constitute a bar to the plaintiff's right to recover. And if so, there was no error in granting the defendant's second prayer, nor in the verbal instruction by the court that there was no evidence upon which the plaintiff could go before the jury. It follows, also, from what we have said that there was no error in refusing the two prayers offered by the plaintiff. And, besides, they were objectionable, because there was no evidence upon which the jury could find that the life-estates had determined within 20 years before the institution of the suit.

We come, then, to the exceptions to the evidence, the first and second of which it is unnecessary to consider, because the death of the life-tenants was proved in the subsequent progress of the case. In the fourth and fifth the witness testified she was a daughter of Peter Stein, and a devisee under his will, and one of the grantors in the deed to Small, and that she never had heard of an outstanding title to the lot in Philip Rutter or his heirs at law. Now, for the purpose of contradicting the witness, it was clearly competent for the plaintiff's counsel, on cross-examination, to ask her whether she had any conversation with Small at the time of the execution of the deed in regard to Philip Rutter; and, for the same reason, he had the right to ask her why the covenant of general warranty was inserted in the deed? But the error of the court in this respect does not furnish sufficient ground to justify us in sending back this case for a new trial; for, if it be conceded that the witness had in fact heard of an outstanding title in Philip Rutter, and that she had a conversation with Small in regard to it, and further that Small himself had knowledge of such title, this evidence could not in any manner affect the question of disseizin or ouster by Small, if he entered under his deed claiming title to the entire lot, and remained in the exclusive possession thereof for 20 years, the period prescribed by the statute of limitations.

For these reasons the judgment must be affirmed.

### KOCH *et al.* v. MARYLAND COAL CO.

(Court of Appeals of Maryland. December 16, 1887.)

#### 1. PUBLIC LANDS—SPECIAL WARRANTS—TITLE RELATES BACK TO DATE OF WARRANT.

In an action of trespass *quare clausum fregit* the title to the *locus in quo* was claimed by both parties under special proclamation warrants, dated, plaintiffs' March 21, 1794, and defendant's October 4, 1793. *Held*, that defendant's title was superior to plaintiffs', as under special warrants the title to land relates back to their date, such warrant being equivalent to a designation of the location by actual survey.

#### 2. TRESPASS—TO LAND—INSTRUCTIONS.

On the trial of an action for trespass *quare clausum fregit*, for mining coal on plaintiffs' location, the latter, after admitting the correctness of certain plats in evidence, proved the places of the alleged trespass, and that they were "also within the lines of defendant's tract," "and where the two said tracts lie foul of each other as located on the plats." *Held*, that an instruction assuming that state of facts, given on defendant's request, was not erroneous.

Appeal from circuit court, Garrett county.

Action of trespass brought by William H. Koch and John J. Keller against the Maryland Coal Company, for mining coal on plaintiffs' land. Judgment for defendant, and plaintiffs appeal.

*Wm. Brace* and *B. A. Richmond*, for appellants. *Wm. E. Walsh*, for appellee.

MILLER, J. This action of trespass *quare clausum fregit* was brought by the appellants against the appellee. The trespass complained of consisted in mining coal on part of a tract of land called "Republic." Title to the *locus in quo* was claimed by the plaintiffs under the patent for "Republic," and by the defendant under a patent for a tract called "Mount Pisgah." Defense on warrant was taken, under which locations were made by both parties, and plats returned by the surveyor. At the trial, after the evidence on both sides was closed, the plaintiffs asked for two, and the defendant for seven, instructions to the jury. The court granted both of those asked by the plaintiffs, and also the first, second, third, fifth, and sixth of those asked by the defendant, and rejected its fourth and seventh. The plaintiffs excepted to the granting of the defendant's prayers, and specially objected to the first, second, and third, upon the grounds that there was no evidence to sustain them; that they assumed facts, and submitted questions of law to the jury. The verdict was for the defendant, and the plaintiffs have appealed.

The defendant's second prayer places its defense entirely upon paper title, and tells the jury that if they find the issue of the warrant and patent for "Mount Pisgah," and the mesne conveyances and facts as to the derivation of title thereto to the defendant, then their verdict must be for the defendant. The first and third also set up title by possession in the defendant, and those under whom they claim; but it is needless to consider them if we hold that the defendant's paper title is better than that of the plaintiffs', because the latter rely upon their paper title derived under the patent for "Republic," and have offered no evidence tending to show that they ever acquired title to the *locus in quo* by possession. The whole controversy, therefore, depends upon whether the court was right in granting this second prayer. It has been argued by counsel for appellants that this prayer is defective, because it assumes that the defendant's location of the place of the trespass as within the lines of "Mount Pisgah" is correct. This would be a serious objection to the prayer if the plaintiffs had not themselves proved and admitted the correctness of this location, and if we could see from the record that there was any dispute upon this point. But the exception shows that the plaintiffs, after offering in evidence their title papers, gave evidence tending to prove that they were correctly located on the plats, and that the defendant had mined coal within the lines of their part of "Republic," as so located, "[all of said places of alleged trespass being also within the lines of defendant's tract called 'Mount Pisgah,' as located by it, and where the two said tracts lie foul of each other as located on the plats,]" and then rested their case. What is thus stated in brackets was part of the plaintiffs' own proof, and is a clear admission by them that the lines of the two tracts were "foul of each other" at the place of the alleged trespass. The only other reference to locations found in the exception is that the defendant offered evidence tending to prove that all its title papers were correctly located on the plats. From all this it seems to us to be very clear that there was no controversy about the correctness of the locations on both sides, and the plaintiffs cannot object to this prayer, on the ground that it assumes a fact which they themselves had proved and admitted to be true.

The question, then, is, which is the superior title,—that derived under the patent for "Republic," or that derived under the patent for "Mount Pisgah?" The patent for "Republic" bears date the fifth of September, 1796, but purports to have been granted on a certificate of resurvey made and returned to the land-office on the tenth of March, 1794. The patent of "Mount Pisgah" is dated the fifteenth of July, 1795, but the certificate on which it was granted was not made and returned into the land-office until the twenty-ninth of September, 1794, more than six months after the return of the certificate of "Republic." In this state of facts the appellants contend that the title under their patent relates back to the date of their certificate, which is older than

that for "Mount Pisgah," and therefore they have the better title. If there were no other objections to their title, and if the patents for these two tracts had been issued under common warrants, and the composition money had been duly paid under the elder certificate, there could be no doubt as to the correctness of their contention. Dorsey, Ej. 98, note 1, and cases there cited. But both these patents were issued under special proclamation warrants; that for "Mount Pisgah" being dated the fourth of October, 1793, and that for "Republic" the twenty-first of March, 1794; and the appellee contends that the doctrine of relation carries, in such cases, the title back to the date of the warrant, and it therefore has the superior title. This difference as to the operation of the doctrine of relation, in cases of patents under special warrants which specifically describe the land, was very clearly laid down by the chancellor in the case of *Cunningham v. Browning*, 1 Bland, 299, where the whole land system of the state, and the practice of the land-office, are reviewed, in a very able and elaborate opinion. "It is a well-settled general rule," says the chancellor, "that under a special warrant the title to the land commences from the date of the warrant itself, because the description of its location embodied in the warrant has distinguished it from every other tract. The warrant is therefore in itself equivalent to a designation by an actual survey. So, too, the title commences with the date of a warrant of resurvey, and of an escheat, or a proclamation warrant. But upon a common warrant it only commences with the date of the certificate of survey, or from the date of the entry of a special location upon the surveyor's book. The land arrived at becomes thus bound, because of its having been by some of these modes accurately described and distinctly specified. The reason of the rule is the same in all these cases, and the evils to be avoided alike in all." 1 Bland, 326. The decisions of the chancellor as judge of the land-office have always been held by the profession as of high authority in all matters pertaining to the ejectment law of the state. This decision was made more than half a century ago, and we believe it has ever since been accepted by ejectment lawyers as founded in sound reason, and stating the correct rule on this subject. Again, in the notes by Mr. Gill to the lectures of Judge Dorsey, on the Action of Ejectment in Maryland, which is also a work of high authority in this state, the same distinction is made and the same rule laid down. Dorsey, Ej. 103. The precise question now before us as to the effect of a proclamation warrant has never been decided by the court of appeals, but in *Smith's Lessee v. Devecmon*, 30 Md. 478, the case of *Cunningham v. Browning* is referred to with approval, and it was there said by this court that "in that case, as well as in the case of *Norwood v. Owings*, 1 Har. & J. 296, it was held that the title of the party commenced from the date of an escheat warrant, and that the patent when granted related back to the date of the warrant." We agree with the chancellor that this doctrine of relation is founded on common-law principles, and that under it the title begins with the first authoritative and certain designation or description of the particular tract of land intended to be taken up. In the case of a common warrant, which simply directs the surveyor to lay out a specified quantity of land, anywhere, without regard to any particular space or tract, the certificate of the surveyor first contains the requisite description or designation, and the title commences from the date of such certificate. But in case of special warrants which on their face designate and describe the particular land intended to be affected, the title begins with the date of the warrant. In all cases, however, the party, in order to successfully invoke the doctrine, must comply with the law and the rules of the land-office by duly paying the composition or caution money. Such we understand to be the general rules on this subject as settled by ample authority,

It follows from what has been said that, in our opinion, the appellee has the better title to the land in dispute, and this, as it seems to us, disposes of the present appeal. Judgment affirmed.

BAKER *et al.* v. LAUTERBACK.

(Court of Appeals of Maryland. December 13, 1887.)

## 1. PARENT AND CHILD—CONTRACT OF APPRENTICESHIP OF SON FOR TERM BEYOND MAJORITY.

Code Md. art. 6, § 20, provides a method by which a father may bind his son as apprentice until he reaches the age of 21. A mother entered into a written agreement with defendants to bind her son, then 20 years of age, as apprentice for 5 years. *Held*, that the contract was void.

## 2. FRAUDS, STATUTE OF—AGREEMENT NOT TO BE PERFORMED WITHIN A YEAR—RATIFICATION BY PERFORMANCE—PENALTY.

The mother of deceased attempted by writing to bind him, then 20 years of age, as apprentice to defendants, for 5 years, for a stipulated sum; \$200 to be retained by defendants from the wages as a penalty if deceased left for any cause. The contract was not signed by defendants. Deceased remained with them after coming of age, until killed by accident. Defendants paid his wages, less the \$200. *Held*, that the contract was void, under the statute of frauds; but as deceased continued to work after coming of age, with knowledge of the terms, he would be bound to that rate of compensation, but the forfeiture could not be enforced.<sup>1</sup>

Appeal from circuit court, Howard county.

Catherine Lauterback, administratrix of John Lauterback, plaintiff, sued Baker Bros. & Co., defendants, to recover balance due for services of deceased. Judgment was rendered for plaintiff for \$160, and defendants appealed.

*John T. Mason, W. A. Hammond, and E. C. Williams*, for appellants. *T. C. Weeks, R. D. Johnson, and W. Reynolds*, for appellee.

BRYAN, J. John Lauterback entered the service of Baker Bros. & Co. on the first day of March, 1880, and remained in their employment until August, 1883, when he was killed by an accident. He was 20 years of age on the twenty-ninth of March, 1880. His father died some years previously to his entering this service. But it appears that his mother signed a written contract with Baker Bros. & Co., by which she undertook to bind him to them as an apprentice for five years to learn the art and trade of glass-blowing. The contract stipulated that, if the boy was considered competent to learn and be instructed, he was to receive for his services one-half of the rate of wages paid journeymen for similar work for the first four years, and two-thirds of such wages for the fifth year; and it was further stipulated that \$200 should be held by the employers out of his wages as security, to be paid at the expiration of the term of the apprenticeship, or forfeited if he should leave their employment for any cause whatever before the expiration of the term of five years. All the wages were paid with the exception of \$200, and the present suit was brought by the administratrix of the deceased apprentice against Baker Bros. & Co. to recover this amount. The verdict was for \$160.

The contract was not signed by the employers, but only by the mother of the boy. In the view which we have taken of the case, this circumstance is immaterial. A father may bind out his son as an apprentice until he reaches the age of 21 years, provided he pursues the mode authorized by the twentieth section of article 6 of the Code; but a contract of apprenticeship executed by the mother is simply void. The boy would not be obliged to serve according to the terms of such an instrument; nor would the employer, by force of it, acquire any control over him. He did, however, serve for three years and

<sup>1</sup> A contract within the provisions of the statute of frauds relating to contracts not to be performed within a year, to be valid, must be signed by both parties to it. *Wilkinson v. Heavenrich*, (Mich.) 26 N. W. Rep. 139. If the contract cannot be performed by either party within the year, part performance will not take it out of the operation of the statute. *Wolke v. Fleming*, (Ind.) 2 N. E. Rep. 325; *Henry v. Wells*, (Ark.) 3 S. W. Rep. 637. But when the party employed has continued, from year to year, to perform the services, it will be presumed that both parties have assented to the renewal of the contract. *Sines v. Superintendent of Poor*, (Mich.) 25 N. W. Rep. 485. For a further discussion of that provision of the statute of frauds relating to contracts not to be performed within one year, see *Treat v. Hiles*, (Wis.) 32 N. W. Rep. 517, and note; *Railroad Co. v. English*, (Kan.) 16 Pac. Rep. —; *Ward v. Matthews*, (Cal.) 14 Pac. Rep. 604.

five months, with a full knowledge of the terms of this contract. He knew, therefore, the rate of compensation which his employers expected to pay for his work; it would not then be just that he should receive more. The law would imply a contract on the part of his employers to pay him what his services were reasonably worth. It would not, however, imply a contract on the part of the boy to serve for five years, nor to pay a forfeiture in case he should leave the service before the expiration of that time. A contract of this kind is required, by the fourth section of the statute of frauds, to be in writing. The terms of the statute are that no action shall be brought "upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." If, therefore, the boy had in express terms made a verbal contract to serve for five years, it could not have been enforced against him by the other party. And if, after serving a portion of the time, he should refuse to carry out his contract, and bring suit to recover the value of the services rendered, the verbal contract would not avail the employer as a defense. It could not be set up as a contract at all; the breach of it would impose no liability which the law could enforce; the obligation to perform it could not be maintained in an action at law. In Browne on the Statute of Frauds the law is thus stated: "As a general proposition, however, we shall hereafter see that a verbal contract within the statute cannot be enforced in any way, directly or indirectly, whether by action or in defense." Section 122. "The supreme court of Connecticut, in a case where the plaintiff, by oral agreement, bound himself to serve the defendant for a term longer than one year, for a consideration to be paid at the end of that time, and having repudiated the contract, and quitted his employer at the end of six months, brought his action to recover the value of the services so rendered, held that he could recover, and that the defendant could not set up the existing verbal agreement to defeat his claim." Section 122a. "The clear rule of law is that such a contract cannot be made the ground of defense any more than of a demand. The obligation of the plaintiff to perform it is no more available to the defendant in the former case than the obligation of the defendant to perform it would be to the plaintiff in the latter case." Section 131. It appears to us, therefore, upon the uncontested facts in the case, that the plaintiff is entitled to recover the full value of the boy's services, less such sums as have been paid. It seems to be unnecessary to notice in detail the rulings of the court below. It is sufficient to say that they accord with the views which we have expressed.

It must be observed that, although contracts within the statute of frauds are void unless they are in writing, yet the voluntary performance of them is in no respect unlawful. If services be rendered in pursuance of a contract of this kind by one party, and be accepted by the other, they must be compensated. *Ellicott v. Peterson's Ex'rs*, 4 Md. 491. And if an action be brought against a defendant for acts done, which were in performance of such a contract, or authorized by its terms, no recovery can be had against him. *Cane v. Gough*, 4 Md. 333; Browne, St. Frauds, § 133. It is said that the contract operates as a license to do these acts, although it cannot be set up as conferring any right of action. As said by Lord ABINGER in *Carrington v. Roots*, 2 Mees. & W. 248, in speaking of a case within the statute: "I think the contract cannot be available as a contract at all, unless an action can be brought upon it. What is done under the contract may admit of apology or excuse, *diverso intuitu*, if I may so speak; as where, under a contract by parol, the party is put in possession, that possession may be set up as an excuse for a trespass alleged to have been committed by him. \* \* \*" The agreement might have been available in answer to a trespass by setting up a license; not setting up the contract itself as a contract, but only showing matter of excuse for the trespass. Judgment affirmed.

## NEW YORK, P. &amp; N. RY. CO. v. BATES.

(Court of Appeals of Maryland. December 16, 1887.)

## 1. CONTRACTS—CONSTRUCTION—PROVINCE OF COURT—INCONSISTENT INSTRUCTIONS.

Where the jury are allowed by conflicting instructions to place two different and inconsistent interpretations on the same state of facts in a written instrument, which it is the province of the court to construe, it is error for which a new trial will be granted.

## 2. PRINCIPAL AND AGENT—APPOINTMENT—AUTHORITY.

In an action of *assumpsit* for unpaid personal services against a railroad company, it appeared that plaintiff authorized an ex-president of the road, by letter, in relation to his vouchers for such services, which had been left with the ex-president for settlement prior to his resignation, as follows: "I hereby authorize you to make the best settlement you may be able to do for me." *Held*, that the ex-president by virtue of this letter from plaintiff was authorized as his agent, not only to determine upon the amount he should receive, but to collect and receipt for the money coming to plaintiff under the settlement.

## 3. RAILROAD COMPANIES—ACTION AGAINST, FOR SERVICES—VOUCHERS.

In action of *assumpsit* for personal services against a railroad company, defendant asked that the jury be instructed that if they found from the evidence that the unpaid vouchers of plaintiff were not signed and approved by one P. until after he had ceased to be president of the road, then, in the absence of proof that any other official of the company had authority to sign and approve them, the vouchers in themselves were not evidence of indebtedness, and the jury were not at liberty to so consider them. *Held* improperly refused.

Appeal from circuit court, Worcester county.

Action in *assumpsit* by John L. Bates against the New York, Philadelphia & Norfolk Railway Company for personal services. The facts are stated in the opinion.

J. W. Crisfield, for appellant. John H. Handy, for appellee.

MILLER, J. This was an action of *assumpsit*, brought by the appellee against the appellant to recover for 13½ months' services from the thirteenth of November, 1882, to the thirtieth of December, 1883, as superintendent of the construction of part of the defendant's road, at \$75 per month. The amount claimed to be due by the bill of particulars, after deducting credits, was \$773.21, and at the trial the jury gave a verdict in favor of the plaintiff for that sum. The exceptions taken relate entirely to the rulings of the court upon certain prayers offered by the defendant, (none appearing to have been offered by the plaintiff,) and these rulings alone are before us for review.

There was some discussion at bar as to the pleadings, but none of the prayers make any reference to the pleadings, nor was there any ruling made by the court below involving the admissibility of testimony. No question, therefore, as to the sufficiency of the pleadings is open for review in this court. *Leopard v. Canal Co.*, 1 Gill. 222; *Dorsey v. Dashiell*, 1 Md. 207.

In our opinion, the learned judge before whom this case was tried fell into error in his action in granting the defendant's second prayer as modified by him, and in granting, at the same time, the defendant's sixth prayer. By the first the jury were instructed that, if they found the facts stated in the prayer and in the modification thereof made by the court, they were "at liberty to consider the letter of the twenty-first of February, 1884, from the plaintiff to the witness Painter, as authority to said Painter simply to procure an adjustment and allowance of the vouchers therein mentioned by the defendant;" and by the second they were instructed that, upon finding the same facts, they were at liberty to consider this letter "as authority to said Painter to adjust or to receive payment of the vouchers above referred to." To allow the jury upon the same state of facts to place two different and inconsistent interpretations upon a written instrument, which it was the province of the court itself to construe, was certainly a fatal error in the trial of the case. The jury ought to have had a plain and definite instruction from the court as

to the extent of the authority which the plaintiff gave to Painter by this letter; for, in our judgment, the case in a great measure depends upon its true construction in this respect, in view of the facts disclosed by the record. What, then, is the construction and effect of this letter in view of the testimony found in the record? The two main witnesses in the case were the plaintiff and Uriah H. Painter. On some points their testimony is conflicting, but there seems to be no dispute as to the following facts: Painter was president of the defendant company during the period covered by the plaintiff's claim, and so continued up to the twenty-first of January, 1884, but on that day he ceased to be president, and was succeeded by Mr. William L. Scott. The plaintiff sent and delivered the monthly vouchers for his salary to Painter, in Washington, and at the latter's request. These vouchers, when thus sent and delivered, were receipted by the plaintiff in accordance with the custom and requirement of the company in regard to all vouchers. Those of them covering the amount sued for were never paid by the company, and remained in Painter's possession up to the date of the letter in question. Thus far there appears no conflict of testimony. Painter then testifies that on the thirtieth of December, 1883, he had a conversation with the plaintiff about his vouchers in his (witness') office in Washington; that he then told the plaintiff that he (witness) had disposed of his interest in the railroad, and had nothing more to do with it; that he (witness) had some vouchers of his own, and, if the plaintiff desired it, he would put plaintiff's vouchers on the same footing with his own, and plaintiff said, "That was all right;" that he took out the plaintiff's vouchers, and said that he had not up to that time approved them, and told him they had never been adjusted, and that he would see the general (Gen. William Painter, the brother of the witness, and the vice-president of the company) about them, and see what could be done, and plaintiff said, "All right," and he and witness went together to Philadelphia the next day; that in the latter part of February, 1884, Gen. Painter brought him the letter in question, dated the twenty-first of February, 1884. This letter is conceded to have been written and signed by the plaintiff, and is as follows:

"U. H. Painter, Esq.—DEAR SIR: In regard to the vouchers of mine sent to you, for service as supt. of construction during the year 1883, I hereby authorize you to make the best settlement you may be able to do for me.

"Yours, respectfully,

J. L. BATES."

Reading this letter in the light of the facts above stated, or, indeed, in the light of any testimony on the subject to be found in this record, we are clearly of opinion the plaintiff thereby authorized and empowered Painter, who was then out of office, and no longer had authority to act for the company, to present these unpaid vouchers or claims, and to obtain "the best settlement of them" he could; and that the term "settlement," as here used, includes, not only the determination of the amount due, if there was any dispute on that subject, but the collection and receipt of the money coming to the plaintiff under such settlement. To this extent, as it seems to us, the authority plainly goes, and we are unable to place a more restricted construction on the language used. Merely to have the vouchers "adjusted and allowed," without collecting and receiving the money, would not, in our judgment, gratify the broad terms of the letter, nor accomplish the object the plaintiff had in view in writing it. He lived in a distant locality, and what he wanted was to get the money he claimed to be due him on these vouchers; and thinking that Painter, who had similar unpaid claims of his own, would be the best person he could employ for that purpose, he made him his agent to obtain what he could in payment therefor. Such being the extent of his authority, what did Painter do under it? He testifies that, in pursuance of this letter, he settled the vouchers mentioned in the bill of particulars with the company; that he made the settlement with Mr. Cassatt, who was the agent of John Keller, the con-

tractor for the construction of the road; that in the settlement he put the plaintiff's vouchers on the same footing with his own, and they were all settled for and delivered to the company at the same time; that the company accepted the vouchers and the settlement, and in the settlement for all these vouchers, including those of the plaintiff as well as his own, the sum of \$5,000 was paid to him in March, 1884, and the remainder in April, 1884. It is true that he nowhere says that he ever paid any of this money over to the plaintiff, and, from the fact that this suit is brought, we assume he did not. But if the company acted in good faith in the matter of the settlement and payment of the money to Painter, there is no principle of law or demand of justice that requires them to pay it over again to the plaintiff. He was the plaintiff's agent to collect and receive the money, and if he has defrauded his principal by not paying it over, the remedy of the latter is against him, and not against a third party dealing with him in good faith as such agent.

The defendant's fourth prayer meets our views of the case as above expressed, and should have been granted. Most of the hypothesis of facts set out in this prayer depends upon the testimony of Painter; but the prayer leaves it to the jury to find whether they were true or not. The credibility of the witness was, of course, entirely for the jury to pass upon. In the defendant's first, second, and third prayers there are some defects which justified their rejection. The first fails to leave it to the jury to find that the company acted in good faith, and the second and third do not, in plain terms, leave it to them to find that Painter had ceased to be president when the letter was written.

We are also of opinion that the defendant's fifth prayer announces a sound legal proposition, and should have been granted. If the jury found from the evidence, as the prayer puts it, that these unpaid vouchers were not signed and approved by Painter until after he had ceased to be president, then it seems to us plain, in the absence of proof that any other official of the company had authority to sign and approve, that these vouchers were not, of themselves, evidence of any indebtedness from the company to the plaintiff, and the jury were not at liberty so to consider them. After he had ceased to be president, he could do no act, in that capacity, to bind the company.

Judgment reversed and new trial awarded.

#### DORBERT v. STATE.

(*Court of Appeals of Maryland.* December 16, 1887.)

##### LOTTERIES—EVIDENCE—"POLICY BOOKS."

On the trial of an indictment under Rev. Code Md. art. 72, § 163, prohibiting the keeping of any place for the sale of lottery tickets, certain slips of paper, known as "policy books," were, over objections, admitted in evidence as inculpatory defendant. The record on appeal falling to show the circumstances of the admission, *held*, that the presumption must prevail that the ruling of the trial court was correct.

Appeal from criminal court of Baltimore city.

Defendant, George Dorbert, was indicted for owning and keeping a place for the sale of, and for selling, lottery tickets. He was convicted, and appeals.

*T. C. Ruddell*, for appellant. *Atty. Gen. Roberts*, for appellee.

**YELLOTT, J.** The appellant was indicted and tried in the criminal court of Baltimore city. The first count charged him with selling lottery tickets to one Robert Thornton. On this count there was a verdict of acquittal. There were two other counts in the indictment,—the second charging him with keeping a certain place for the purpose of selling lottery tickets; and the third, with permitting a certain house, of which he was the owner, to be used as a place

for the sale of such tickets. On these counts there was a verdict of guilty. The statute prohibits the keeping, or allowing to be kept, any house, office, or other place for the purpose of selling or bartering any lottery tickets, policy, certificate, or any other thing by which the vendor or other person promises or guarantees that any particular number, character, ticket, or certificate shall, in any event or on the happening of any contingency in the nature of a lottery, entitle the purchaser or holder to receive money, property, or evidence of debt. The penalty prescribed for this offense is \$1,000, to be recovered either by indictment or by action of debt in the name of the state. Rev. Code, art. 72, § 163.

The record in this case is so imperfect that it is impossible to ascertain on what ground the ruling of the court below was founded. It contains but a single exception. It seems that the state offered in evidence certain slips of paper, which are known as "policy books." This evidence was objected to; but the court ruled that it was admissible, and the exception to the ruling is in these words: "At the trial of this case the state, to maintain the issue on its part, offered in evidence certain slips of paper, which are known as 'policy books,' to which the defendant objected; but the court overruled the objection; to which ruling the defendant did then and there except, and prayed the court to sign this his bill of exceptions, which is accordingly done. \* \* \* These slips of paper are not incorporated in the record, which contains no evidence whatever. This court has, therefore, no means of knowing under what circumstances and in connection with what proof these slips of paper were introduced as evidence, and is thus unable to determine whether the ruling of the court below was erroneous or otherwise. Nor can it seek for information *de hors* the record. An appellate court, in deciding on an appeal, cannot travel beyond the record, and recognize the existence of facts not therein set forth. *Mahoney v. Ashton*, 4 Har. & McH. 295; *Bradstreet v. Potter*, 16 Pet. 317. The record should disclose the facts relevant to the ruling excepted to. An appellate tribunal has no other source of information, and when a party invokes the interposition of this court, on the ground that he has been aggrieved by an erroneous ruling, if he fails in a proper presentation of the questions involved in controversy, he has no just reason to complain if his efforts to obtain a reversal of an adverse decision prove to be abortive. "A judgment is the highest exercise of judicial power," and cannot be reversed on a bill of exceptions which presents nothing for determination. *Burtils v. State*, 4 Md. 277; *Reynolds v. Negroes Juliet*, 14 Md. 120; *Clemens v. Mayor, etc.*, 16 Md. 212. The principle settled by adjudication is that, when a record presents no question for determination, the presumption that all things have been rightly and properly done, and that the decisions of a court of competent jurisdiction are well founded and its judgments regular, must prevail. In the disposition to be made of this appeal, this legal maxim must necessarily exercise a predominant control. It must be presumed that the learned judge in the court below had all the information presented to him which has been withheld from this court, and that his ruling was in conformity with established principles. His judgment should therefore be affirmed.

Ruling affirmed, and cause remanded.

#### REES *et al.* v. LOGSDON *et ux.*

(Court of Appeals of Maryland. December 15, 1887.)

##### 1. MORTGAGES—COLLATERAL SECURITY—MERGER.

Where a mortgage reciting a money indebtedness, payable at a definite time, was, in fact, given to secure payment for property purchased under a pre-existing agreement which allowed payment to be made in material, and was silent as to time, and both parties afterwards continued to act under the terms of the agreement, and not under those of the mortgage, *held* that, as between the parties, the mortgage was merely collateral security, and that the agreement was not merged.

**2. SAME—TIME OF PAYMENT.**

As between the parties, the time expressed in a mortgage given as collateral to secure payment for property purchased under a pre-existing agreement, silent as to time, does not run against, or impair the privileges of the purchaser under such agreement, who has committed no default, when prevented by the vendor's wrong from fulfilling the terms of that contract.

Appeal from circuit court, Allegany county. In equity.

Bill filed by James B. Rees and Robert Burkhiser, appellants, against Joseph Logsdon and wife, to foreclose a mortgage. The facts sufficiently appear in the opinion.

*Ferd. Williams* and *C. W. Daily*, for appellants. *D. A. Richmond*, for appellees.

STONE, J. In May, 1883, the appellants were the owners of a saw-mill, and the appellee the owner of a tract of timber land in Allegany county. In that month they entered into the following agreement:

"This agreement, made this seventh day of May, 1883, between Joseph Logsdon, of Allegany county, Md., and Burkhiser & Rees, of Mineral county, W. Virginia. The parties of the second part do agree to move the saw-mill on the property of the party of the first part, in Allegany county, Md., on or before the tenth day of June, 1883; and the said party of the second part agrees to saw said Logsdon's timber for four dollars per thousand feet; and the said party of the second part do agree to take all the sawing out in lumber, that is, such lumber as is suitable for wagon stuff, cut according to dimensions given. Said Logsdon does agree to furnish the lumber at \$16 per thousand, delivered at the factory of Germond, Rees & Co., in Keyser, W. Virginia. The said Logsdon further agrees to keep the mill in logs as far as possible; and the party of the second part agrees to saw good lumber. And the parties of the second part do further agree that the party of the first part can have the privilege of taking the mill at fourteen hundred dollars, and pay for it all in lumber at \$16 per thousand, delivered at the factory of Germond, Rees & Co., in Keyser, W. Virginia.

"Witness our hands and seals this the seventh day of May, 1883.

"BURKHISER & REES. [Seal.]  
"JOSEPH LOGSDON." [Seal.]

Soon after the saw-mill was moved on the land of Logsdon, the appellee, he exercised the option given him under the agreement, and purchased the mill. Security was demanded by the appellants, and Logsdon and wife executed a mortgage to the appellants to secure the sum of \$1,400. The mortgage itself is in the common form, and makes no allusion to the agreement or for what it was given except that it recites an indebtedness on the part of Logsdon to the appellants in the sum of \$1,400. There is, however, no doubt whatever that this mortgage was given to secure the payment for the mill. On that point there is no conflict in the evidence. The appellants subsequently filed a bill to foreclose the mortgage, and the defense set up by the appellee is that, by the agreement under which he purchased the mill, he was to pay for it in lumber, and that he began his payments and continued them until the appellants refused to receive any more lumber, and so the matter rested until suit was brought.

The substantial question in the case is, therefore, whether the agreement is merged in the subsequent mortgage, or whether the mortgage was taken merely as collateral security for the performance of the agreement. There is no doubt that the acceptance of a security of a higher nature in lieu of or in satisfaction of one of an inferior nature operates as an extinguishment or merger of the latter; but where such security is accepted merely as an additional or collateral security for a pre-existing debt, it is equally clear that the doctrine of extinguishment or merger does not apply. *Brengle v. Bushay*, 40 Md. 141, and the cases there cited. The question whether the mortgage

in this case was taken merely as collateral security is therefore one of fact, and the burden of proof is upon the appellee to show that such was the case. Taking the whole evidence, we think the appellee has made out his case with reasonable certainty. There is a conflict between the parol proof offered by the appellants and the appellee. They themselves are the only witnesses of any importance; but the written proof, as well as the parol, we think, establishes the following facts: The appellants, at the time they made the agreement of May 7, 1883, were carrying on a spoke factory, and were in want of timber for the use of the factory. They first agreed with the appellee Logsdon to transport their mill to his land, and to saw timber for him, and agreed to take all their pay for such sawing in lumber. This is the first part of the agreement. The second part of it gave Logsdon the option to purchase the mill, and to pay for it all in lumber. This agreement shows that the principal object of the appellants at the time the agreement was made was to procure lumber for their factory. The sale was made within 10 days after the mill was taken upon the land of Logsdon, and the mortgage was executed in a very short time afterwards. At the time of the execution of the mortgage, the spoke factory of the appellants was in full operation, and the same desire existed on their part to get timber for their factory that existed when they made the agreement. This is conclusively shown by the fact that the appellee made some payments in lumber, which were received and receipted for by the appellants, as a part payment on the mortgage notes, at the rate specified in the agreement. In the face of the fact that after the mortgage was given both parties were acting under the terms of the agreement, and not under those of the mortgage, it is impossible to conclude that the agreement was merged and done away with, and the mortgage substituted in its stead; and so they continued to act until the factory was closed, either by the failure of appellants or from other causes, and then, and not till then, the appellants wrote to the appellee telling him not to send any more lumber. It is also clearly shown that the appellee had an abundance of timber, and was ready and willing and able to pay off his indebtedness in lumber within the time specified in the mortgage, to-wit, six and eighteen months, and that he was only prevented from doing so by the peremptory order of appellants.

We are therefore of opinion that the mortgage in this case was merely an additional or collateral security, and that the agreement was left in full force and effect. This agreement the appellants themselves violated; but whether such violation was the result of their fault or misfortunes does not appear from the record. At any rate, they, and not the appellee, broke the contract. Every fact in the record points to the conclusion that the appellee made this purchase and gave this security because of the sure and certain market for his sawed lumber which the agreement guaranteed him. It is no concern of the appellants whether he did or could sell his lumber elsewhere. The agreement is silent as to the time of the payment for the mill. This omission is supplied by the mortgage, which fixed the times of payment at six and eighteen months. The appellee had the right then, and has the same right now, to pay for it in lumber at the times specified in the mortgage. Had the appellants not broken their contract, and had the appellee failed to pay the amount of \$700 in lumber at the expiration of six months from the date of the mortgage, the appellants would have been entitled to resort to the security of their mortgage. But by preventing the appellee from fulfilling his contract and disposing of his lumber to them at the time he anticipated doing so, the appellants cannot prevent his doing so now. To allow that would be to allow the appellants to take advantage of their own wrong. He is therefore clearly entitled to the privilege of paying his debt, if he so elects, according to the agreement, in lumber.

But stress has been laid in the argument against the decree of the lower court, because the decree gave the appellee three and nine months in which

to perform his contract. This is just one-half the time allowed him by the original agreement, and the court below could not well have given less time, if it held, as it did, and we think rightly, that the appellee was entitled to go and perform his contract as he had originally made it.

Objection is also made to the decree because no interest has been allowed the appellants, although the mortgage notes bear interest. Viewing as we do the mortgage as a mere collateral security for the payment of the debt, the interest is not material. The rights of the parties depended on the agreement. If the appellee had made default, then perhaps the appellants, in resorting to the mortgage, would have been entitled to their interest. But the appellee has made no default, and until he does, no interest should be computed against him, as certainly none was contemplated by the agreement. But even if the agreement itself had called for the payment of interest, a court of equity would have been justifiable in offsetting such a claim by the damages and loss which the appellee sustained by the depreciation of the market for his timber that he relied on under his agreement with the appellants, and which they wrongfully deprived him of.

In conclusion, we may say that this is a case entirely between the parties to the agreement; that no rights of creditors or any third parties are involved; that certain legal propositions and considerations that might be properly invoked, if the rights of third parties were involved, can have no application here, and the decree will be affirmed. Decree affirmed and cause remanded.

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WALKER v. OSWALD, Clerk of Circuit Court.

(Court of Appeals of Maryland. December 16, 1887.)

1. ELECTIONS—MAJORITY OF VOTES—ACQUIESCENCE OF THOSE NOT VOTING.

The rule that, when an election is held at which a subject-matter is to be determined by a majority of the voters entitled to cast ballots thereat, those absenting themselves, and those who, being present, abstain from voting, are considered as acquiescing in the result declared by those actually voting, applies equally where, at a general election, the measure, though receiving a majority of the votes cast on that subject, failed to receive a majority of the votes cast upon some other subject.

2. SAME—HIGH-LICENSE ACT—MAJORITY OF VOTES CAST.

Act Gen. Assem. Md. Jan. Sess. 1886, c. 248, § 7, relating to the adoption of high license, after providing that "the voters of said county at the general election" shall determine by ballot upon the adoption or rejection of the provisions of the act, and after directing the form of ballots to be used, by making it the duty of the judges to "make a full return of the votes cast as aforesaid," (on which return the clerk is to proclaim the result,) makes the adoption of the act dependent solely upon the votes cast for and against it.

3. SAME.

Section 8, giving the act effect "if a majority of the voters of said county shall determine by their ballots" in its favor, must be read in conjunction with section 7, and, thus read, clearly means, not a majority of all the voters of the county voting upon some other subject, but a majority of all the voters of the county who vote upon this act.

Appeal from circuit court, Washington county.

*Mandamus.* Petition filed by William W. Walker, appellant, claiming that George B. Oswald, clerk of the circuit court of Washington county, has not correctly proclaimed the result of the election at which the so-called "high-license law" was submitted to the voters of the county, and praying for a writ of *mandamus* against the appellee. The facts sufficiently appear in the opinion.

*Edward Stake*, for appellant. *M. L. Keedy* and *F. F. McComas*, for appellee.

*McSHERRY, J.* By an act of the general assembly of Maryland, passed at the January session of 1886, c. 248, after making provision as to the mode of procuring and the price to be paid for a license authorizing the sale of spirit-

uous, fermented, and intoxicating liquors in Washington county, it is enacted as follows:

"Sec. 7. And be it enacted, that, upon the first Tuesday after the first Monday of November, eighteen hundred and eighty-six, the voters of said county, at the general election then to be held, shall determine by ballot whether or not the provisions of this act shall go into effect in said county. Those favoring the act will cast their ballots with the words written or printed thereon, 'For the high-license law;' and those opposing the act will cast their ballots with the words written or printed thereon, 'Against the high-license law;' and it shall be the duty of the judges of said election to make a full return of the ballots cast as aforesaid, as now provided by law, to the clerk of the circuit court for Washington county, who, upon the certified returns, shall immediately make proclamation as to the result of said election.

"Sec. 8. And be it enacted, that, if a majority of the voters of said county shall determine by their ballots in favor of the 'high-license law,' and the clerk of said court shall so proclaim to the people of said county, the provisions of this act shall take effect on the first day of May, eighteen hundred and eighty-seven."

At the general election which was held on the second day of November, 1886, in Washington county, the aggregate number of votes cast for the several candidates for congress was 8,680. The number of votes cast "for the high-license law" was 4,314, and the number "against the high-license law" was 3,825. On the fifth day of November the clerk of the circuit court for that county issued his proclamation setting forth the number of votes cast both for and against the high-license law, and certifying and declaring "that it appears from said returns, now on file in my office, that upon said question a majority of the voters of said county have determined by their ballots in favor of 'the high-license law.'" On the second of May following the appellant, a dealer in spirituous, fermented, and intoxicating liquors, in the county named, applied to the clerk of the circuit court for a license authorizing him to sell such liquors, and tendered to the clerk in payment for the license the amount fixed by the general license laws of the state, which amount was less than that prescribed by the act now under consideration. The clerk refused to issue the license to the appellant unless he would pay the sum named in the act now in question, and would also comply with the other provisions thereof. Upon such refusal the appellant filed in the circuit court for Washington county a petition charging that "in truth and in fact a majority of the voters of said county at said election have not determined by their ballots in favor of the high-license law, and that said clerk has not correctly and truly proclaimed the result of said election in accordance with the requirements of said act of assembly," and praying for a writ of *mandamus* against the appellee, the clerk of that court, requiring him to issue to the appellant the license previously applied for, without a compliance on the part of the appellant with any of the provisions of the act now before us. The appellee answered this petition, and a statement was filed showing the number of votes cast at said general election upon this measure and for the congressional candidates; and a *pro forma* order was passed, refusing the writ. From that order this appeal has been taken.

It thus appears, and in fact it is conceded, that the number of votes cast in favor of the high-license law was not equal to the majority of all the votes cast at the same election for the several candidates for congress; though the votes actually cast in favor of this law constituted a majority of all the votes polled on that particular subject. The single question, therefore, presented by this appeal is whether, under these circumstances, the act became operative and effective; or, stated in other words, did the adoption of the act depend upon its receiving in its favor a majority of all the votes cast at that election upon some other subject or subjects, or upon its receiving a majority

of the votes cast specifically for or against its adoption. It has been settled, both in England and in this country by an almost, if not quite, unbroken current of judicial decisions from the time of Lord MANSFIELD to the present day, that when an election is held at which a subject-matter is to be determined by a majority of the voters entitled to cast ballots thereat, those absenting themselves, and those who, being present, abstain from voting, are considered as acquiescing in the result declared by a majority of those actually voting, even though, in point of fact, but a minority of those entitled to vote really do vote. Thus in *Oldknow v. Wainwright*, 2 Burrows, 1017, which was a feigned action to try a right of election to the office of town clerk of Nottingham, the fourth issue was whether Thomas Seagrave was duly elected by the mayor, aldermen, and common council; and there was a special verdict, wherein, after setting out the constitution of the borough, that the voices were all equal voices, the vacancy of the office of town clerk, and a regular summons to elect another, it proceeded as follows: "That the whole number of electors was twenty-five, and that, out of that number, twenty-one assembled on the twenty-sixth of May pursuant to the said summons; that the mayor put Thomas Seagrave in nomination, and that no other person was put in nomination; that nine of the twenty-one voted for him, but twelve of them did not vote at all, but eleven of them protested against any election at that time," etc. Lord MANSFIELD held: "Whenever electors are present and do not vote at all, [as they have done here,] they virtually acquiesce in the election made by those who do." Judge FOLGER, in *People v. Clute*, 50 N. Y. 461, delivering the opinion of the court says: "It is also the theory and practice of our government that a minority of the whole body of qualified electors may elect to an office when a majority of that body refuse or decline to vote for any one for that office. Those of them who are absent from the polls, in theory and practical results, are assumed to assent to the action of those who go to the polls; and those who go to the polls, and do not vote for any candidate for any office are bound by the result of the action of those who do," etc. Conceding this to be true with respect to a special election held for the purpose of submitting a single question to the popular vote, it is insisted, on the part of the appellant, that a different principle should prevail in a case like this, where, at a general election, the measure, though receiving a majority of the votes cast on that subject, failed to receive a majority of the votes cast upon some other subject. Hence, as we have already stated, the sole ground upon which it is claimed that the act in question failed to become effective is that at the general election when the subject was voted on, less than a majority of those who voted for the congressional candidates cast their ballots "for high-license law," and not that a majority of those who voted on this subject did not vote in favor of it. This objection to the adoption of the act is founded exclusively upon the construction which is sought to be placed upon the words of the eighth section.—"a majority of the voters of said county,"—taken in connection with the evidence furnished by the vote in the congressional canvass, that there were more voters in the county than the number who voted upon this measure. If this construction, which confines the language to what is alleged to be its literal import without reference to the provisions of the preceding section, is to prevail, it would be, it seems to us, as applicable in the case of a special election, where but one subject is submitted, as it is claimed that it is in the case of a general election, where several subjects or persons are to be voted for; the only difference between the two instances being in respect to the evidence which may be adduced to ascertain the actual number of the voters of the county. In regard to a general election, it is urged that the highest aggregate vote cast furnishes the evidence as to the number of the voters of the county. At a special election it is not improbable that only a minority of the voters, well known to be an unmistakable minority, may vote. This fact might be susceptible of proof,—might be in real-

ity self-evident. Yet, in the latter instance, those who absent themselves from the polls, and those who, being present, abstain from voting, are regarded as assenting to the result declared by those who do vote. Upon what principle would it be incompetent to apply the same presumption to those who, though attending a general election and voting on other subjects, abstain from voting upon one particular matter like the act in question? The very concession that a minority may elect necessarily implies that there is a large number of voters who do not vote, of whom that minority is merely a fraction. Hence the admission that a majority of those entitled to vote did not vote, does not preclude the minority who actually do vote from determining the result by their ballots. That is precisely what was decided in *Oldknow v. Watnwright*, where there were 25 entitled to vote, of whom 21 were present, and only 9 voted, and 11 protested against an election. The special verdict shows how many voters there were, how many were present, and that only a minority voted; and yet it was held that the election by that minority was perfectly valid.

Recurring to the language of the act, it will be observed that the legislature has with particularity provided the forms of the ballots, both for and against the high-license law; and that it has prescribed that "a full return of the ballots cast as aforesaid" that is cast for and against the act, should be made by the judges of election to the clerk, and that the latter, "upon the certified returns, shall immediately make proclamation as to the result of said election." What possible reason was there for the legislature making provision with such exactness for "a full return of the ballots cast," both for and against the high-license law, and for a proclamation by the clerk upon the certified returns, if it was not designed that exclusive reference to the votes cast on that subject should be had in determining whether the act did or did not become operative? It is perfectly manifest that the phrase, "full returns of the ballots cast as aforesaid," refers to the votes cast for and against the high-license law and to no other votes; and that the duty of the clerk to "make proclamation as to the result of said election" could only be performed by announcing the result as evidenced by the certified returns of the votes cast upon that subject. If, therefore, he was confined, in making his proclamation as to the result of the election, to the returns made to him of the votes cast for and against the adoption of this act, no votes cast at the same election for some other purpose can be considered, counted, or resorted to in determining the question of the approval of this measure. Indeed, if the legislature intended that the act should not become effective, unless a majority of all the voters of the county affirmatively voted for it, it is difficult to conjecture a reason for the insertion of the provision respecting the casting and counting of votes against the measure, because, upon the assumption that the construction contended for is correct, if the votes cast in favor of the act had not been equal to a majority of all the voters voting for some candidate or for some other measure at that election, the act would have failed to take effect, notwithstanding no votes had been cast against it at all; and consequently it would have been wholly unnecessary to make any provision whatever for casting ballots against the adoption of the law. The proclamation which the clerk is directed to make is "as to the result of said election;" that is, the election held upon this question. The eighth section of the act must be read in conjunction with the seventh section, which we have been considering, and, thus read, clearly means, not a majority of all the voters of the county voting on some other subject, but a majority of all the voters of the county who vote upon this act. The contrary construction would place these two sections in antagonism, and would cause the eighth to render nugatory the provisions of the seventh section.

The conclusion which we have reached is fully supported by the supreme court of the United States in *Saint Joseph Tp. v. Rogers*, 16 Wall. 644, where

the language, "a majority of the legal voters of the township," was held to "require only a majority of the legal voters of the township voting at the election," etc.; and by the same court in *County of Cass v. Johnston*, 95 U. S. 360. In this last-named case all the cases relied upon by the appellant are reviewed, and the majority of the court, through Chief Justice WAITE, states the question there presented as follows: "The first question presented for our determination in this case is whether the township aid act of Missouri is repugnant to article 11, § 14, of the constitution of that state, inasmuch as it authorizes subscriptions by townships to the capital stock of railroad companies wherever two-thirds of the qualified voters of the township voting at an election called for that purpose shall vote in favor of the subscription, while the constitution prohibits such a subscription, unless two-thirds of the qualified voters of the \* \* \* town, at a regular or special election to be held therein, shall assent thereto." The court quotes with approval the construction placed by the same tribunal in 16 Wall., upon the clause "a majority of the legal voters of a township," and adds: "This we understand to be the established rule as to the effect of elections, in the absence of any statutory regulations to the contrary. All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect is clearly expressed." Other cases to the same effect might be cited, but it is not deemed necessary to do so.

Being of the opinion, for the reasons assigned and upon the authorities quoted, that the two sections construed together clearly mean that the act was to become operative and effective if it received, as it did, at the general election referred to, the approval of a majority of the voters of the county voting on that subject, we will affirm the order appealed from.

#### WEBB v. McCLOSKEY.

(Court of Appeals of Maryland. December 16, 1887.)

##### 1. GOOD-WILL—SALE OF—LIABILITY FOR ACTS OF THIRD PARTY.

Plaintiff sold to defendant the stock, good-will, and fixtures of a business which had been conducted by a third person, from whom plaintiff had purchased it, and agreed not to engage in, nor assist such third person to engage in, the same business in the neighborhood of the store sold. In an action on a note given for the purchase money, such third person having opened business opposite the store sold, defendant asked an instruction, which was refused, that he could recoup such sum as the good-will sold him was injured thereby. *Held*, that plaintiff bound himself personally, and not for such third person, and the refusal was proper.

##### 2. SAME.

In such case, there being no evidence that plaintiff had authority to bind a third person not to engage in a certain business in competition to defendant, an instruction to that effect is not erroneous.

Appeal from superior court of Baltimore city.

Suit brought by Frank J. McCloskey upon a promissory note executed by James A. Webb, in consideration of the stock and good-will of a business sold him by plaintiff. Judgment for plaintiff, and defendant appeals.

*Wm. M. Buscy*, for appellant. *Albert Ritchie*, for appellee.

McSHERRY, J. James Hyland, who was then engaged in business at 119 North Calvert street, in the city of Baltimore, on the last of December, 1883, executed and delivered to the appellee a bill of sale of certain personal property pertaining to that business, and some 18 months afterwards sold the same property to the appellee under the following assignment, viz.: "I, James Hyland, trading under the firm name of James Hyland & Company, in consid-

eration of the sum of one thousand dollars to me paid by Frank J. McCloskey, do hereby sell and convey to said Frank J. McCloskey the following personal property, to-wit: The stock, good-will, and fixtures of the store No. 119 North Calvert street, including horse, wagon, and harness, warranted against all adverse claims." On the date of this transfer the appellee sold the same property to Charles W. Webb, received \$250 in cash in part payment, and delivered to him the following agreement, viz.: "This is to certify that I have agreed to sell to Chas. W. Webb store No. 119 Calvert street, now occupied by James Hyland; the said Hyland having given me the power to sell, for the sum of \$1,100, and to pay one month's rent; possession to be given Saturday, August 14th; two hundred and fifty cash; eight hundred and fifty in thirty days; stock to \$150; horse and wagon, \$300; fixtures, \$50,—and all right, title, and interest in said business." Some days later another paper was executed by McCloskey, which is in these words, viz.: "BALTIMORE, August 13, 1886. Recd. of Charles W. Webb two hundred and fifty dollars in cash, and his note at thirty days from this date, for eight hundred and fifty dollars, drawn to my order indorsed by James A. Webb, in full for purchase money of stock, good-will, fixtures, horse, wagon, and harness, in and about the business conducted under the style of James Hyland & Co., at No. 119 N. Calvert street; full authority to sell and deliver which I possess. And it is hereby agreed that I will not engage in, nor assist James Hyland to engage in, the same business in the neighborhood of No. 119 N. Calvert street." Upon the execution of this last paper, Charles W. Webb delivered to the appellee the promissory note sued on in this case, signed by him, (Webb,) payable to the appellee, and indorsed by the appellant, James A. Webb, for the balance due by Charles W. Webb to the appellee on the above-mentioned purchase. Within two months after these transactions, Hyland opened a competing establishment across the street from 119 North Calvert street, and carried on business there to the detriment and injury of Webb. Upon the maturity of the note, it was protested for non-payment, and suit was instituted upon it. At the trial a single exception was reserved, and that presents for review the rulings of the superior court of Baltimore city upon the prayers set out in the record. At the argument in this court the appellant's counsel abandoned his first prayer, and we have consequently merely to consider his third and the sixth, which were granted at the instance of the appellee.

The appellant's third prayer sought an instruction from the court to the jury, to the effect that the appellant might recoup out of the claim of the appellee upon the note alluded to, such sum as the jury should find from the evidence the "good-will" of the business sold by McCloskey to Charles W. Webb was injured by the competing establishment opened as herein stated by Hyland, if the jury should find that McCloskey, in making the sale to Charles W. Webb, was acting as an agent or representative of Hyland, and not as the owner himself of the property sold. We have been referred to a number of adjudged cases upon the subject of the sales of "good-will," but we are unable to see what application they have to this case. While it is undoubtedly true that McCloskey sold, under the paper writing of August 13th, to Charles W. Webb the "good-will" of the business conducted at 119 North Calvert street, and that he bound himself not to engage in and not to assist Hyland to engage in the same business in that neighborhood, it is equally true that McCloskey did not engage in the same business, and that he did not assist Hyland to do so. McCloskey had no power to prevent Hyland from going into the business, and he did not agree that Hyland should not do so. His agreement related only to his own acts, and not to Hyland's. While he sold the "good-will" of the business as he owned it, that sale did not imply that Hyland or some other person, at some future day, should not, except at the risk of the appellee, engage in a competing business in the same vicinity. We fail to see from anything disclosed by the record in this case upon what known

principle the subsequent conduct of Hyland in establishing a competing business in that neighborhood can be relied upon to defeat, either wholly or partially, the right of the appellee to recover upon the note which is the cause of action in this proceeding; and we have been referred to no authority supporting such a position. The theory of the prayer which we are considering involves that proposition, provided the jury should find that McCloskey was merely the agent of Hyland in making the sale; but there is not the slightest particle of evidence before us from which such an agency can be even even conjectured, much less legally inferred.

The cases of *Guerand v. Dandeleit*, 32 Md. 561, and *Warfield v. Booth*, 33 Md. 68, have been cited in support of the prayer we are now considering. In the first of these cases there had been a sale by Francis Guerand, the father of the appellant, Eugene F. Guerand, to Jean Fruillar and the appellee, Dandeleit, of the custom, good-will, name, and utensils of a dyeing and scouring establishment; and Guerand, the vendor, covenanted that "he would not at any time thereafter exercise or conduct, in the city of Baltimore, the trade or profession of a dyer or scourer, nor directly or indirectly compete with the aforesaid lessees and vendees for the good-will and custom sold as aforesaid." Subsequently, E. F. Guerand, the son, ostensibly resumed the business under his own name, but it was alleged that the use of his name was a mere cover and blind adopted with the intent to conceal the interest of the father in the establishment, and that the capital employed in the business belonged to Francis Guerand. Upon this state of facts an interlocutory injunction was granted, and an appeal from that order was taken. This court, after holding the covenant to be valid, says: "The allegation of the bill is that the name of the son is used as a mere cover and blind to conceal the interest of the father. If this be so, as we are bound to assume on this appeal, the case is unquestionable. The father's covenant is that he will not, directly or indirectly, compete for the good-will and custom sold to the complainant and Fruillar. This restrains him from the use of any means whatever whereby the value of the thing sold, and for which he has received his price, may be in any manner impaired or lessened. He can neither compete himself, nor employ or combine with others to do it." The case of *Warfield v. Booth* was an action at law upon a contract of sale of the "good-will of practice" as surgeon and physician; and this court sustaining the right of the plaintiff to recover for a breach of the contract, allowed the defendant to set off against the plaintiff's claim the unpaid notes given by the plaintiff to the defendant for part of the price agreed to be paid for such "good-will." The facts of these two cases are not similar to the facts of this case. Had McCloskey resumed a competing business in the name of Hyland or in his own name, or had he assisted Hyland therein, he would have brought himself within the principles recognized and applied in one or the other of the two cases alluded to. But, as we have stated, he neither engaged in the business himself, nor did he assist Hyland, and if he is to be held accountable at all, it would be for the consequences of Hyland's acts over which he had no control and against the happening of which he did not contract. As, therefore, there is not any evidence before us tending to show that he has violated his agreement with Webb, and as there is no evidence whatever from which the jury could have legally concluded that in making the sale to Webb he was acting, not for himself, but for Hyland, we can reach no other judgment than that the superior court was right in rejecting the third prayer of the appellant.

The first and second instructions given at the instance of the appellee announce the proposition that if the appellant indorsed the note before its delivery, as surety, that the plaintiff was entitled to recover on the first count of the declaration, unless the jury should find that the plaintiff failed to deliver some part of the property specified in the contract of sale. The sixth instruction was framed upon the second count of the declaration, and declares

the defendant liable if he placed his name upon the note as indorser, and the note was presented at maturity and dishonored, and that he had due notice thereof. These instructions are certainly free from any error, and no objection was taken to them at the argument before us. If the property purchased included, as we think it did, the "good-will" of the business, the appellee performed this part of his undertaking by a delivery of the property and of the good-will as far as that was capable of being delivered; and the subsequent interference with that "good-will" by Hyland upon his own motion, without aid or assistance from McCloskey, could not, as we have observed in a former part of this opinion, prejudice the appellee's right to recover on the note. This principle is distinctly announced by the court below in the third instruction of the appellee, and we think correctly states the law.

We are of opinion that the fifth instruction was properly granted. There was no evidence that McCloskey had authority to bind Hyland not to enter into a competing business.

The sixth instruction relates to the effect of the testimony of the witness Barrow; but as that testimony is not in the record, we are unable to express any opinion in regard to it, and we must assume, in the absence of anything showing the contrary, that the ruling of the court in this respect was correct. *Gent v. Lynch*, 23 Md. 58.

Finding no errors in the rulings appealed from, the judgment will be affirmed.

#### DALRYMPLE v. GAMBLE *et al.*

(Court of Appeals of Maryland. December 16, 1887.)

##### 1. EXECUTORS AND ADMINISTRATORS—CONTEST OF WILL BY FOREIGN ADMINISTRATOR—Costs.

Letters of administration were granted appellant in Maryland on the personal estate of his brother, supposed to have died intestate. In his own interest as distributee, though in good faith, he unsuccessfully resisted a will executed and offered for probate in another state, and his claim for expenses incurred thereby was, upon revocation of his authority, disallowed, as not incurred to recover or secure part of the estate, as provided for in Code Pub. Laws Md. art. 93, § 5, cl. 5, and the *bona fides* of prosecuting such action not having been certified to as provided in section 105, same article. *Held*, that the claim was properly disallowed.

##### 2. SAME—LIABILITIES—INTEREST ON FUNDS NOT DEPOSITED.

An administrator who received  $2\frac{1}{2}$  per cent. interest on deposits made in a bank cannot complain of being charged therewith, even on funds not so deposited, as they ought to have been.

##### 3. SAME—COMMISSIONS—DISCRETION OF ORPHANS' COURT.

The allowance of commission to an administrator is entirely in the discretion of the orphans' court, and, unless transcending the limits of law, is not reviewable.

Appeal from orphans' court of Baltimore city.

Augustine J. Dalrymple, late administrator of the personal estate of William H. Dalrymple, was disallowed expenses incurred in contesting the will of his decedent offered for probate in another state, under which Marie E. Gamble, wife of George H. Gamble, was devisee. From this, and an order allowing but 7 per cent. commissions, and charging him with  $2\frac{1}{2}$  per cent. interest on funds in his hands, the late administrator appeals.

*S. Teackle Wallis* and *J. S. Alexander*, for appellant. *Albert Ritchie* and *J. S. Lemmon*, for appellees.

IRVING, J. The facts essential to be known in this case for the intelligent appreciation of the questions raised in it, and to be disposed of by us, are as follows: Edwin A. Dalrymple died in Baltimore on the thirtieth of October, 1881, intestate, unmarried, and without issue, leaving a considerable estate in Maryland, to which his two brothers and two sisters became entitled. Dr. Augustine J. Dalrymple, the appellant in this case, took out letters on the estate. Within less than a month, William H. Dalrymple, one of Edwin's

surviving brothers, died in California. Immediately on receiving information of his death, this appellant took out letters on his estate in Maryland. After taking out such letters, information came to Dr. Dalrymple, the administrator, that his brother William was alleged not to have died intestate, but was alleged to have left a will in favor of one Marie E. Hatch, and that this legatee and devisee claimed to be the widow of the deceased William H. Dalrymple. Dr. Dalrymple also received information leading him to believe that this Marie E. Hatch was not the wife of his brother, as she claimed to be, and that the alleged will was fraudulent, and, if executed by his brother, was so executed when he was incompetent to execute it, and unable to resist the influence exercised over him by this Mrs. Hatch, who, instead of being his wife, was believed to be only his mistress. Fully impressed with this view, (and justifiably so, from the information he had received,) he took steps to resist the will, and the claims of this woman, in the proper courts of California. This he did in his own name and that of his sisters, who were equally interested with him, and who gave him a power of attorney to act for them. That litigation resulted in the establishment of the will in the lower court; and, on appeal to the supreme court of the state of California, the decision of the lower court was affirmed. Pending this litigation in California, proceedings were instituted here to revoke his letters in the interest of the legatee under the California will, but the same was not pressed to final disposition until the litigation in California was ended; then this appellant's letters were revoked, and new letters *c. t. a.* were granted to him and to J. L. Lemmon of the counsel of the appellee in this case. Upon appeal to this court, the action of the orphans' court in this regard was affirmed. This being done, the appellant proceeded to pass an account of his partial administration of the estate, before the revocation of his letters, preliminary to turning over the estate to the new administrators *c. t. a.* In that account, he claimed allowance for his services, expenses, attorney's fees, and various costs incurred in the litigation over the will in California, and the orphans' court allowed the claim. He was also allowed 10 per cent. commissions. This account was passed and allowed on the second December, 1882; and on the twenty-seventh of the same month, on application, the order of approval was stricken out, and the same was set for hearing on exceptions upon the fifteenth of January succeeding. The account had been passed without notice, and was entirely *ex parte*, and it was entirely within the power of the orphans' court to review their action alleged to have been improvident, and to rescind allowances made, if found to have been erroneous, within a reasonable time, which this certainly was; the fund being still under their control, and undisposed of. *Scott v. Fox*, 14 Md. 388; *Stratton's Case*, 46 Md. 551; *Bantz's Case*, 52 Md. 686; *Wilson v. McCarty*, 55 Md. 277. Exceptions were specifically filed, and, after hearing, the court disallowed the claim of the administrator for personal services, and expenses incident to the litigation over the will in California; reduced the allowance of commissions from 10 per cent. to 7 per cent.; and directed that the administrator charge himself with  $2\frac{1}{2}$  per cent. interest on all cash funds as allowed him by the bank in which he made his deposits. From this order of the orphans' court the administrator appealed.

These questions are presented, viz.: *First*, as to the disallowance of the claim for services and expenses of the California litigation; *second*, as to the commissions allowed; and, *third*, as to the interest charged on the cash in the hands of the administrator.

The counsel for the appellant have presented his claim in the strongest possible aspect, and have made most eloquent arguments in support of their contention, based on the entire *bona fides* of the appellant in the litigation he unsuccessfully prosecuted in California, of which there is no doubt; and the powerful reasons he had for the belief he entertained when he took his pro-

ceeding, and for questioning the correctness of the jury's finding, which, however, he did not contend was otherwise than binding on him. But we have been unable to see in any of the suggestions made, or authorities cited, any good ground for questioning the correctness of the action of the orphans' court. The English and American authorities relied on in support of the appellant's contention can have no controlling influence upon a question which depends, in this state, upon statutory powers of the orphans' court and the statutory duties of an administrator; and the authorities cited in this state do not reach the question here presented. The case of *Edwards v. Bruce*, 8 Md. 387, and the other cases relied on, are instances when the power of the orphans' court to allow the costs was undeniable. In all cases of plenary proceedings before them under sections 249 and 250 of the ninety-third article of the Code, their power to award costs in their discretion is unquestionable; it is statutory. If this proceeding were in equity, that court would have full power over the question of costs; but, presented as it is, it must be disposed of in accordance with the law applicable to the court in which the proceeding was had. To allow this administrator for personal services, for expenses of travel, etc., and for costs of the litigation over a will in another state, to prevent its being established, would be stretching the discretion and power of the orphans' court beyond the statute, or any legitimate inference drawn from it, in any decision yet made. The courts of the state where the litigation was carried on imposed the costs on the appellant and his co-plaintiffs; and we find no warrant anywhere for reimbursing him from the estate in his hands as administrator in this state; which administration was, in fact, revoked as the result of the establishment of the will. They were, in no sense, costs of his administration, or of duties pertaining to it. *Young's Case*, 8 Gill. 285, relied on by appellant, does not justify this allowance. There the rightful administrator was allowed his costs in successfully establishing his right to administer, against persons not entitled to the trust. The court did say the allowance was proper, in analogy to the practice of allowing an executor for costs in defending a *caveat* to the will. As his costs were given him by statute, the analogy is certainly not striking, and the allowance need not rest on it. Those costs were legitimate administration costs. Persons not entitled were endeavoring to get the control and management of the estate, and the costs of successfully resisting such pretensions were allowed out of the estate. Here, an administrator was appointed, on the supposition there was no will. A will is discovered, and his authority must be revoked if it be probated. He, not as administrator, and in defense of his right as administrator, but with others as distributees, and who were all the distributees if there be no valid will, unsuccessfully resisted the will. The analogy utterly fails. The interest of the estate was in no degree promoted by his action, but, if his claim be allowed, was seriously injured thereby. He made an unsuccessful effort in his own interest, and not that of the estate, and there seems to us no reason why the estate should bear the costs of such effort in his own interest which failed.

The only possibly plausible ground upon which the contention for the allowance could be placed is that the appellant was in good faith, and with really probable ground for supposing he would succeed, discharging any imperative duty devolving upon him as administrator in resisting the will in the California courts. This argument was strenuously pressed, but will not stand the test of close examination. It is supposed to rest entirely upon the fifth clause of the fifth section of article 93 of the Code of Public Laws. In providing what allowances are to be made an executor or administrator in his accounts, that fifth clause says: "For costs and extraordinary expenses [not personal] which the court may think proper to allow, laid out in the recovery or security of any part of the estate." Here is authority given the orphans' court to make such allowance as it thinks proper for costs incurred in the effort to re-

cover or secure any part of the estate. But even this authority is modified to some extent by section 105 of the same article, (93.) By that section the right of the executor or administrator to allowance, in such case, for the costs of prosecution or defense of such action for or against the estate, is made to depend on the certificate of the court in which the proceeding was had "that there were probable grounds for instituting, prosecuting, and defending the action in which judgment or decree shall have been given against them." Now, assuming that these sections contemplated such proceedings in a home or foreign jurisdiction, and assuming that such proceeding as was instituted in California by this appellant to resist the will there set up could be regarded as falling within the meaning and intention of the language of the statute, "for the recovery or security of any part of the estate," the administrator was not fortified with the certificate of the court, such as section 105 of article 93 requires. But it is hard to perceive in what sense that proceeding was for the recovery, security, or preservation of any part of the estate. The existence of the estate, and the right of William H. Dalrymple's proper representatives to it, were in no way questioned. The only possible controversy was to whom it should go,—to the alleged devisee and legatee, or to the Maryland brother and sisters. It was purely one of distributal right. The real and personal estate there, by statements in the proceedings, was not claimed to exceed \$1,100; and only \$100 of that, in any event, would be transmissible here for distribution here, regarding that as an ancillary administration to this, instead of this being ancillary to the one in the place of residence and will. The proceeding which was instituted was not justifiable for the recovery of that small amount. It was not ordered by the orphans' court, nor has it been contended the orphans' court could have ordered it. We are unable to see how or where the duty devolved on this appellant, as administrator upon the estate here, to institute the proceedings in California, for the costs of which, including personal services, he is now claiming allowance. Unless such duty did rest on him, clearly the orphans' court had no authority to allow him his claim. His bond required him, in its statutory language, "well and truly to perform the office of administrator of William H. Dalrymple, deceased, according to law, and shall in all respects discharge the duties required of him by law as administrator as aforesaid, without injury or damage to any person interested in the faithful performance of said office." By no possible straining can this bond be construed to impose a duty on the administrator to resist the probate of a will of his alleged intestate in this or any other state. An executor, after a will is probated, is required, in this state, to defend the will, if the same be caveated, (*Compton v. Barnes*, 4 Gill, 55; *Townshend v. Brooke*, 9 Gill, 91.) and he is allowed his costs for so doing, no matter what the result, for it is held to be his duty to defend the will, and confirm his authority as executor. The statute gives him his costs in such case. *Townshend v. Brooke*, 9 Gill, 90. But if the executor had an interest adverse to the will, and, before probate, united with others in contesting its probate, and letters *pendente lite* were granted him, would it be contended that in such case he would be entitled in his accounts, as administrator *pendente lite*, to allowance for costs for unsuccessfully resisting the will? Could it be claimed, either in virtue of the statute, or by analogy to it? Clearly, it could not be with any plausibility even in the claim, and, if it could not, we are unable to perceive the distinction between such case and the one under consideration. If a person not named as executor had taken out letters *pendente lite*, would it have become his duty, as such administrator *pendente lite*, to interfere, and resist the probate of the will? If in that case, or in the case under review, it was his duty, then neglect to discharge that duty would have rendered him answerable on his bond as administrator. Duty and liability in such case are correlative. Would a suit on this appellant's bond have been maintainable against him had he neglected to do what he did in respect to contesting the

will? We think it very clear it could not have been, for there is no language in the bond specifying such duty, and we find nothing in the statute binding him to any such course; nor do we know of any obtaining practice from which it could be inferred as his duty. The action taken was purely personal in its nature, and not fiduciary in character. It was personal in name, and was conducted with others jointly interested, who had agreed to share proportionately the expenses of the proceeding. If successful, it could only bring benefit to the plaintiffs therein, and it brought nothing to, and received nothing for, the estate as such. The orphans' court could not, on anybody's petition, have ordered the administrator to take such proceeding, because the interest of the estate as such was not involved. If the court could not order it done, how could he voluntarily engage in it at the charge of the estate? Suppose the estate in Maryland had only been seven thousand dollars, then, on the theory of the appellant of his right to allowance of the claim performed, the whole estate would more than be exhausted, and very anomalously, the person who successfully maintained a right to it, under the will, would be denied the fruits of her title, and be made to pay the expenses of defending her own rights, and also those of the person whom the courts trying the case decided had wrongfully interfered to defeat the right which was established. From what we have said, it is apparent that we think the court acted rightly in reviewing their action in the first instance, and in striking out the allowance which was first made. In that account, and in that court, no matter how *bona fide* the appellant had been in his conduct in respect to the litigation for which allowance was claimed, such allowance had no proper place, and ought not to be accorded.

The order of the orphans' court charging the appellant with 2½ per cent. interest on the cash received does not seem to us unreasonable or improper. It was but ordering him to account at a rate of interest which he admitted the bank paid him on all the funds of the estate deposited in it. He ought not to be permitted to derive benefit from it personally. It belonged to the estate, and, though it be charging him with interest on funds not actually in bank, it ought to have been there, and not to have been used for the purposes it is shown to have been used for. He had no order of the court to so use it, or to retain it for any contingency. We see no wrong in the requirement which was made of him in that regard.

Commissions were first allowed at the rate of 10 per centum. When the account was received, the allowance of commissions was stricken down, and fixed at 7 per centum. It is contended that, the rate having been fixed at 10 per cent., the administrator at once accounted with the state, and paid tax thereon at that rate, and that the court could not afterwards alter it. The court having full power, for good cause appearing to them, to review its action, (*Stratton's Case*, 46 Md. 551,) did so, and that question is not reviewable in this court, (*Handy v. Collins*, 60 Md. 229.) The question of commissions is entirely in the discretion of the orphans' court, except so far as it is limited by law, and no question is presented of the court's transcending that limit in respect to allowance. If the appellant has paid the state too much, he must take such steps as are open to him to get it refunded.

We find no error, and the order of the orphans' court will be affirmed. Affirmed and remanded.

#### HENKEL *et al.* v. TRUBEE *et al.*

(*Supreme Court of Errors of Connecticut*. October Term, 1887.)

##### 1. SALE—FRAUD—FALSE REPRESENTATIONS OF AGENT.

Upon the trial of an action for goods sold and delivered, defendants alleged that they were induced to enter into the contract by the false representation of plaintiff's agent that they had 14 orders for the goods in defendants' district, which orders they would transfer to defendants. Some of the orders were forged, and others con-

ditional, but the evidence did not cover all of the 14. *Held* that, nevertheless, having proved a fraudulent misrepresentation as to a material fact, defendants were entitled to a verdict.<sup>1</sup>

2. SAME—ACTION FOR PRICE—FACTS ADMITTED—EVIDENCE.

Upon the trial of an action for goods sold and delivered, plaintiffs offered to prove the contract and the delivery of the goods, both of which facts had been admitted by defendants. The court excluded the evidence. *Held* no error.

3. SAME—EVIDENCE—LETTER WRITTEN BY AGENT—*RES GESTÆ*.

Plaintiffs' agent, in transmitting a duplicate copy of the contract to them, sent a letter detailing his acts, and stating his understanding of the arrangement with defendants. He died before the trial. *Held*, that his letter was no part of the *res gestæ*, and was inadmissible.

Appeal from superior court, Fairfield county.

Action by Charles O. Henkel *et al.* against David Trubee *et al.* for the price of goods sold and delivered under a written contract. The contract, and delivery of the goods under it, were admitted. Defendants' answer alleged rescission of the contract for fraudulent misrepresentations, return of a portion of the goods, and payment of the price for the balance to plaintiffs' agent. The jury found for defendant, and plaintiffs appealed.

*H. W. Taylor* and *E. S. Sumner*, for plaintiffs. *G. Stoddard* and *W. D. Bishop, Jr.*, for defendants.

STODDARD, J. A false statement by the vendor of the existence of a material fact, preceding and inducing a contract for the sale of goods, will authorize the rescission of the contract by the vendee, if made (1) with knowledge on the part of the vendor of its falsity; (2) recklessly, the vendor having no reason to believe the existence of the asserted fact; (3) as of the personal knowledge of the declarant, if such fact could be so known, and this includes cases where the statement, though not in form as of the personal knowledge of the declarant, yet is made under such circumstances as to induce the average person to believe such statement to be intended to be made as of personal knowledge, and is in fact made so as to have been actually so believed and relied upon by the vendee; or (4) negligently, without competent or reasonable information as to the existence of the fact. Of course, statements of authorized agents have the same effect in these cases as if made by the principal. The complaint in this case counts on an express contract in writing, as follows:

"Order given by David Trubee & Co. to Henkel Brothers, of Paterson, N. J., May 5, 1886. We have ordered the following goods upon terms mentioned below, and with the understanding that no agreement or verbal promise differing from this order has been made by either buyer or seller. Buyer further agrees to sell the goods at not less than \$4.50 per dozen. Seller agrees to sell no retail trade in buyer's territory. Henkel Brothers agree to exchange presents, if D. T. & Co. desire it, as soon as anything new with G. S. B. P.

"20 cases G. S. Baking Powder, with presents, @ \$4 per doz.

"Terms, 30 days; 2 per cent. extra for cash in 10 days.

"Ship via Boat, Old Line.

[Signed by buyer]

" " salesman]

"DAVID TRUBEE & Co.

"C. H. PUTNAM."

The defendants' answer contained allegations of fraudulent misrepresentations within the rules above stated, and the demurrer thereto was properly overruled. Upon the trial of the issue of fact, upon a denial of the allegations of the answer, the jury found the answer true, and established by their verdict the alleged fact that the contract was induced by the fraudulent misrepresentations of the vendor. Upon the issues thus presented, the case seems to have been properly determined. Some questions of evidence are pre-

Concerning the rescission of a contract executed because of fraudulent representations, see *Gammill's Heirs v. Johnson*, (Ark.) 1 S. W. Rep. 610, and note.

mented by the record. On the trial the defendants admitted that the contract was made, and goods delivered, as stated in the complaint, and placed their defense wholly upon the alleged ground that such false and fraudulent representations had been made that they were entitled to rescind the contract, and that they had exercised their right of rescission. The plaintiff offered evidence to prove the existence of the contract, and the delivery of the goods pursuant to the contract. This evidence was excluded by the court. The facts which this evidence tended to prove being all admitted upon the record, evidence to prove them was unnecessary, and the exclusion of the evidence worked no injury to the plaintiff, and was no error. The contract in question was made by the plaintiffs by their agent, and, in transmitting the duplicate copy of the contract to his principals, the agent also sent a letter detailing his acts, and containing statements of his understanding of the arrangement with the defendants. The agent died before the trial, and it is now claimed that the letter is part of the *res gesta*. We think no definition of the *res gesta* will countenance this claim of the plaintiff. The ruling of the court was right. Certain other books and papers were offered by the plaintiff, and rejected by the court. These books and papers seem to be immaterial, as well as hearsay. The answer alleges "that, to induce the defendants to make such purchase, the plaintiffs represented, by their agent, that there was a demand for the goods in this market, and that they had already obtained genuine and *bona fide* orders for fourteen cases of the goods, which orders the plaintiffs would turn over to the defendants," etc. On the trial, the defendants offered evidence that six or seven of the fourteen pretended orders were not in fact made, and that the signatures to the pretended orders were forged, and, in reference to most of the other orders, that they were conditional, and not binding. The plaintiffs now say that, as the defendants did not offer evidence of fraudulent misrepresentations concerning all of the 14 pretended orders, the answer is not proved. In this the plaintiffs err. The gist of the defense is a fraudulent misrepresentation concerning a material fact. If that is proved, it is not material that the defendants failed to prove some additional fraudulent misrepresentations, although it is alleged in the answer. A claim is made in the plaintiffs' brief, based upon the assumption that the defendants had suppressed material evidence within their control; but there is nothing in the case to warrant such assumption or claim. The defendants had sold three cases before they discovered the fraud that had been practiced upon them. They immediately returned the balance of the goods to the plaintiffs, and notified them of the rescission of the contract, and tendered to Putnam, the plaintiffs' agent, the amount of money received by them for the goods sold. The plaintiffs now say that Putnam had no right to receive the money. The record in this particular is very brief. Putnam seems to have been the general agent of the plaintiffs in reference to the sale in question. There are not sufficient facts and claims appearing on the record to justify this court in saying that the court below erred in this particular. And so in reference to the claimed right of the plaintiffs to receive \$72, instead of \$36, the case is quite bare of facts and claims, and is in such condition that the error, if any, is not apparent.

Upon the whole, we are of opinion that no such erroneous ruling has been made in the case as to justify the granting of a new trial. There is no error, and a new trial is not granted.

(The other judges concurred.)

## GROSSMAN'S APPEAL.

*(Supreme Court of Pennsylvania. October Term, 1887.)*

## NEGOTIABLE INSTRUMENTS—SURETIES—AGREEMENT TO OBTAIN OTHER SURETIES.

One who, at the request of the principal in a promissory note, signs as surety, upon the condition, and with the understanding, that another shall also so sign, cannot, in an action upon the note, set up as a defense the failure of the condition, in the absence of proof of the payee's knowledge thereof.<sup>1</sup>

Appeal from court of common pleas, Butler county; AARON L. HAZEN, Presiding Judge.

November 28, 1885, there was entered in the court of common pleas of Butler county, Pennsylvania, at common pleas, No. 217, December term, 1885, a judgment on a warrant of attorney, contained in a judgment note for the sum of \$200, and attorney's commission, \$10, in which I. J. McCandless was plaintiff, and T. R. McCall, John Grossman, and George K. Baker were defendants. Execution was issued to Eastern district, No. 89, September term, 1886. The defendant then filed his petition asking a stay of execution, and that the judgment be opened, alleging as his defense, substantially as follows: That T. R. McCall, the principal in the note, called upon the petitioner sometime prior to the date of the said note, and requested him to go his security on a note, which petitioner refused to do, but, on McCall insisting, finally informed him that, if he would get another good man to sign a note as security with him, he would sign as requested; that a few days thereafter McCall returned, and informed petitioner that George K. Baker, a man known to be good, would sign the note with him as surety; that petitioner then and there signed the note, with the distinct understanding that it was not to be used unless George K. Baker also signed it as surety; that said note was never delivered, but was handed to McCall for the purpose of getting the signature of said Baker, which was to be done before McCall should deliver the note; that the said Baker never signed the note, but that his name thereon was a forgery, and that plaintiff had directed the money to be made from petitioner alone. Rule was granted to show cause why the judgment should not be opened. On the hearing, the facts were proved substantially as alleged, but the rule was discharged, at the cost of the petitioner, who thereupon appealed.

*J. F. Brittain and Stephen Cummins*, for appellant. *Newton Black*, for appellee.

**PER CURIAM.** The court below committed no error in refusing to open the judgment. It is not material that Grossman signed the note with the expectation that Baker would also sign it as co-surety. No knowledge of this understanding was brought home to McCandless, who loaned the money. If, then, Grossman signed the note, and intrusted it to McCall to get the additional signature, he put it in the power of the latter to perpetrate a fraud upon McCandless. The latter had agreed to loan the money to McCall in case both Grossman and Baker became sureties. McCandless had no reason to suppose that the signature of Baker was a forgery. It is a familiar rule of law that, when one of two innocent persons must suffer a loss, he shall suffer whose negligence was the cause of such loss. The application of this principle to the case in hand affirms the decree.

The decree is affirmed, and the appeal dismissed, at the costs of the appellant.

<sup>1</sup>As between the parties thereto, a party has the right to show the nature of his indorsement, as that it was without recourse; and, as between the original parties, he may show the character in which he signed,—whether as surety, guarantor, or co-maker. *Genesee v. Wissner*, (Iowa,) 28 N. W. Rep. 478, and note.

TUCKER v. PRESTON.<sup>1</sup>

(Supreme Court of Vermont. December 20, 1887.)

## 1. ASSUMPSIT—MISUNDERSTANDING OF PARTIES—QUANTUM MERUIT.

Plaintiff worked for defendant about one year without any special contract as to compensation; then the parties entered into a permanent contract as to his past and future earnings, but, by a failure to understand each other, the minds of the parties never met. *Held*, that plaintiff could recover, in *assumpsit*, what his services were reasonably worth.

## 2. SAME—INTEREST—YEARLY BALANCES.

It is not error, in such case, to allow interest on the yearly balances found to be due plaintiff.

Exceptions from Orange county court.

This is an action of *assumpsit*, heard on report of referee by the county court, Orange county, December term, 1886; WALKER, J., presiding. Judgment on the report for the plaintiff to recover the sum found due by the referee, and his costs. Exceptions by defendant.

The referee reported, in substance, the following facts: That the plaintiff in 1887 was about 62 years old, and without any family of his own; that, having never married, he had worked on a farm many years for different persons, usually through the season, from the first day of March until the winter months, for fair wages, and during the winters at odd jobs for such persons as might require his services; that he had no permanent home, except at various places where he happened to be employed; that the defendant was an aged widow lady, owning and occupying a farm; that her family consisted of herself and two grandchildren; that she became dissatisfied with the help she had had in carrying on her farm, and applied to and engaged the plaintiff to work for her; that the plaintiff commenced to work for her on the first day of March, 1877, and worked until the twenty-third day of July, 1885; that in January following the spring when he went to work for the defendant they had some talk about the matter, and the plaintiff understood that he was to work for the defendant and stay with her as long as he lived; that she would give him a home, and, when he died, bury him handsomely, and, if he outlived her, that he was to have her property; that the defendant understood the trade substantially as the plaintiff did, except that part of it regarding her property if he outlived her; that for the first three years the plaintiff's services were of considerable value to the defendant; that for the next three years, not of so much value; and for the balance of the time, on account of his age and partial blindness, of much less value; that in fact there was really no mutual contract or understanding between them; that the plaintiff left the defendant because he supposed and believed from reports, and her acts to him, that she wanted to get rid of him, and that, if he did not leave, she would throw him on the town, and that, from the evidence and circumstances in the case, he had good reason to believe that the defendant wanted to get rid of him, and that he had good reasons to believe that, unless he went away from the defendant, she would throw him on the town for his future support; that if, from the foregoing facts, the plaintiff can recover, that his services for the defendant for the first three years were reasonably worth \$50 per year, and that for the next three years they were worth \$30 per year, making in all the sum of \$240; that during this time the defendant furnished the plaintiff clothing, and paid his taxes, etc., which were reasonably worth \$90; which amount should be added to the balance of interest reckoned to December 21, 1886, if in the opinion of the court the plaintiff be entitled to interest; that for the balance of the time the plaintiff's services were reasonably worth all he received from the defendant during that time in the way of board, clothing, etc., and no more, and that one should offset the other.

<sup>1</sup>Reported by Messrs. Senter & Kemp, of the Montpelier bar.

*D. C. Dinison & Son*, for plaintiff. *Hunt & Stickney*, for defendant.

ROSS, J. The result of the facts found by the referee is that the plaintiff went to work for the defendant at her request; worked nearly a year without any special agreement in regard to the compensation which he was to receive, or when it was to be paid; then the parties supposed they had entered into a permanent contract in regard to his services, past and future, but, by failure to understand each other, their minds never met, and the plaintiff continued to work several years for the defendant. This leaves the plaintiff's entire work, performed at the defendant's request, without any agreement in regard to compensation or payment. He can therefore recover for it, in *assumpsit*, on *quantum meruit*. The referee has found how much the plaintiff's services thus performed were reasonably worth, and how much he had received in payment. The defendant contends that the referee has allowed too much interest, if the plaintiff is allowed to recover. We do not think this contention can be maintained. The referee, in determining what would be a reasonable compensation for the plaintiff's services, found a certain sum due the plaintiff yearly, and diminished this sum by whatever he had received in payment, and allowed interest on the balance from the end of the year. This was his method of ascertaining the sum which the plaintiff reasonably deserved to receive as compensation for his services for the plaintiff. No question of a demand, or the necessity of a demand, before the allowance of interest, arises upon the facts reported by the referee. His method of ascertaining the sum which the plaintiff reasonably deserves to receive as compensation for his services makes the interest on the balance due yearly a part of the sum total, as much as the yearly balances. The judgment of the county court is affirmed.

# KING v. CUMMINS *et al.*

(*Supreme Court of Vermont. Washington. December 19, 1887.*)

EQUITY—ASSIGNMENT—SETTING ASIDE—MENTAL INCAPACITY—UNDUE INFLUENCE.

Defendant's intestate executed an assignment of her expectancy in her sister's estate to secure certain indebtedness claimed to be due from her to the assignee. It appeared that at the time of the execution of the assignment she was 90 years old, and her memory was seriously impaired; that she had not sufficient memory and mental vigor to understand whether she owed the debts or not; that she could not distinguish between her own debts and those of others, and allowed debts to be included in the assignment simply on the allegation of the creditor that they were all right; that a large amount of the debts so included were mere guess-work of the assignee, and not based upon any known agreement; that she was influenced by her son to sign the assignment; that the inducement was that she could always be with her son, who had always kept her supplied with liquor. *Held*, that this was such a showing of mental incapacity and undue influence as warranted setting aside the assignment.<sup>1</sup>

Appeal from chancery court, Washington county; POWERS, Chancellor.

In equity. This action was brought by Clark King, administrator with the will annexed of the estate of Lucinda Cutler. The defendants, A. O. Cummins, administrator of the estate of Henry Cummins, and Timothy Davis, administrator of the estate of Polly Gould, interpleaded; the purpose of the action being to set aside an assignment executed by Polly Gould and her son, John Gould, of their expectancy in the estate of Lucinda Gould. It was heard on the report of special masters at the September term, Washington county, 1886. It was decreed that the assignment be set aside and held for naught. The defendant Cummins appealed. The facts as found by the report of the masters are as follows:

David Gould deceased some time in the fall of 1861, leaving a will whereby he bequeathed to his wife, Polly, a life-estate in his home farm in East Mont-

<sup>1</sup> As to when equity will grant relief on the ground of fraud, confidential relations, or undue influence, see *June v. Willis*, 30 Fed. Rep. 11, and note.

pelier; and to his son, John Gould, the remainder, subject to the payment by John of certain other legacies therein named. From David's decease, Polly and John occupied the farm together; and after the death of John, in 1883, Polly remained upon the farm until late in the fall of the same year, when she moved to Montpelier, where she remained until her death, June 29, 1884, at the age of 93 years lacking a month. Lucinda Cutler, a sister of Polly Gould, deceased April 4, 1874, leaving a will providing that the residue of her estate after the payment of all other legacies should remain in the hands of her executor, or, in case of his death, resignation, or inability, in the hands of a trustee to be appointed by the probate court, for a term of 10 years after her decease, after the expiration of which term said residue, with its accumulations, "to go and descend to her legal heirs, to be divided according to law;" which will was duly probated, and Addison Peck appointed executor, who administered for a time, and was succeeded by Clark King, duly appointed administrator with the will annexed. April 30, 1872, Polly and John mortgaged said farm to Lucinda Cutler to secure their note of that date for the sum of \$700. August 22, 1873, Polly and John again mortgaged the farm to H. W. Heaton, to secure two notes of that date,—one for the sum of \$720; one for the sum of \$115,—and a note of April 29, 1873, for the sum of \$103.50; all signed by Polly, and the first and last named by John. This mortgage also covered a piece of land in Montpelier known as the "Somerby Place," of which Polly then owned an undivided half. August 22, 1873, Polly and John again mortgaged said home farm to Dennison Taft to secure a note of that date for the sum of \$790. September 19, 1874, John executed still another mortgage of the farm to Avery Cummins, to secure a note of that date signed by him for the sum of \$800. The mortgage to Dennison Taft, at some time after its execution, came into the hands of William N. Peck, and was by him foreclosed at September term of Washington county court of chancery, 1875, at which term decree was passed, with one year's redemption, expiring November 10, 1876. Neither Polly and John nor Cummins redeemed, and the decree became absolute as against Polly and John and Avery Cummins. Soon after the decree became absolute, Henry M. Cummins purchased the rights of said Peck, taking from him a quitclaim deed of the farm, dated May 3, 1877; and March 1, 1877, said Henry M. also received a deed from Polly and John of the "Somerby Place,"—a quitclaim deed. The incumbrances prior to the Taft mortgage still existed, and Henry M. paid to the executor of Lucinda Cutler and to said Heaton their claims, and so secured to himself absolute title to the farm. The amount of incumbrances, including the decree, at the date of the expiration of the decree, was \$3,019.43. After Henry became the owner of the farm in the manner above narrated, Polly and John continued to occupy the farm just as they had done before, presumably under some arrangement with Henry M.; but what that arrangement was cannot be stated, as there was neither writing nor living witness produced with definite knowledge to tell. All that was shown about this is learned from defendant A. O. Cummins, who was a witness in his own behalf, and who had some knowledge in a general way of his brother Henry's affairs, and he supposes the arrangement to have been that Polly and John were to pay Henry M. 6 per cent. on the money invested by him in the farm, and were permitted to stay there at the sufferance of Henry M.; he being the absolute owner. Henry M. Cummins deceased about August 8, 1881, and immediately thereafter A. O. Cummins was duly appointed administrator of his estate. Among Henry M. Cummins' papers his said administrator found the two smaller notes described in the Heaton mortgage, and a note for the sum of \$1,000, dated December 1, 1876, payable to Henry M. on demand, signed by Polly and John, and witnessed by F. V. Randall. This note was called in the trial "the Randall note." The \$115 Heaton note was payable to Heaton or order, and when found by A. O. Cummins did not bear Heaton's indorsement. A. O. Cum-

mins procured Mr. Heaton to indorse this note without recourse after Henry's death, and after the making of the assignment hereinafter spoken of. Within two or three days after the death of Henry M., A. O. Cummins, having then been appointed administrator, went up to the farm, and had an interview with John about these matters, and also made some general talk with Polly about her remaining on the farm, and about paying for the use of the farm. Subsequently A. O. Cummins had two or more interviews with John at Montpelier in relation to the business, and it was suggested that John and his mother make an assignment of their expectancy in the estate of Lucinda Cutler to secure the said Cummins for the past indebtedness, and for their future occupancy of the farm; and so it was arranged between Cummins and John that Cummins should come up to the farm, and have writings executed to accomplish that purpose. According to this arrangement with John, on December 18, 1881, a time previously agreed upon between Cummins and John, Cummins, with a lawyer, repaired to the farm to consummate the business. On that day, at the farm, Polly and John executed to A. O. Cummins, as administrator of the estate of Henry Cummins, in writing, under seal, an assignment of all their interest in the estate of Lucinda Cutler, with power of attorney to receive and receipt for such sum as should be coming to them, or either of them, from the administrator of Lucinda Cutler's estate to an amount sufficient to pay said Cummins the indebtedness therein named. The indebtedness named in the assignment is the said "Randall note," the said two smaller notes named in the Heaton mortgage, a note of \$1,250, that day executed by said Polly and John to A. O. Cummins, administrator, and such further indebtedness as should arise under a lease of the farm that day executed, and hereinafter more particularly described. At the same time A. O. Cummins, administrator, executed to Polly a lease of the farm from that time to the first day of April, 1884,—about the time the 10 years after the death of Lucinda Cutler would expire,—with a provision that it should terminate at all events with the death of Polly, at an annual rental of \$175. After Polly's death, Timothy Davis was duly appointed administrator of her estate. Said Davis claimed from Clark King, administrator with the will annexed of Lucinda Cutler, whatever was coming to Polly as heir of Lucinda Cutler; and A. O. Cummins, administrator, claimed the same by virtue of said assignment. Thereupon King brought the bill in this case, and the court ordered the said Davis and Cummins to interplead, and these masters were appointed to hear them. King has paid into court the fund here in controversy, being the sum of \$3,370.80. Upon either side was introduced a great number of witnesses, who gave their opinion respecting Polly's mental and physical condition during the last 10 years of her life, with more or less detail of her circumstances and surroundings.

From this testimony is found: Up to within 15 years of her death, Polly was a woman of more than ordinary business capacity and understanding. John was her only living son, and for him she entertained great affection, and in him had great confidence. He was addicted to the excessive use of intoxicating liquor, and was "easy going" and shiftless. Polly herself loved strong drink, and sometimes partook of it to intoxication. John ministered to his mother's desire in this behalf, and furnished her with her "warm drink," as she called it. The masters think that this attention on his part in nowise diminished her affection for or confidence in him. In 1883, during John's last sickness, some of the neighbors called the attention of the overseer of the poor of the town to the fact that Polly was in need; whereupon he, with one of the selectmen, went to the farm to look into the matter, and interviewed Polly respecting her needs and situation. Polly insisted to them that she had everything she wanted, except that since John had been sick she had no one to bring her her "warm drink." The fact is that at that time she was not comfortably provided for. The overseer at that time did nothing for

her relief, and, as far as appeared, never did. This was after the execution of the assignment, but her condition of mind then was not substantially different from what it was at the time of the assignment. Polly was induced to execute the assignment by John. Cummins' negotiations were mostly with John, and John influenced his mother.

On that thirteenth day of December, 1881, Polly's memory of recent events was seriously impaired, though better touching occurrences of her earlier years, as is said to be often the case with old people. She was laboring under the impression that she was going to get the whole of the Lucinda Cutler estate, amounting to about \$17,000, when the 10 years expired; and although Mr. Cummins, in the interview when said assignment was executed, told her that she would not, that the children of the brothers and sisters would share in it, she still persisted in the belief that she would get the whole of it, and Mr. Cummins could not make her see it otherwise. The inducement held out to her for executing the assignment was that she could remain on the farm; and her desire to do so, with John as her companion, was the consideration in her mind that obscured all others. She understood that the signing of those papers obligated her to the payment of the indebtedness named therein, and pledged her interest in her sister's estate for such payment. She could distinguish in her mind the difference between one sum of money and another, but she had not sufficient memory and mental vigor to understand in a reasonable manner whether she owed the debts named in the assignment, or whether, in justice and equity, she ought to pay them. The note of \$1,250 was written by Mr. Cummins' attorney; its amount was by him (Cummins) calculated as the sum due for the rent of the farm from the date the Peck decree became absolute to the first day of December, 1881. Cummins computed the rent according to his understanding of what the arrangement was, not that he definitely knew what the arrangement was, but, as hereinbefore stated, that he supposed that it was that Polly and John were to pay 6 per cent. interest on the money by Henry M. invested there. Polly, by reason of her age and consequent impaired memory, did not have a reasonable comprehension of this accounting, or a reasonable judgment as to whether it was right or wrong. Although the matters there considered at some time may have been, and probably were, within her full knowledge, she had not at that time sufficient memory to call them up, or sufficient judgment to reasonably consider them. She accepted the amount because they told her it was right. The masters do not think that John himself, who was present that day, had a very intelligent comprehension of the details of that business, though it is not claimed that he was incapacitated from transacting business affairs. It is not insinuated that Mr. Cummins intended any wrong, but it is stated that the making up of the \$1,250 note was in a great measure "guess-work" on his part. The circumstances surrounding the parties at and about the date of the "Randall note" suggested to the mind of the masters some doubt as to whether Henry M. preserved that note as a subsisting debt against Polly and John. The evidence presents to the minds of the masters the conjecture that that note was given at the time Henry M. purchased the Peck decree with a view then entertained, but afterwards abandoned, that new notes should be given for all that Henry M. should pay out to redeem the farm; Polly and John still retaining an equitable interest in the property. This note was mentioned to Polly at the time of the making of the assignment, and she was informed that it was named therein. The masters do not think that Polly was at that time of sufficient memory to reasonably understand what that note was given for.

*S. C. Shurtleff*, for defendant Cummins.

The only infirmity found is lack of memory. If Polly Gould understood what she was doing and the effect of her act, of what consequence is it whether she understood other things reasonably or unreasonably? The issue in this

case is the same as in *Allore v. Jewell*, 94 U. S. 506. Imbecility or weakness of mind, not amounting to idiocy nor lunacy, is not alone sufficient to avoid a deed. *Jackson v. King*, 4 Cow. 207; *Smith v. Beatty*, 2 Ired. Eq. 456. Unless there is inadequacy of consideration, or some other evidence of fraud, imposition, or overreaching, any degree of imbecility or insanity, short of total business incapacity, will not suffice to avoid a contract. *Henderson v. McGregor*, 30 Wis. 78; *Darnell v. Rowland*, 30 Ind. 342; *Henry v. Ritenour*, 31 Ind. 136; *Hall v. Perkins*, 3 Wend. 626; *Odell v. Buck*, 21 Wend. 142; *Petrie v. Shoemaker*, 24 Wend. 85; *Person v. Warren*, 14 Barb. 488; *Hirsch v. Trautner*, 3 Abb. N. C. 274; *Clearwater v. Kimler*, 43 Ill. 272; *Sheldon v. Harding*, 44 Ill. 74; *Farnam v. Brooks*, 9 Pick. 212; *Beller v. Jones*, 22 Ark. 92; *Mann v. Batterly*, 21 Vt. 326. Absolute soundness of mind is not necessary to enable one to make a valid conveyance; it is sufficient if the mind comprehend fully the import of the particular act. *Rippy v. Gant*, 4 Ired. Eq. Id. 443; *Miller v. Craig*, 36 Ill. 109; *Dennett v. Dennett*, 44 N. H. 581; *Hovey v. Hobson*, 55 Me. 256; *Speers v. Sewell*, 4 Bush, 239; *Creagh v. Blood*, 2 Jones & L. 509.

*Pittkin & Huse and Senter & Kemp*, for defendant Davis.

As to the measure of her capacity, the rule is that she must have had enough to enable her to understand and comprehend in a reasonable manner the nature and effect of the business which she was doing. *Stewart v. Flint*, 59 Vt. 144, 8 Atl. Rep. 801. Or, according to *Hill v. Day*, 34 N. J. Eq. 150, affirming *Lozeur v. Shields*, 23 N. J. Eq. 509, where there is no reason to suspect fraud, the test, where mental incapacity is charged, is, "did the person whose act is challenged possess sufficient mind to understand in a reasonable manner the nature and effect of the act he was doing, or the business he was transacting?" Or, according to Lord HALE, "did she know what she was about?" *Stewart v. Flint*, *supra*, and cases there cited. The whole case shows Polly's condition at the time of the assignment to have been one of great and real mental weakness; and, "in a case of real mental weakness, a presumption arises against the validity of the transaction, and the burden of proof rests upon the party claiming the benefit of the conveyance or contract to show its perfect fairness, and the capacity of the other party." 2 Pom. Eq. Jur. § 947; *Baker v. Monk*, 38 Beav. 419; *Wartemberg v. Spiegel*, 31 Mich. 400; Bigelow, Fraud, 282; Kerr, Fraud & M. 189, 190; Bailey, Onus Probandi, 353. In addition to real mental weakness, there must be substantial inadequacy of consideration, or undue influence, or certain fiduciary relations between the parties. Among the relations named above as fiduciary, which include all those where there is influence on one side, and confidence on the other, are those of parent and child, guardian and ward, attorney and client. *Tate v. Williamson*, L. R. 2 Ch. 55, quoted in 2 Pom. Eq. Jur. § 956.

The report finds "Polly was induced to execute the assignment by John. Cummins' negotiations were mostly with John, and John influenced his mother." It is such a finding as, taken with the degree of weakness found in Polly, and the knowledge Cummins had of her condition, and the inducements and influences that would control her, make it incumbent on Cummins to show the fairness of the transaction, the capacity of Polly to act independently, or that she had competent independent advice. The following cases show that even imputed undue influence would put this burden on Cummins. 3 Ilead. Cas. Eq. 123; *Watson v. Rodwell*, 27 Moak, Eng. R. 417, note; *Smees v. Smees*, 32 Moak, Eng. R. 321, note; *Huguenin v. Baseley*, 14 Ves. Jr. 273; *Maitland v. Irving*, 15 Sim. 437; *Maitland v. Backhouse*, 16 Sim. 58; *Espey v. Lake*, 10 Hare, 261; *Archer v. Hudson*, 7 Beav. 551; *Cooke v. Lamotte*, 15 Beav. 234; *Hoghton v. Hoghton*, Id. 278; *Blackie v. Clark*, Id. 595; *Cobdett v. Brock*, 20 Beav. 524; *Berdoe v. Dawson*, 34 Beav. 603; *Baker v. Bradley*, 7 De Gex., M. & G. 597; *Lyon v. Home*, L. R. 6 Eq. 655; *Kempson v. Ashbee*, 10 Ch. App. 15; *Bainbridge v. Browne*, 18 Ch. Div. 188; *Ross v.*

*Ross*, 6 Hun, 80; *Leighton v. Orr*, 44 Iowa, 679; *Noble's Adm'r v. Moses*, 1 South. Rep. 217.

One claiming under conveyance of an expectancy must show affirmatively its perfect fairness, and that a full and adequate consideration was paid. 2 Pom. Eq. Jur. § 953; 1 Story, Eq. Jur. 336; Bigelow, Fraud, 274; *Bromley v. Smith*, 26 Beav. 664; 3 Chit. Eq. Dig. 2794, and cases there cited; Hill, Trustees, 238, and note; Adams, Eq. (5th Amer. Ed.) 372; Bailey, Onus Probandi, 352.

*Ross, J.* The contention is between the interpleading defendants,—*Davis* as the representative of *Polly Gould's* estate, and *Cummins* as the representative of *Henry M. Cummins' estate*,—and is whether *Polly Gould*, December 13, 1881, possessed sufficient mental capacity to make binding the transaction then entered into by her with the defendant *A. O. Cummins*. She was then nearly 90 years old, and her mental faculties much enfeebled and obscured. The measure of capacity required to make a binding contract was recently before this court, sitting in full bench at the last general term, in *Stewart v. Flint*, 59 Vt. 144, 8 Atl. Rep. 801. It is there held that the party must possess capacity enough to enable her to understand and comprehend the nature and effect of the business she was doing. The masters have found that on the day of executing the assignment of her expectancy in her sister's estate "*Polly's memory of recent events was seriously impaired, though better touching occurrences of her earlier years, as is said to be often the case with old people.*" "*She was laboring under the impression that she was going to get the whole of the Lucinda Cutler estate, amounting to about \$17,000, when the ten years expired; and although Mr. Cummins, in the interview when said assignment was executed, told her that she would not, that the children of the brothers and sisters would share in it, she still persisted in the belief that she would get the whole of it, and Mr. Cummins could not make her see otherwise.* The inducement held out to her for executing the assignment was that she could remain on the farm; and her desire to do so, with John as her companion, was the consideration in her mind that obscured all others. She understood that the signing of those papers obligated her to the payment of the indebtedness named therein, and pledged her interest in her sister's estate for such payment. She could distinguish in her mind the difference between one sum of money and another; but she had not sufficient memory and mental vigor to understand in a reasonable manner whether she owed the debts named in the assignment, or whether, in justice and equity, she ought to pay them." The statement of her capacity in this quotation from the report is not, in substance, changed or varied by the other statements in the master's report. While she understood the effect of the transaction in which she was engaged, did she understand and comprehend its nature? We think she did not. She did not comprehend, and in her then condition could not, whether she owed the debts she was binding herself to pay, nor whether they were of such a nature that, in justice and equity, she ought to bind herself to pay them. In other words, she had not sufficient mental capacity to distinguish her own debts from the debts of others, nor to discriminate whether they were of such a character that they equitably and justly belonged to her to pay, or had a moral claim on her for payment. She was without determining capacity in herself, and the judgment which she once possessed was gone. She did not, and could not, be made to understand her rights in her sister's estate; and her desire to be with her son John as her companion was a consideration in her mind that obscured all others, and that was the inducement held out to her for executing the assignment. This last indicates that undue influence was taken of her desire to be with John as her companion, and partake of "the warm drink" which he furnished. Whether this undue influence was exerted by Mr. Cummins or John is left in doubt by the report of the masters;

but, by whichever exerted, it controlled her, rather than a reasonable comprehension of the nature of the transaction,—of the property she possessed, even in prospect, and of its application or assignment for the payment of her own debts, or of the debts of others, which had some just and equitable claim upon her for payment,—in executing the assignment. The assignment must therefore be set aside. Whether the estate of Henry M. Cummins has a valid claim against her estate for the use of the farm from December, 1881, to April, 1884, notwithstanding her incapacity to enter into a valid contract, is not presented for consideration, and no opinion is expressed in regard thereto.

The decree of the court of chancery is affirmed, and the cause remanded.

**KEMBLE v. KEMBLE et al.**

(Court of Chancery of New Jersey. December 20, 1887.)

**PARTITION—IMPOSSIBILITY OF DOING EQUAL JUSTICE—UNCERTAIN LOCATION OF MINERALS.**

In a suit for partition of lands, where it appeared that there were valuable mineral deposits beneath the surface, but their exact locality, extent, or value was uncertain, rendering it impossible to do equal justice between the parties, *held*, that under act N. J. April 20, 1885, providing that a division or partition is not to be made if it will work great prejudice to the owners, the court would not decree a partition.

Bill for partition.

*Mr. Van Blarcom*, for complainant. *M. R. Kemble*, for defendants.

BIRD, V. C. The bill in this case is filed for the partition of lands. The only question involved is, whether partition can be made without great prejudice or not; or, if partition cannot be made so that each of the defendants can have the share to which he is entitled in the land, whether a partial partition can be made by giving four of them, who are entitled to four-eighths, their shares in the land in one parcel, and by making division of the other parcel according to the interests of the other owners. The number of acres described is 92. It is claimed that there are extensive valuable mineral deposits beneath the surface; but it is not certain as to their exact locality, and it is uncertain as to their extent or value. But the allegation of their existence creates the difficulty which has caused me to hesitate about disposing of the case; for plainly, if the mineral deposits be what they are claimed to be, on the one hand, and there could be an equal distribution of them under the law, it would be the duty of the court to make division of the inheritance. This right, so long recognized, is cherished as of great importance, and I think courts never fail to give it due weight in the consideration of every such question. But while this is so, the possibility of doing injustice, by the division of land under such circumstances, gave rise to the statute which provides against division when it cannot be done without great prejudice. An effort was made to fix, with some certainty, the location of the minerals; but, for all judicial purposes, it seems to me that there was an entire failure, and only presented more strongly the difficulty under which I am laboring; that is, the uncertainty of making a division without doing great injustice to some of the parties. If one-half of it were to be assigned to the four part owners, they might get all of the mineral deposits. The testimony satisfies me that that is possible. And yet I think it is possible that, in making a division, a smaller portion than one-half might possibly contain the larger portion of the mineral deposits. These statements are sufficient to satisfy the mind that the action of a court would, in all probability, impose a great disadvantage upon one or more of the tenants in common. It is plain, therefore, that I cannot proceed under the act of April 20, 1885, and give to any two or more of the parties to this suit any portion of these lands, and order the rest to be sold, without encountering and violating provisions of the act which says in so

many words that a division or partition is not to be made if it will work great prejudice to the owners.

I will advise a decree in accordance with these views.

CONWAY *et al.* v. WILSON.

(*Court of Chancery of New Jersey.* December 30, 1887.)

1. EQUITY—PLEADING—MOTION TO STRIKE OUT ANSWER.

On motion to strike out the answer, where the language of the notice recited that the answer was not responsive to the bill, set up no defense thereto, and admitted all the equity of the bill, *held*, the motion was too broad, and was properly overruled.

2. EXECUTION—LEVY—RELEASE OF, TO DEBTOR—PRESUMPTION OF SATISFACTION.

The answer to a bill to foreclose a chattel mortgage set forth that the complainant proceeded at law, and recovered a judgment for the amount due on his claim, and then issued an execution, and levied upon the mortgaged goods, together with others not covered by his mortgage, and without selling or realizing anything therefrom, directed the sheriff to release all the goods levied upon to the defendant; and therefore complainant, having once had a levy on goods enough to satisfy his claim, his demand was presumed to be satisfied. *Held*, this rule could not apply where the defendant himself had received and retained the goods.

3. SAME—EXEMPTION—UNDER FORECLOSURE OF CHATTEL MORTGAGE.

The right of exemption from execution sale is purely statutory, and in New Jersey has not been extended to sales under foreclosure of chattel mortgage.

Bill to foreclose chattel mortgage.

On motion to strike out answer. The facts appear in the opinion.

*J. W. Morgan* and *E. A. Armstrong*, for complainants. *J. W. Wartman*, for defendant.

BIRD, V. C. The motion to strike out goes to the whole answer, and in the language of the notice is because "(1) that said answer is not responsive to the allegations of the bill of complaint, and does not set up any defense to said bill of complaint; (2) that said answer admits all the equity claimed in the bill." The last reason given makes it most plain that the motion is too broad. Where the complainant expressly charges an equity, and calls upon the defendant to answer such charge, he cannot call on the court to strike all the answer out because it, or any part of it, admits just what the complainant alleges. It would be most absurd to call upon the defendant to respond, and when he does, and admits the claim, to strike out all his admissions. I had been taught that this method of compelling a defendant to speak was one of the great objects and benefits of equity pleading. Therefore I cannot say that the whole answer must be stricken out. Strictly speaking, I might rest here; but as another point was fully discussed, I will look at it.

The answer sets up that the complainant had his claim secured by mortgage on goods and chattels, and that he proceeded at law and recovered judgment for the amount due on his claim, issued an execution, made a levy on the same and on goods other than those covered by the mortgage, and then, without selling or realizing anything therefrom, directed the sheriff to surrender all the goods so levied on to the defendant, and that the sheriff did so; and from the facts it is claimed that the complainant no longer has any claim. Supposing all this to be well pleaded, the argument is that the complainant, having once had a levy on goods enough to satisfy his demand, his demand is presumed to be satisfied. The defendant relies on *Freem. Judgm.* § 475, and this is the general rule. *Hanness v. Bonnell*, 23 N. J. Law, 159; *Carr v. Weld*, 19 N. J. Eq. 319; *Banta v. McClellan*, 14 N. J. Eq. 120; and *Johnson v. Tuttle*, 9 N. J. Eq. 365. But this rule cannot be applied when the defendant himself has received the goods and retains them. *Hanness v. Bonnell*, 23 N. J. Law, 159. He cannot have the consideration and the security both.

Another claim presented by the answer is the same exemption from the mort-

gage as that given by the statutes in cases of executions in favor of the debtor. This right, in case of executions, is purely statutory, and counsel admits that the legislature has not extended it to sales under foreclosure of chattel mortgages. There seems to be nothing in the law to prevent the debtor from giving, selling, assigning, or mortgaging any or all of his goods and chattels; and when the transaction involves an adequate consideration, it would not be upheld as equitable, if the court were to deprive the creditor of the very security for which he gave his money. This branch of the motion is to strike out the whole answer, which is not granted.

The complainant is not entitled to costs.

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TRUAX v. WHITE *et al.*

(Court of Chancery of New Jersey. December 31, 1887.)

MORTGAGES—DEATH OF MORTGAGOR—RE-EXECUTION TO MORTGAGOR'S WIDOW—CONSIDERATION—BURDEN OF PROOF.

W. took a mortgage from his brother for money loaned. After his death, his widow procured another mortgage, running to herself, from the mortgagor, alleging that the money loaned was hers, and surrendering the first mortgage. W.'s administrator sued to foreclose the first mortgage. *Held*, that the burden of proof was on the widow to show that it was her money, and not that of her husband, and, having failed to do that, her mortgage must be held null and void.

Bill to foreclose a mortgage.

Truax, administrator of William White, deceased, filed this bill to foreclose a mortgage given by Atlantic White to complainant's intestate, making Jane White, wife of deceased, party.

A. C. Hartshorne, for complainant. Frederick Parker, for defendant White.

BIRD, V. C. Atlantic White, being indebted to William White in the sum of \$916.25, gave his bond, and also a mortgage upon certain real estate, to secure its payment to William White. After the death of William White, the complainant obtained letters of administration upon his estate, and filed a bill to foreclose the said mortgage, and also to have declared null and void another mortgage which was given by said Atlantic White upon the same property to the widow of William White purporting to secure the same money. Mrs. White, the widow, claims that this \$916.25 was hers. She says that her husband contracted to loan this money to his brother, Atlantic White, and obtained permission from her so to do; Atlantic wanting just that sum of money to pay his proportion of the purchase money of the lands so mortgaged. She says that her husband, William, came to her and told her that he had promised Atlantic that he would furnish him with that amount of money in case he bought this land, and asked her if this money could be used for that purpose, to which she consented. She says that afterwards she gave this money to Atlantic White herself, and informed him that it was hers. It appears that the money was handed to Atlantic before the papers were executed, or the bond and mortgage given as security therefor. However, when the bond and mortgage were executed by Atlantic, they were drawn to William, and by him taken to his home in Brooklyn, where they remained until after his death, which occurred in a few months thereafter. Mrs. White insists that when he brought the bond and mortgage home they were wrapped in paper; that he handed them to her, saying, "There is the bond and mortgage for the money," or something to that effect, and that she placed them in a drawer where her husband kept his papers; but that she did not know that they were drawn in her husband's name until after his death, when a brother of hers, upon the inspection of them, informed her of that fact. This important fact being known, Atlantic was immediately sent for. He went from near Asbury Park to Brooklyn, and was there prevailed upon to consent to execute a second bond

and mortgage for a like sum. They proceeded to Freehold, in the county of Monmouth, and there procured a bond and mortgage to be drawn, which was executed by Atlantic and recorded, the first bond and mortgage being then surrendered to Atlantic. I am to determine, under the testimony, whether Mrs. White is entitled to this bond and mortgage against the administrator of her husband, William, who obtained possession of the first bond and mortgage, made an inventory thereof, and caused it to be recorded. Mrs. White has been sworn. Much of what she has said has been objected to as illegal, because it pertains to conversations and transactions by and between herself and her deceased husband, of whose estate the complainant is administrator. To her testimony respecting these conversations and these transactions the statute seems to be an effectual bar. With so much of her testimony out of the case, the inquiry seems to be comparatively limited. Whose money was the \$916.25. She declares that she received this amount of money from her father; that her father, in making division of his estate in his life-time, gave her so much of it, and at the same time a gold watch, in all making the gift about \$1,000. This money, it appears from her own statements, she kept between the ticks of a bed on which she and her husband slept, which fact she says was unknown to her husband. This is a remarkable statement, when it is admitted by her that she kept a bank-account in her own name, and that all of the moneys which her husband earned over and above expenses were given to her and deposited by her in the savings institution where all their moneys were kept, as I have said, in her name. To me, it seems quite incredible, if she received an amount of money from her father equal to \$900, that she went to the precaution of making deposits of all the small sums from time to time that her husband received by way of earnings and gave to her for that purpose, and would not deposit that large amount also. But what is equally characteristic and striking in the case is that no one else is called to support the defendant, Mrs. Jane White, with respect to her declarations in this particular, except her brother, who only speaks of her father having about this amount of money which he understood was for Mrs. White.

But supposing that she had \$916.25, is the proof at all clear that the money loaned by her husband was that same money? The burden is on Mrs. White. Taking so much of her testimony as is not excluded by the statute, it would appear that she had \$916.25, and that she carried just that amount from Brooklyn to Asbury Park in a stocking, and then gave it to Atlantic White, saying to him that that was the money her father had given to her. But Atlantic says she did not see him alone, and pay him the money. He says that the next day after Jane came to his house, her husband came, and that he brought a satchel out of the room which he and his wife occupied, and that he paid him the money. He further says that when his brother paid him this money, Jane said nothing about its being her money. Abigail White, a sister of William and of Atlantic, says that Jane had the satchel, and said to her that she wished her husband would come and take care of the money, for she didn't want to be bothered with it. In addition to this William took the bond and mortgage in his own name, and carried them to his house, and handed them to his wife, who immediately placed them in his drawer, where he kept his private papers, among such papers, without examining them or inquiring of him about them. There they remained until after her husband's death without inspection of them by her, or without her making any demand for them. I am aware that Abigail and Atlantic are interested as the next of kin of William, as Jane is as claimant of the whole fund; but after giving due consideration to this fact, and all the other facts above adverted to, I cannot conclude that Jane has discharged the burden resting on her as such claimant.

I think the bill was properly filed by the complainant; that he is entitled to the relief prayed for; the said mortgage given by Atlantic to Jane being null and void. I will so advise, with costs.

*In re DELAWARE BAY & C. M. R. Co.*

(Court of Chancery of New Jersey. December 20, 1887.)

## 1. CONSTITUTIONAL LAW—EXCLUSIVE PRIVILEGES—RAILROAD AT SEA-SIDE RESORT—RECEIVER.

Const. N. J. art. 4, § 7, subsec. 11, provides that the legislature shall not pass any private, special, or local law "granting to any corporation, association, or individual any exclusive privilege, immunity, or franchise whatever." The New Jersey act of May 8, 1880, provides that any railroad company whose road is constructed at any seaside resort not exceeding four miles in length, etc., shall be exempted from the provision of the act of February 12, 1874, (Revision, p. 943, § 160;) that, if any company fail to run its trains on any part of its road for 10 days, the chancellor may appoint a receiver, etc. *Held*, that the act of May 8, 1880, is unconstitutional; affirming *In re Railroad Co.*, ante, 261.

## 2. RAILROAD COMPANIES—FAILURE TO RUN TRAINS—RECEIVER—SEA-SIDE RESORTS.

The Delaware Bay & Cape May Railroad Company was organized under the general railroad law passed in 1873. Revision, 925. It ran from Cape May city to the steam-boat landing, a distance of less than four miles. The petition showed that it had not run for more than 10 days, and asked for the appointment of a receiver. Revision N. J. p. 943, § 160, provides "that if any railroad company in this state has or may hereafter fail or neglect to run daily trains on any part of its road for the space of ten days, then the chancellor of this state, upon petition of any citizen of this state, and due proof of the facts, shall speedily appoint a receiver," etc. The defendant relied on the provision of the act of March 8, 1880, (Supp. Revision, 834,) which provides that "any railroad company whose road is constructed at any seaside resort not exceeding four miles in length, and which was built and intended merely for the transportation of summer travelers and tourists," shall be excepted from the operation of section 160, above recited. Many people live at Cape May the whole year, and not merely during the summer season. *Held*, that Cape May is not a sea-side resort, within the meaning of the act; affirming *In re Railroad Co.*, ante, 261.

## 3. SAME—APPOINTMENT OF RECEIVER—JURISDICTION OF VICE-CHANCELLOR.

Defendants contended that the power of appointing a receiver under the act of February 12, 1874, (Revision, p. 943, § 160,) was personal to the chancellor, and that he could not delegate it. *Held* that, under Revision, p. 126, § 116, providing that the chancellor may refer to the vice-chancellor any pending cause or matter to hear for him, and report and advise, the vice-chancellor had jurisdiction to hear the petition.

Petition for receiver. On rehearing. For former opinion, see ante, 261.

*W. H. Willard*, for petitioner. *B. W. Edmunds* and *S. H. Grey*, for defendants.

BIRD, V. C. I consented to rehear this case. The defendants came in, and said that they had been surprised, and expressed the conviction that all the points which they were entitled to be heard upon had not been fully presented to nor considered by the court; either of which, in matters of so much importance, is sufficient to warrant the court in hearing a reargument.

The first point presented in resistance to the petition is that the court has not jurisdiction, because of the person or officer of the court to whom the petition was presented, and before whom the argument was had. Clearly, this point in the case should be disposed of at the threshold. It is quite useless for the court to climb and club unless it can collect and conserve the fruit of those labors. It is said that in such a case the application must be made to the chancellor, and, because that is the direction of the statute, the petition cannot be presented to a vice-chancellor, nor heard by him. The defendants did not see fit to depend upon this want of jurisdiction, but presented themselves before the vice-chancellor, following the counsel of the petitioner in an elaborate effort, by the production of witnesses, and argument in resistance to the insistence of the petitioner; thus casting their case, and all the consequences thereof, upon the court, without once questioning the right or power of the vice-chancellor to hear the case for the chancellor, and to advise an order or decree therein. Therefore it might with great propriety be said that the question of jurisdiction is presented too late to receive the attention of the court.

But, if the objection is to be considered at all, it may well be asked, why is it claimed that there is any distinction between the chancellor and the court of chancery? It may well be asked whether or not the chancellor can do anything except as he represents the court of chancery, or whether he can do anything in the court of chancery except he does it as chancellor? I am unable to make any distinctions whatever between authority conferred upon the chancellor and authority conferred upon the court of chancery, when the authority conferred pertains to the exercise of equitable or judicial powers or functions. The constitution says "that the court of chancery shall consist of a chancellor." Now, if the chancellor is called upon to act in any judicial capacity whatsoever by that name, he can only act as the head or representative of the court of chancery.

In the next place, it is claimed that, this authority conferred being personal or individual, the chancellor cannot delegate the power. It inheres in him alone, by express legislation; not more so, certainly, than any other act which he is called upon to perform in his capacity as chancellor, with reference to the court of chancery. The act creating vice-chancellors declares that the chancellor may refer to the vice-chancellor any cause or other matter which may at any time be pending in the court of chancery, to hear the same for the chancellor. Now, this particular matter is pending in the court of chancery; and the chancellor, under this act, had a right to refer it to a vice-chancellor, to be heard, not for the court of chancery, but to be heard for the chancellor. The same act provides that "the chancellor may make all such general rules for the effectual execution and carrying out of this act as he shall deem necessary and proper." And the eleventh rule of the court of chancery provides for motion-days, fixing time and place, and declares that all motions on such days can be heard by the chancellor, or one of the vice-chancellors; one of whom will attend for that purpose. This particular matter was first presented upon a motion-day, and the hearing commenced before one of the vice-chancellors upon such motion-day. It was, like every such case, heard for the chancellor; and if an order or decree be advised by the vice-chancellor, and signed by the chancellor, it will become effectual, not because it was heard by the vice-chancellor, for and on his own account as such vice-chancellor, but because it was and is signed by the chancellor, as such, by force of the provision of the act of the legislature establishing and authorizing such action upon the part of vice-chancellors; becoming, thereby, the acts of the chancellor himself as effectually, to all intents and purposes, as though he had heard the case himself from the beginning.

Upon this same branch of the discussion, it is insisted that all the labor which has been had in this case, and which must follow if these proceedings now instituted be continued, has been and will be for naught, because the case is being heard in the court of chancery, and not by the chancellor, and, being so heard in the court of chancery, every step is nugatory and void; and that, if the chancellor were to attempt to recognize or enforce it, he could not do so, because of the fact that it is an effort of the court of chancery to perform an obligation which the statute has imposed only upon the chancellor. The effort is made to make it appear that the head is no part of the body.

That I regard the other points discussed on the rehearing of great importance is shown by the fact that I at once allowed the rehearing; but, upon careful consideration, my judgment still is the same as expressed in my former conclusions.

## DOANE v. MILVILLE MUT. MARINE &amp; FIRE INS. CO.

(Court of Chancery of New Jersey. December 28, 1887.)

## 1. INSURANCE—MUTUAL—FIRE AND MARINE DEPARTMENTS—INDEPENDENT POLICIES—ESTOPPEL.

Upon the organization of the "Milville Mutual Marine & Fire Insurance Company," the corporation declared that the business of the two departments, marine and fire, should be carried on separately; that there should be no other connection between the two than that the expense of the institution should be equitably borne by each. This intention was made known by their by-laws, circulars, and agents, and for more than 20 years the company thus conducted its business, even when one of the departments was losing money. *Held*, that whether or not it was the intention of the legislature in granting the company's charter to permit the carrying on of two distinct branches of the business, the members who had taken out policies in either department, having done so with full knowledge that the premium notes, and assets of the other department were not, under the rules of the company, subject to the payment of their losses, were estopped to assert any such claim.

## 2. SAME—INSOLVENCY OF COMPANY—PAYMENT OF DEBTS—PREMIUM NOTES—EQUITABLE ASSETS.

Revision N. J., chapter on "Corporations," § 80, provides that "in the payment of creditors and in the distribution of the funds of any such company, the creditors shall be paid proportionately to the amount of their respective debts, excepting mortgage and judgment creditors, when the judgment has not been by confession for the purpose of preferring creditors;" and the premium notes and other assets of a mutual insurance company are applicable to the payment of the debts of the corporation in the manner provided by said section, and not otherwise, though they may be equitable assets.

## 3. SAME—CANCELLATION OF POLICY BY INSOLVENT COMPANY—LIABILITY OF POLICY-HOLDERS.

The officers of a mutual insurance company, with knowledge of its insolvency, but before it had been so declared, voluntarily canceled the policy of one of its members, and executed a release from all liability thereunder. *Held*, that the policy-holder was, nevertheless, still liable for all losses and expenses incurred during the life of the policy, and which actually existed at the time of cancellation.

## 4. SAME—INSOLVENCY—PRIORITY OF JUDGMENT CREDITOR.

A judgment creditor of an insolvent corporation, to avail himself of the preference allowed such creditors in the distribution of assets, must have obtained his judgment before the court has taken control of the company by injunction or other preliminary order, and a creditor who obtains judgment the day on which a bill for the appointment of a receiver is filed, and a restraining order issued, is entitled to no preference over general creditors.

## 6. SAME—LOSS UNDER POLICY AFTER APPOINTMENT OF RECEIVER.

A policy-holder whose loss occurred after an appointment of a receiver for the insolvent company is not entitled to a share in the distribution of the assets.

Bill for receiver. On exceptions to master's report.

*W. S. Casselman*, for complainant and receiver. *D. J. Pancost*, for defendants Lemy & Blight. *S. H. Grey*, for defendant Woods. *Potter & Nixon*, for defendant Carll.

**BIRD, V. C.** The defendant company is an insolvent corporation. On the twenty-first day of September, 1885, a bill was filed setting forth the inability of the company to pay its debts. An order to show cause why a receiver should not be appointed, together with an order restraining the company from performing any duties whatsoever devolving upon it, was issued. Upon the return of the order, a receiver was appointed and an injunction awarded; soon after, a reference to ascertain the true condition of the company, the nature and extent of its liabilities, and to report the extent of its obligations, by way of marine losses, and also by way of losses by fire. The master having made his report, exceptions thereto have been presented. One important exception is in these words: "That the said master has certified that the losses that occurred under the mutual marine policies can only be collected from the assets of the mutual marine; that the amount of the different parties for losses that occurred under mutual fire policies can only be collected from the assets of the mutual fire. Whereas he ought to have certified that losses that occurred

under mutual marine policies can be collected from the assets of the mutual marine and mutual fire, and that the amounts due the parties for losses that occurred under mutual fire policies can be collected from the assets of the mutual fire and mutual marine." This presents the judgment of the master, as it appears by his report, and the objections thereto. The question raised is serious enough. Let us look at it. In so doing we must consider the charter, the by-laws, and the nature of the company, and the conduct, both of it and of its members, for a long period of its existence.

Its charter was obtained in the year 1859. Pamph. Laws 1859, p. 144. By this it was provided that the said corporation was incorporated "for the purpose of insuring their respective vessels, buildings, household furniture, merchandise, and other property against loss or damage by sea or fire." They were authorized to pass by-laws for the purpose of carrying into effect the object had in view by the charter. Section 8 of their by-laws provided that the company should keep the marine and fire accounts separate, and declared that the companies should be assessed to pay losses in their respective departments, and the expenses of the whole business should be charged to the different departments, fire and marine, as equitably as possible. It seems that, during a very long period, if not during all their existence, they endeavored to preserve a distinction between the marine and fire insurance. The proof shows that, at the very outset, circulars were issued, making known this distinction, which circulars were distributed by their agents, containing this language: "Both fire and marine insurance effected; but no fire notes can be assessed for a marine loss, nor a marine note for a fire loss." In addition to this by-law and this circular, it appears that the agents of the company faithfully represented the resolution of the company to everyone who became members thereof, so that marine policy-holders understood that they were independent of the fire policy-holders, and that the fire policy-holders understood that they were independent of the marine policy-holders. It is also in evidence that for a long period of time, if not during the entire existence of the company, the marine branch was much more profitable than the fire branch of the company; so much so, that while there was little or nothing in the treasury to the credit of the fire, there was nearly \$40,000 to the credit of the marine; and it also appears that, at times, the former became indebted to the latter by the use of a portion of the money due to the latter, in order that the fire department of the company might be maintained.

The exceptants regard this attempt upon the part of the company to carry on two separate branches of business, under their charter, as void,—*ultra vires*; hence, as I have said, the question is a serious one. The view, however, which I take of it, relieves me from determining, at this stage of the transaction, whether or not it was the intention of the legislature to permit the company to carry on two separate and distinct branches of business. They had the power to insure against risks by sea, and also the power to insure against risks by fire. Whether, by mutual arrangement and agreement, they could fulfill the object of their mission and keep within the law by only applying the profits of the marine department to that department alone, and of the fire to the fire department alone, I am not prepared to decide. But there is another view to be presented. I am clear that a corporation of this character may be estopped, by its resolutions and by its acts, as well as individuals. The corporation at its inception declared that they would carry on the two departments separately, making no other connection between the two than that the expenses of the institution should be as equitably borne by each as possible. This intention was immediately made known by their by-laws and by their circulars and by their agents. It cannot, therefore, be said that any individual was misled by supposing that the entire premium notes or assets of the company, whatever they might be, would be subject to the payment of his claims against the company. With his eyes opened, with this important

fact before him, he voluntarily became a member of this association. He thus obliged himself to accept these terms, and also obliged himself, to every other member of the company, that he would see to it that these terms were carried out. It was a mutual agreement between all concerned. This simple statement of facts seems to warrant the conclusion that, after the existence of this company for over 20 years, during which entire period all persons becoming interested acknowledged the force of the by-law, consented thereto, and also to the circular and the action of the agents. It seems to be impossible that the court could declare the action of the company void, without, at the same time, doing great injustice. Each member had a right to take the other at his word; each had a right to confide in the integrity of the company, and in its power to proceed upon the basis indicated; and if each policyholder made his investment and secured a benefit upon the principle involved, how can the court now say to him, "You did an unlawful thing, and the profits or benefits which you expected to derive therefrom you are not entitled to?" Or how can the court say to another class that "the action of the company being contrary to law, you are not only entitled to no profits or benefits, but you are under obligations to do that which you did not contract to do,"—which must, in this case, upon the one hand or the other, inevitably be the result, if the doctrine of estoppel be not applied. For there would be no complaint if it were not the fact that one of those branches has fallen far short of profit, while the other, for the time being at least, was very profitable. Therefore let me again ask, how can the court say to those who are in the branch of the company which has been profitable, that "you are not only not entitled to any credit because of the profits which have been made to your department, according to the contract, but you must pay, to the amount of your premium note, that proportion of indebtedness which the other branch of the company has incurred?" In what department of the law has any such proposition found a foothold? It what department of equity has it ever been declared that where one individual solemnly contracts with another for the purpose of a particular thing, and they mutually advance money to its accomplishment, and irretrievably changes his legal relations, that he is not equally bound? It cannot be said that there is any fraud. There is no deception. It is admitted that every holder of a policy had the fullest information. Therefore it is most clear that the doctrine of estoppel must apply. If not in such case, it should be obliterated from our books as a mockery. Had this question arisen upon the first institution of the company, or its first publication of the by-law, there would have been far less difficulty in determining the rights of policy-holders. It may be that, under such circumstances, a court would feel itself obliged to say that the charter did not contemplate the separation of the two branches of business. Doubtless every one will admit that the argument presented by the exceptants to the effect that a single charter cannot be intended to create two corporations has great force.

It appearing, therefore, that this exception should not prevail, the next important inquiry is whether the exception presented by the Woods is well taken or not. They were members of that company. Before the company was declared insolvent, they presented their policies, and, upon the payment of 2½ per cent., secured a release from all liability by the cancellation of their policies. The master reported that, under the circumstances, this release or cancellation is not effectual, but that they are still liable for their full proportionate share of the losses and expenses incurred during the life of their policies, and which actually existed at the time of cancellation. This has been excepted to as erroneous; the insistence being that, as the company had the right to discharge them and cancel their policies, and as they accepted the terms which the company was willing to make, and paid the 2½ per cent. imposed, they are free from all further liability. In this respect I think the master should be sustained. It may not have been thought, at the time of the

cancellation of these policies, that the company was in serious financial embarrassment. But it would seem that of this fact there can be no doubt. There can be no doubt that insolvency was then staring the officers in the face. If this be so, what possible right had they to transfer a large proportion of the assets of the company without an adequate consideration? I do not think it can be contended for a moment that such an act was justifiable; if several thousand dollars worth of assets could have been thus surrendered, all of the assets of the company could have been so surrendered likewise. A matter so plain, it seems to me, need only to be stated in order to show the substantial rights of the creditors of the company to their claim against the persons whose policies were thus canceled. I conclude, therefore, that they must account and answer for the full amount for which they were liable under the charter and by-laws at the time of the cancellation of their policies, giving them credit for the amount already paid. *Insurance Co. v. Kinnier's Adm'rs*, 28 Grat. 88; *Sands v. Hill*, 42 Barb. 651; *Sterling v. Insurance Co.*, 32 Pa. St. 75; *Com. v. Insurance Co.*, 112 Mass. 116; *Cumings v. Sawyer*, 117 Mass. 30; *Smith v. Insurance Co.*, 8 Hill, 508; *Insurance Co. v. Boeckler*, 19 Mo. 135; *Hyde v. Lynde*, 4 N. Y. 387; *Nathan v. Whitlock*, 9 Paige, 151; *Burke v. Smith*, 16 Wall. 895; *Insurance Co. v. Stewart*, 10 Va. 387; *Insurance Co. v. Van Winkle*, 12 N. J. Eq. 333; *Miller v. Fire Ass'n*, 42 N. J. Eq. 459. 7 Atl. Rep. 895. The foregoing, I think, presents the discussion so far as it has been opened before me with respect to the assets of the company, and the liability of the different members thereof.

The next question is as to the distribution of the assets between judgment and general creditors. The master has reported that the assets of the company are all equitable assets, and being such, must be distributed equitably; and as a consequence of that fact, judgment creditors have no preference. The eightieth section of the act respecting corporations provides "that in the payment of creditors, and in the distribution of the funds of any such company, the creditors shall be paid proportionately to the amount of their respective debts, excepting mortgage and judgment creditors when the judgment has not been by confession for the purpose of preferring creditors." I do not think words can be so placed as to make language any plainer. The language is not that the creditors should be paid *equally*, if the assets of the company are *equitable assets*; nor that the judgment creditors shall have preference out of the *legal* assets of the company. Nothing is said upon the question, one way or the other. It simply declares how they shall be paid,—that "in payment of the creditors and in distribution of the funds of any such pany." Manifestly, the officer who is winding up such company has nothing to deal with, under the statute, upon this point, but *funds*,—the proceeds of sales of real and personal estate, or the proceeds of any other assets converted into funds. He is supposed to have converted everything into money,—into *funds*; and these funds he is directed by the statute to make distribution of proportionately among the creditors, except to mortgage and judgment creditors. The exception on this ground is well taken.

Although the exceptions to the master's report have not raised the question directly, and although the argument of counsel did not present it specifically, yet the conclusion which I have expressed, lastly, and the facts presented in the testimony and in the master's report, and fully suggested by the argument of counsel, render it necessary that it should be determined at what point a creditor shall cease to acquire any benefit from his diligence in obtaining a judgment. It cannot be that a judgment recovered at any time before distribution of the funds, comes within the statute, and is to be paid in full, in preference to general creditors. A limit must, therefore, have been intended by the legislature. At what point of time is that limit? Is it at the time of the appointment of the receiver, or of the issuing of the injunction, or of an order to show cause why an injunction should not issue and a receiver be ap-

pointed, with a restraining clause, forbidding the company from collecting any moneys or paying or discharging any debts, or transacting any business whatsoever, or the filing of the bill? It seems to me that the true spirit and intent of the act is to limit the period at which a judgment may be recovered, and the creditor secure the benefit of the priority contemplated by the statute, to whenever the court, according to the directions of the statute, wholly or partially takes control of the company, and of its assets, either by injunction or other preliminary order, thereby depriving the company of all power to act in the premises, except under the directions and by the consent of the court itself. When the court takes either of these steps, the hands of all parties, the company and its agents and creditors, including judgment and execution creditors, are all alike stayed. No one of them can proceed with any effect towards the payment of a debt or enforcing a judgment by execution or otherwise. It is true, the creditor may obtain his judgment, and thereby certify his claim; but he cannot seize upon the assets of the company, nor can the company discharge the judgment by paying. Therefore, at and after the juncture of filing the bill and issuing a restraining order or injunction, it would seem that no proceedings could be made effectual by a suitor against the company or its assets; both being in the custody of the law. This very wise and salutary principle is universally recognized.

In this same connection, another question was presented by the concurrence of events; a judgment having been entered upon the day that the bill of complaint was filed and the restraining order issued. On which side of the line does the judgment creditor, in such case, stand? If the court undertakes to classify him with judgment creditors, upon what principle shall it be done? I can discover no principle which secures to him any priority over general creditors. As the law in such cases knows no parts of days, a judgment entered on the day of obtaining the restraining order would be excluded. As already intimated, the court by its order forbids the defendant company from paying. This being lawful, I do not see by what method the judgment creditor could compel payment by execution; and, since he cannot do this, I cannot see how he could acquire a preference. In other words, when the court steps in and takes possession, all opportunity for any one obtaining an advantage by his diligence ceases. *Johnson v. Pennington*, 15 N. J. Law. 188; *Thomas v. Desanges*, 2 Barn. & Ald. 586; *Rex v. Warwick*, 1 El. & Bl. 816. As the case stands, this principle governs. A loss accrued after the appointment of a receiver. The policy-holder insists that he is entitled to share in the distribution of the assets of the company. Against his claim the master has reported; to this there is an exception. So far as this question has been considered by the courts, the master is right.

When a company of this character becomes insolvent, and passes into the hands of a receiver, it ceases to be for all purposes except that declared by the statute,—the winding up of its affairs according to the directions of the statute permitting its existence, under which it was created, and subject to which it necessarily always is. Every person becoming a member of such company is subjected to all the provisions, conditions, or limitations of the statute. He has no reason to complain, because they are part of the bargain. Notwithstanding the apparent hardship in which such policy-holder finds himself, it is less troublesome to the cautious and less obnoxious to reason than at first appears. He had it in his power to provide against the contingency which involved him in the loss he sustained, and which he now seeks to recover of this company. He could have secured other insurance, and, by the insolvency of this company, was warned so to do if he expected relief from such disaster. *Mayor v. Attorney Gen.*, 82 N. J. Eq. 815; *Dean's Appeal*, 98 Pa. St. 101; *Com. v. Insurance Co.*, 119 Mass. 45.

I will advise a decree in accordance with these views. The prevailing party is entitled to costs.

AYERS *et al.* v. HAWK *et al.*

(Court of Chancery of New Jersey. December 30, 1887.)

1. CHATTEL MORTGAGES—RECEIVER—CONTRACTS WITH MORTGAGOR BINDING ON MORTGAGEE.

A receiver appointed under a chattel mortgage contracted with the mortgagor that certain property covered by the mortgage should be the mortgagor's in payment for services rendered. *Held*, that this contract was binding upon the mortgagee.

2. SAME—MARSHALING ASSETS.

Where one creditor has a lien or security beyond what others have, he must, when called upon to do so, first exhaust such lien or security.

3. EXECUTION—LEVY ON GROWING CROP—BEFORE APPEARANCE ABOVE GROUND.

Two judgment creditors levied on what they both claimed to be a growing crop of corn,—one making his levy after the corn was put into the ground, but before it had made its appearance above the surface; the other levied after such appearance. *Held*, that the first was a valid levy, and entitled to priority.

Bill to foreclose a chattel mortgage, and to settle the rights of mortgage and judgment creditors. The opinion states the facts.

*W. H. Walters* and *B. C. Frost*, for complainants. *M. Wyckoff*, for defendants *Gardner* & *Vliet*. *W. M. Davis*, for the banks.

BIRD, V. C. This bill is filed to foreclose a chattel mortgage, and thereby to settle the rights of mortgage and judgment creditors. The mortgagee claims certain goods and chattels raised by the mortgagor under a contract with the receiver in the cause. I conclude that the complainant is not entitled to any of the hay remaining on the premises. This hay was the share of the tenant, (mortgagor,) allowed to him by the receiver for moving the horses. It seems to me that, when the complainant filed his bill to enforce and carry out the old contract, (the mortgage,) an entirely new relation was created, and especially so when a receiver was appointed. From thence the complainant can claim nothing, except through or at the hands of the receiver, who alone can act for the complainant; and in this case the receiver has contracted that the hay in question shall be the defendant's, (Hawk's.) This evidently took the place of the former contract. It was made for the good of the complainant, and he must accept it. The hay became thereby Hawk's, and he had a right to sell or mortgage it. And this same reasoning applies with equal force to all the other products. I can see no escape from this conclusion. The receiver took charge of certain articles under the order of the court, and by virtue of the power in the chattel mortgage, and contracted with the debtor (the chattel mortgagor) with reference to them, and this was done, presumably, for the good of the estate; and the consideration paid (hay, oats, etc.) or used was just as though he had used so much money of the estate. It was just as though he had first sold what hay, oats, etc., he found there, and had said to Hawk, "I will pay you so much in cash for your work in managing these crops for me in the interest of creditors."

As the testimony stands, two of the notes (the bank notes) were Carpenter's, although drawn by Hawk to the order of Carpenter, and indorsed by Carpenter. Hence the banks can claim nothing by subrogation; the doctrine does not extend to them. But the banks are entitled to have any benefit which may arise from the liens which the mortgagees have on goods or chattels not covered by the execution of the banks. In other words, where one of two creditors has a lien or security beyond what the other has, he must, when called upon so to do, first exhaust such additional lien or security.

There were two judgment creditors, each one taking a levy under his execution on what they both claim to have been a growing crop of corn,—the one making his levy after the corn was planted, and before the stalks had made any appearance above the ground; and the other, after such appearance. Both claim priority. The creditor taking the last levy says the first levy was

ineffectual, because there was nothing to levy on; there was nothing visible or tangible. I think the law regards the first levy as good and effectual. There has been a certain amount of work done towards the production of the annual crop. The productions of the soil, and the result of the labor of man, are regarded as chattels; they pass to the executor, and are subject to sale under execution. *Westbrook v. Eager*, 16 N. J. Law, 81; *Bloom v. Welsh*, 27 N. J. Law, 177; *Wilkinson v. Ketter*, 69 Ala. 435; *Doremus v. Howard*, 28 N. J. Law, 893; *Evans v. Roberts*, 5 Barn. & C. 829; *Benj. Sales*, 93-95. After the seed or grain from which the crop is expected to spring has once been cast into the ground in the usual course of good husbandry, it must be regarded as a growing crop. If this be not the safe rule, then when does the plant or seed become a chattel? Shall it be at any period before maturity? It has never been claimed that the crop must have matured. The only possible difference between one period of time and another from the planting to the reaping is that of degree; the nearer perfection the crop becomes, the stronger becomes the assurance that the owner will realize. Beyond this, there cannot possibly be any distinction in right. In this case, when the first levy was taken, enough had been done by the tenant towards the annual crop to have warranted the executor, in case of the death of the tenant, to inventory and claim it against the heir. This general rule was applied to a crop of potatoes in *Evans v. Roberts*, *supra*, and potatoes spring or germinate and mature under the ground. This view is opposed by the insistence that there is no crop, no growing grain, until the germ has grown above the surface. It seems to me it would be as logical to say that there is no crop or product until the harvesting or marketing. I cannot comprehend how the law can, in such a case, take notice of any particular step or change in nature's operations or developments. I will advise accordingly.

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EMERSON *et al.* v. PIERCE *et al.*

(Court of Chancery of New Jersey. January 7, 1888.)

**EQUITY—PRACTICE—BILL TO QUIET TITLE AND FOR PARTITION AMONG COMPLAINANTS.**

Complainants filed their bill to establish a claim of title to the land mentioned in the bill in their favor, against defendants, and after that for partition of the land among complainants. Defendants were adjudged to have no interest in the land. *Held*, that the court had no jurisdiction to proceed to make partition of the lands between complainants, and a decree for that purpose could not bind the parties.

Bill to establish claim of title, and for partition. On motion to confirm master's report.

*George Hilton*, for the motion.

BIRD, V. C. It is now disclosed that this report rests on a bill filed for two distinct and specific purposes: *First*, to establish a claim of the title to the lands named in the bill in favor of the complainants, and against the defendants; and, *second*, for the partition of those lands among the complainants. The first object has been attained; can the other be attained in the same suit? In other words, the main object having been accomplished, can the suit now proceed? Another question is involved: Can there be a suit in chancery, under our practice, without a defendant? This is the case before me. By virtue of the decrees already made, the defendants have been decreed to have no interest in these lands. This terminates the litigation as to them, to all intents and purposes. They are as completely out of the case as though they had died, and with their death all and every right, title, or interest ever owned or claimed by them had, by operation of law, become extinguished. In such case, could the complainants proceed in the same cause to make mutual disposition of the subject-matter? I think not.

But it is said that, in this case, the bill prays for partition. I do not see

that that lessens the difficulty. And it is said the court will not hesitate because of mere technicalities, but will brush them aside, and effect justice, without extra costs and delay. It is not a question of mere procedure, nor of technicalities, nor of expenses; but of jurisdiction, or right, or ability of the court to act in such case. Can any two or more citizens unite to ask the court to aid them in settling an account, in making division of the goods which they hold in common? Can two or more, being partners, and claiming all the partnership assets against others, join in asking the court to declare that those others have no interest, and then, after so declaring, to make an accounting and division among them? I think not. The very most that can be said of such procedure is that the court, or the person holding the court, has used the forms of law to arbitrate, but without any agreement between the parties to abide by the result. Hence it will be seen that in my judgment, in every such case, the court can do nothing to aid the complainants. Every step taken will be ineffectual, because not binding; and no decree would be a bar when pleaded, unless acquiesced in so long that lapse of time became an estoppel. In other words, every such proceeding is nothing more nor less than voluntary; and this characteristic cannot be changed even by the court of chancery recognizing the proceedings.

I cannot advise a confirmation of the report.

#### WARE v. CHEW.

(Court of Chancery of New Jersey. January 12, 1888.)

EASEMENTS—LIGHT AND AIR—JUDICIAL NOTICE—STATUTE OF FRAUDS—ESTOPPEL.

S. owned two adjoining city lots,—one of them had a dwelling-house on; the other was vacant. He leased the former for five years to W. for a dwelling, and to carry on his manufacturing business. W. took possession. S. then sold the vacant lot to C. but, before he took title, C. told W. he thought of buying and building, and asked him if he had any objections, when W. said "No," and added that his rights under the lease must be respected. C. made excavations for a cellar, and commenced a wall for a one-story building, 15 feet above the surface of the ground; which, if erected, will be within 8 feet 8 inches of the windows in the rear part of W.'s house, and 15 inches above the top of those windows. Upon a bill filed to restrain C. from building so as to obstruct the light and air from entering said windows, *held*, that in such case the statute of frauds was a bar to an unexecuted parol agreement, if one had been established. *Held, also*, that no agreement had been established which included the light and air. *Held, likewise*, that when W. told C. that his rights under his lease must be respected, C. had complete notice, and that all of the talk between the parties thereafter did not work an equitable estoppel. And *held, further*, when a stone wall is built so near to a window, the court will take judicial notice that it will materially diminish the passage of light and air.

(*Syllabus by the Court.*)

On bill for injunction, brought by Charles F. Ware against John H. Chew, to restrain the latter from erecting a building which would obstruct the free passage of light and air to the premises occupied by complainant.

*J. J. Crandall*, for complainant. *H. A. Drake* and *S. H. Grey*, for defendant.

BIRD, V. C. Smith was the owner of two city lots adjoining each other. On one of them was a dwelling-house, covering its entire width in front, with an extension back, containing four or five windows in the first story, opening to the eastward over four feet of the lot on which the house stood, and over the other lot. There were two windows in the main building, opening also to the eastward. There were no windows on the west side of this building. The other lot was vacant, so that light and air were freely admitted to all of the said windows of the dwelling over the vacant lot. Smith leased the dwelling-house and lot to Ware, who occupies it with his family, and also with machinery and employes in the business which he carries on. After Ware had occupied the premises for more than a year, Smith sold and con-

veyed both lots to Chew. Chew has made excavations for a building the entire width of the vacant lot, and 100 feet deep; so that, if he builds, the entire space will be covered, leaving no passage way between the houses. Chew has also commenced laying the foundation walls. Ware has filed his bill, and asks the court to restrain Chew from erecting said building; alleging that it will obstruct the light and air which are necessary for his comfortable enjoyment of the premises which he occupies under his lease.

That Ware is entitled to the relief he prays for is not disputed, unless he has bound himself by an agreement to the contrary, or, by his acts and acquiescence, is estopped from setting up the law, which would otherwise protect him. *Sutphen v. Therkleson*, 38 N. J. Eq. 318. This view of the law in this state has long been recognized and acquiesced in; it may be said to be as definite a branch of our real-estate law as any. But the defendant offers to show two agreements, or the equivalent of agreements, by which he claims that Ware is bound.

*First.* He shows that, at the time Smith leased the lot to Ware, Ware requested Smith to allow him to use the vacant lot, which Smith expressly refused to do, and gave as a reason for his refusal the fact that he might want to build on the lot if he kept it, and, if he did not keep it, he might want to sell it, and the purchaser might want to build. This testimony was objected to, upon the ground of its being in contradiction of a written agreement,—the lease. I think the testimony is admissible; and only upon the ground of fraud. It would seem to be a very great wrong for Ware to acquire valuable rights without consideration; and if it were to be shown that the very point now in dispute was involved in that part of the agreement which is said to be in parol, and that it was distinctly understood that Ware should have no enjoyments whatsoever from or over the vacant lot, in case it should be built upon, for him now to be protected in defying that agreement in a court of equity. When parol testimony becomes essential to prevent fraud or wrong doing, no writing is so sacred as to render such testimony inadmissible. Courts are willing that parties who bind themselves by written instruments shall have the full benefit of all that they contracted for; but if it is made to appear that a party makes his claim under such instrument by fraud, or claims that which it is made to appear by parol was expressly excluded, he will not be sustained in a court of equity. This court will not, under such circumstances, help a man to enjoy that for which he paid no consideration. *Juilliard v. Chaffee*, 92 N. Y. 529; *Naumberg v. Young*, 44 N. J. Law, 331; *Ryle v. Ryle*, 41 N. J. Eq. 582, 597, 7 Atl. Rep. 484; *Merritt v. Merritt*, 10 Atl. Rep. 835, (May term, 1887.) But, while the testimony is admissible, it is insufficient as a bar to the rights which Ware now claims; for it is not made to appear what sort of a structure Smith proposed to build,—whether one like the building Chew threatens to build, or one like the house on the lot now occupied by Ware. I cannot perceive that the simple refusal of allowing Ware to use the vacant lot because Smith might want to build, without showing the character or dimensions of the building which he might propose, so that it should appear that he intended to place a structure there which would obstruct light and air, is sufficient to prevent Ware from maintaining this bill.

*Second.* It is said that Ware entered into an agreement with Chew in and by which he surrendered all and every right which he had to light and air over the vacant lot. The alleged agreement, it should be noted, made no reference to light or air; neither of them having been mentioned. The parties met, and talked about making a passage-way for Ware from the rear part of his house to the street in front. Ware wanted it made upon the vacant lot, and under the building Chew was about to erect; but this Chew would not consent to, and suggested that the same kind of a passage-way be made under the house and through the cellar of the premises leased and occupied

by Ware. Chew says Ware consented to this, and also consented, in order to bring about the proposed change, to make some alterations in his cellar. All this Ware emphatically denies. Ware says they had interviews about it, and that Chew proposed the passage-way through the cellar of his house, but that he never consented to it. Ware's son was present at two of the interviews, and his statements increase the probabilities in favor of Ware's denial of any agreement. Again, it is urged that Ware admitted such an agreement in an interview with Smith. Smith says that he spoke to Ware about it, and told him that he understood it was all arranged, and that Ware said, "Yes, that was so;" and also says that Ware said he would not use his house for carrying out slops and garbage, but would move out first, which certainly is not consistent with the claim of a settlement. But up to this time nothing seemed to have been involved in the interviews between Ware and Chew but a passage-way from the rear. But as more of the conduct of the parties, as well as their conversations upon this point, will be adverted to again, it is not necessary that I here enlarge, since a well-settled rule of law disposes of this branch of the case. In case Chew supposed that he, in his conversations with Ware, was making an agreement by which Ware was to surrender all his rights to light and air, it is claimed that he cannot show any such agreement, it not being in writing; such writing being required by the statute of frauds. Plainly, this would seem to be such an interest in and concerning lands and real estate as the statute contemplates. *Brown v. Brown*, 33 N. J. Eq. 650. And there is still another circumstance which throws some light on this branch of the discussion. After Chew had purchased and had made the excavation for his building, Ware employed counsel, who spoke to Chew, and warned him that he could not erect the wall of his building where he proposed, because it would obstruct the light and air which Ware was entitled to under his lease. Chew said he had made an arrangement with Ware. But very shortly afterwards, on the same day, and while Ware and his counsel were yet consulting, Chew went to them and said: "If there is going to be trouble about this, what will you take to get out?" Either Ware or his counsel said they would let him know, and soon thereafter, on the same day, made known to Chew the sum which would be satisfactory; and that was \$500 to move, or \$300 to rearrange his machinery and to remain. But Chew refused to pay the price, and then the bill was immediately filed. I cannot but conclude from this that Chew knew there was no binding agreement between the parties, or that the agreement, if any, had not embraced the important matter of light and air; for, if these matters had all been disposed of by a good contract, for a proper (I don't say valuable) consideration, he certainly would not have offered to give something additional, which he signified his willingness to do, by asking Ware what he would take. My judgment therefore is that, so far as this branch of the inquiry has any bearing at all, it is against the allegation that the parties had settled their differences by an agreement.

But, *thirdly*, it is urged with great force and apparent conclusiveness that Ware is estopped, because he allowed all these things to take place without giving direct and formal notice of his rights, and from the first standing upon them. In the outset, I should say that, in my view, the defendant's counsel present the doctrine of equitable estoppel in its true light. The question is, has the defendant shown such a case as will justify me in applying the doctrine? On this head, the principal facts are as I now state them. Before Chew purchased these two lots, but after he had secured the promise of a refusal from Smith, he called on Ware, and informed him that he was about to buy them and to build on the vacant one. Ware asked him what he was going to build, and Chew told him a building 20 by 100 feet, and one story high, to be used for a store; the number of feet high not being given. Chew says he asked Ware if he objected, and that Ware said "No; only you will cut off my alley-way." I do not understand that Ware admits saying this; but it is

very clear that he had no right of way over the surface, and doubtless Chew knew it. But Ware says that, when he was asked if he had any objections, he replied "No;" only that his rights under his lease were respected. This important fact is also sworn to by the son of Ware, and is not denied by Chew. Ware, in the very beginning, thus told Chew that he should claim all his rights under the lease. This should not be lost from view. Chew thereby had the completest notice of the lease, and of all the rights of Ware. Chew then proceeded at his own risk, if no change in the situation occurred afterwards. From the point of time when Ware demanded all his rights under the lease, they talked about the construction of an alley or passage-way, as I have above mentioned. But it is clear that the passage-way was the only subject talked about. Once after this, the parties went into the cellar of the leased premises, and had some talk about the same way, or, if the talk was not between them, it was between Chew and his servants, in Ware's presence, so that he was as much bound in equity as though he participated, in case anything was said which required him to speak. Ware, however, says that he was present, and heard Chew talking to his men about moving the coal, and digging a trench, and putting up a partition, as though it was all his own. This interview in the cellar was after Chew had accepted the deed, and is not so material on the question of estoppel as what took place between the parties before. And the same may be said of what transpired at the time Chew commenced his excavation, and during its continuance. The deed was accepted December 7, 1887; on the 12th, Chew commenced his excavation; and on the 19th the bill was filed. Ware had knowledge of this work. Besides this knowledge, he, or some member of his family, dug up and moved from the vacant lot some flowers and shrubbery, and thereby, it is claimed, recognized Chew's right to build. This was pressed, but I can see no such consequence; it was nothing more than a recognition of the ownership of the title in Chew. As it stands before me, it has no relation to the question of light and air. And it is also urged that Ware said to Chew, when the latter commenced digging, that he was more than four inches (the space which the charter of the city has attempted to condemn or confiscate for party-walls) on him, to which Chew answered that he was not, and that then Ware said "all right;" and this is proof of acquiescence. But Ware distinctly says that all he said in reply was "Well, we will see." But, as I have intimated, all the acts or declarations of Ware after Chew accepted his title are, in my judgment, of small importance, and should have but little, if any, influence in the determination of the question. The point at issue, the question of estoppel, must be determined by what took place between the parties at their first or second meeting. Then it was that Ware told Chew that he had no objections to his building, but that his rights under his lease must be respected. It seems to me that this fact illuminates the whole case, and relieves it of all doubt. I cannot conceive that Ware could have done more. His claim was as comprehensive as his title by the lease, and was an infinitely safer course for him than any attempt at particulars. I do not forget that Chew says that Ware wanted an alley-way; but, if he specified this one thing as a convenience, there is no doubt whatever but that he also stood upon all his other legal rights. Chew having thus been so fully warned by Ware that he (Ware) would insist upon all that his lease gave him, it seems to be my duty to conclude that nothing took place afterwards between them to justify me in saying that Ware abandoned his just rights, or so acted or talked as to lead Chew into the honest belief that he had abandoned them. An equitable estoppel is not therefore established.

In justice to the learned counsel for Chew, I should advert to one branch of their argument, viz., a waiver by Ware of all his rights to light and air by his laches in waiting until the excavation was about made before he made them known. If the law would hold him to any greater particularity than

the presentation of his lease, then, in my opinion, Ware was prompt, and acted within a reasonable time. It would be quite unworthy to hold, after Chew had been so notified, that he could proceed without peril, and that any single distinct step in advance would secure him against all the rights of Ware; and it would be equally unworthy to hold that Ware, besides the general claim named, should at any and every instant know all and every of his rights, and distinctly assert at every advance or encroachment of his adversary, and that, too, instantaneously. Our lawful property rights are not held by any such frail or uncertain tenure. When Chew commenced to dig four inches on the ground which his grantor had leased to Ware, and within three feet and eight inches of the windows of Ware's back building, in which he was carrying on his manufacturing, then it was, or soon after, that Ware began to realize that a brick wall so near to his windows, and fifteen inches higher than his windows, would materially obstruct his light and air. I think he acted within time. But if, after this first insistent of his rights under his lease, he was slow to act, it ought not to be charged more to his folly than the aggressive conduct of Chew to his daring. Take the principal case of *Pickard v. Sears*. Had the real owner declared his interest in the property before the sale, he would not have been estopped.

Again, the defendant says, in case all else will not sustain him, it is surely sufficient to show that the complainant has offered no proof that the erection of the wall, as proposed, will so obstruct light and air as to injure him; he being only an occupant. In other words, it is urged that it was the duty of the complainant to show, by the examination of witnesses, that such a wall would interfere with the proper or rightful enjoyment of his home and place of business. I think the complainant has fully established this branch of his case without such additional proof. That the rear part of his house, and the windows in it, are located as stated in the bill, is admitted. That the proposed new wall will be, if built, within three feet and eight inches of those windows, and at least fifteen inches above them, is also admitted. Does the court need more to know the truth? If the windows were closed in by a wall directly against the face of them, would the court be sustained in presuming that all light and air would be obstructed? Clearly so; and I believe the presumption that the wall in question will materially diminish light and air is equally well based. It must be that there are some laws of nature which courts can take judicial notice of, and give effect to, without aid of experts or philosophers. Could it possibly increase my conviction were a score of experts to swear that neither the sun's rays nor the strongest winds could penetrate an eight-inch wall of bricks and mortar? Beyond doubt, there may arise many cases where it would not be at all certain that injury is done by such structures, at much greater distances from the house claiming the easement. Then, of course, the burden would be on the complainant. But, in the case before me, all will see that Chew can have nothing but reflected light until the morning sun is well up in the heavens; and all will as plainly see that the amount of that reflected light is diminished to the extent that the wall cuts off the entire eastern horizon; and that but three feet and eight inches is but a small space indeed, compared to the entire outlook when unobstructed. This, indeed, is so marked or distinguishable, that one of the counsel for Chew felt obliged to admit that when the sun is in the west the light will be diminished if the defendant builds his wall.

I will advise that an injunction do issue restraining the defendant from erecting any building on said premises, named in said bill as lot No. 216, during the continuance of said lease, that will materially diminish the passage of light and air to the windows in the said rear part of the building leased to the complainant. The complainant is entitled to costs.

DODGE *et al.* v. PENNSYLVANIA R. CO. *et al.**(Court of Chancery of New Jersey. January 10, 1888.)*

## 1. MUNICIPAL CORPORATIONS—VACATION OF STREET TO USE OF RAILROAD—RIGHTS OF ABUTTING OWNERS.

For injuries resulting from the violation or destruction of public rights, in cases where no private, individual right is injuriously affected, no private action can be maintained.<sup>1</sup>

## 2. SAME.

Except in the instances where statutory provision to the contrary exists, the law gives no compensation for losses resulting from the surrender of public rights.

## 3. SAME—PRELIMINARY INJUNCTION.

A complainant to entitle himself to a preliminary injunction, to protect a right which he claims in land, must show that on the undisputed facts of his case, and according to the established law of the state, he possesses the right which he claims.

## 4. SAME—OWNERSHIP OF ABUTTER TO MIDDLE OF STREET.

A grantee of land abutting on a public street, if his grantor owns the fee of the street, takes to the middle of the street, by mere force of legal construction, unless a contrary intention is apparent.

## 5. SAME—RIGHT TO USE OF STREET.

And where lands are conveyed as abutting on a proposed street, and the street extends over other lands of the grantor than those conveyed, a right to the use of the proposed street, as a means of passage to and from the lands conveyed, will arise, by implication, in favor of the grantee on the delivery of the deed, and will continue in force until the proposed street becomes a public highway.

## 6. SAME—REVERSIONARY INTEREST IN STREET—VACATION.

Whether such private right will merge in the public right when the proposed street becomes a public highway, and will be extinguished with the public right if the street is afterwards vacated, or will revive on vacation, is a question on which judicial opinion is at variance, and is, as a matter of law, unsettled in this state.

## 7. SAME—USE OF STREET BY RAILROAD—INJUNCTION.

Nothing short of the threatened destruction of property of great value, by acts of wanton lawlessness, inflicting injuries which must result in irreparable damage, will justify the granting of an injunction staying an important public work.

*(Syllabus by the Court.)*

On application by William E. Dodge and others to enjoin defendants, the Pennsylvania Railroad Company and others, from elevating their road in Green street, in Jersey City, New Jersey, which street had, to the extent necessary, been vacated by authority of the city. Heard on bill and affidavits on the part of the complainants, and affidavits on the part of the defendants.

*William C. Spencer, Edward A. Day, and Theodore Runyon*, for complainants. *James B. Vredenburg, Gilbert Collins, and Joseph D. Bedle*, for defendants.

**VAN FLEET, V. C.** Three hundred and ninety-five feet of a highway in Jersey City, known as Green street, have been vacated by the proper authority of that city. The general direction of Green street is from north to south, extending from Harsimus cove, on the north, to the basin of the Morris canal, on the south. The part vacated is now covered by the tracks of the Pennsylvania Railroad Company. The tracks and the street are on the same level; running, however, in different directions. The tracks run from west to east, and the street from north to south. The residue of the street, both north and south of the part vacated, will be left intact, and remain a public highway. The public right in the street, to the extent above indicated, has been surrendered to enable the Pennsylvania Railroad Company to elevate the tracks of their road in Jersey City from Brunswick street, a point about 1,500 yards west of Green street, to the end of their road. This surrender was made in fulfillment of a contract made by Jersey City with the Pennsylvania Railroad Company, under the authority of a statute passed in 1874. That statute enacts "that the proper municipal authorities, respectively, of any city of this

<sup>1</sup> See *Ranch Co. v. Brooks*, (Cal.) 16 Pac. Rep. —, and note.

state, be, and they are hereby, authorized and empowered to enter into such contracts with any of the railroad companies whose roads enter their cities, respectively, to secure greater safety to persons and property therein, whereby said railroad companies may relocate, change, or elevate their railroads within said cities, or either of them, as in the judgment of such municipal authorities, respectively, may be best adapted to secure the safety of lives and property, and promote the interests of said cities, respectively; and for that purpose shall have power to vacate, alter the lines, and change the grades of any streets or highways therein, and to do all such acts as may be necessary and proper to effectually carry out such contracts. And any such contracts, made by any railroad company or companies with said cities, or either of them, are hereby fully ratified and confirmed." Revision, p. 944, § 163. The plan adopted by the Pennsylvania Railroad Company for the elevation of their road, and approved by the proper municipal authority of Jersey City, renders it necessary that that part of Green street which has been vacated shall be closed, and the street at that point was vacated for the purpose of authorizing the railroad company to construct the road-bed on which their elevated tracks are to be laid within the lines of the street. There is no dispute that, if the defendants are allowed to carry out their present purposes, Green street, to the extent that it has been vacated, will be effectually and permanently destroyed as a way of any kind. The complainants claim that the destruction of that part of the street which has been vacated will do them irreparable injury, and they ask to be protected against such injury by injunction.

The complainants own lands on both sides of Green street, but none on that part of it which has been vacated. Their lands lie over 500 feet to the north of the place where the street has been vacated, with a cross-street intervening between their lands and the place vacated. Their lands are improved. Their bill describes their improvements on the west side of the street as "planing-mills, lumber-sheds, and other buildings for box-manufacturing and wood-working and storing lumber," and on the east side of the street as "a brick building for office and business purposes." The complainants' title originated in two deeds made by a corporation known as the "Associates of the Jersey Company;" the first bearing date May 20, 1844, and the second April 2, 1845. Long prior to the date of these deeds, and as early as 1804, Green street, although then under the tide-waters of the Hudson river, both in front of the lands now owned by the complainants, and at the point where it has been vacated, was, in legal theory, at least, a public highway. The Associates of the Jersey Company were, by their charter, made competent to take title to certain lands in fee, and to grant and dispose of the same at their pleasure, and they were also granted important municipal powers. They were given power to make and lay out streets. This power, it has been decided, embraced, not only the upland which they were authorized to acquire, but also land under water. *Jersey City v. Canal Co.*, 12 N. J. Eq. 556. They exercised the power of laying out streets, by making a map on which the streets they intended to establish were laid down. This map was subsequently filed. It is known as the "Mangin Map." Green street appears upon it. It is one of the streets laid out by the associates. The streets laid down on this map became at once, on the adoption of the map, in consequence of the dual character in which the associates acted, public highways. Mr. Justice WHELPLEY, speaking for the court of errors and appeals, in the case just cited, said: "When, therefore, they [the associates] laid out these streets, they acted as owners of the fee in presenting the lands to the public for streets, and also as a municipal corporation in accepting them on behalf of the public; so that when the Mangin map was completed, and adopted by them as the plan of their city, the streets laid down upon it became such by an act of dedication made by the owners or the fee, and immediately accepted by a competent authority on behalf of the public, and also by act of laying out by legis-

lative authority." The lands now owned by the complainants were conveyed by the associates to the persons in whom the complainants' title originated—to the founders of their title—by direct reference to the Mangin map. They were described in the deeds made by the associates as laid down on that map, and as abutting on and bounded by Green street; and they have been so described in each subsequent conveyance down to those under which the complainants hold. The complainants contend that these conveyances, according to well-settled principles of legal construction, vested in their predecessors in title, and consequently in them as the successors to that title, an easement and right of way over all the streets laid down on the Mangin map, and particularly in and over Green street, as appurtenant to the lands conveyed, which right, they insist, constitutes a part of their private property, of which they cannot, without a violation of their constitutional rights, be deprived without their consent, unless just compensation be first made. The defendants do not intend to make compensation.

The private right thus claimed is the sole foundation of this action. It has no other. Indeed, it can have no other. For injuries resulting from the violation or destruction of public rights, in cases where no private, individual right is injuriously affected, no private action can be maintained. Such wrongs can only be redressed by a suit on behalf of the public, either by indictment, or an information by the attorney general. The established rule on this subject is too familiar to require the citation of authorities. The public right in that part of this street which has been vacated has been surrendered. That surrender has been declared valid by the supreme court. Subsequently to the filing of the bill in this case, an application was made for a *certiorari* to remove the proceeding by which the vacation was effected. The writ was refused; the court declaring that the public right had been surrendered by competent authority, exercising a valid power. "A public road," as was said by Judge BLACK in *Paul v. Carver*, 24 Pa. St. 207, "belongs to nobody but the state; and, when the government sees proper to vacate it, the consequential loss, if any there be, must be borne by those who suffer it, just as they would bear what might result from a refusal to make it in the first place." Except in the instances where statutory provision to the contrary exists, the law gives no compensation for losses resulting from a valid surrender of public rights. And this is so, because, ours being a government by the people, such surrenders can only be made by the people's representatives; and as they generally hold office for short periods of time, and must exercise their power in the face of the people, it is assumed that their power in this respect will never be exercised except when the public good imperatively demands it.

The complainants, to entitle themselves to the writ they ask, must have demonstrated that, on the undisputed facts of this case, and according to the established law of this state, they have such right in that part of Green street which has been vacated as they claim. The rule upon this subject is jurisdictional. It is a limitation upon the power of the court, which the court cannot transcend. *Coach Co. v. Railroad Co.*, 29 N. J. Eq. 299; *Leonard v. Hart*, 42 N. J. Eq. 416, 7 Atl. Rep. 865. The point in dispute, it will be perceived, presents a pure question of legal title, which may be stated as follows: What right did the deeds made by the associates grant to the complainants' original predecessors in title in Green street, not in front of the lands conveyed, nor in that part of Green street extending, both north and south of the lands conveyed, to the two next adjacent cross-streets, but in that part of Green street which lay entirely beyond the two next adjacent cross-streets? As to the fee of the street in front of the lands conveyed, the law is settled. A grantee, in such case, if his grantor owns the fee of the street in front of the land conveyed, takes to the middle of the street by mere force of legal construction, unless a contrary intention is apparent on the face of the

deed, or is unmistakably shown by the situation of the parties and the nature and character of the transaction. *Salter v. Jonas*, 39 N. J. Law, 469. And it would seem, also, to be settled, that where a grantor conveys land as abutting on a proposed street, and the street extends over other lands of the grantor than those conveyed, a right to the use of the proposed street, as a means of passage to and from the land conveyed, will arise, by implication, in favor of the grantee on the delivery of the deed, and continue in force until the proposed street becomes a public highway. This is the doctrine established by *Booraem v. Railway Co.*, 40 N. J. Eq. 557, 5 Atl. Rep. 106, as I understand that case. The language of the learned justice who drew up the opinion of the court of errors and appeals in that case, on this point, is as follows: "Whenever a dedication as a public highway is effected—as it usually is—by means of conveyances to private persons by reference to a proposed street, over other lands of the grantor, the private rights of the several grantees precede the public right, and are the source from which the public right springs. By such conveyances, the grantees are regarded as purchasers by implied covenant of the right to the use of the street, as a means of passage to and from their premises, as appurtenant to the premises granted; and this private right of way in the grantees is wholly distinct from and independent of the right of passage to be acquired by the public." This right in the street, which is thus recognized as passing to the grantee, rests entirely upon implication: for, if regard were had alone to the words used to describe the thing granted, and they were construed according to their natural sense, and as they are universally understood, when applied to any other monument as a boundary, it is clear that all right in the street would have to be held to be excluded, for the street is mentioned, not as a part of the subject of the grant, but as defining the limit or boundary of the thing granted. They take the grantee to the street, but give him nothing in it. Such implication is, however, made, in cases like the one mentioned in the opinion just quoted, to give effect to what has been described as "the paramount intent of the parties, as disclosed by the whole scope of the conveyance, and the nature of the property granted;" and where land is conveyed as abutting on a proposed street, before a public highway in fact exists there, and a way over such proposed street is essential to the beneficial enjoyment of the land granted, or even a desirable accessory to it, the implication that, until the proposed street becomes an actual highway, the grantee shall have the use of it as a means of passage to and from his land, seems not only to be reasonable and just, but absolutely necessary to give effect to the manifest intention of the parties. But that case, it will be observed, differs in a very material respect from the case in hand. The lands here were conveyed, not as abutting on a proposed street, but on a street which was a public highway in law. When that is the case, the grantee gets everything which it can be said he expected to get, or which he supposed the grantor intended to grant to him, and there is therefore nothing to be supplied by implication.

The precise question, then, which this case presents, is this: Is it settled as a matter of law, in this state, that if any part of a public street is, at any time subsequent to the date of a conveyance of land abutting on it, abandoned or surrendered, that the grantee named in such conveyance takes, by implied grant or covenant, a private right of way over that part of the street in which the public right has been extinguished? I know of no case decided by a superior court in this state which so declares the law; none was cited on the argument of this motion. The question is one on which the courts of our sister states are at variance. The opinion in *Booraem v. Railway Co.*, *supra*, says: "There is some controversy whether the private right of way in grantees, holding by such conveyances, is merged in the public right, when the dedication is consummated by public acceptance, or whether it is merely suspended thereby, and will revive if the public right is afterwards abandoned."

There are several adjudications, made by courts distinguished for the ability and learning of their judges, which hold that, when the public right attaches, the preceding private right is thereby extinguished, and that, if the public right is subsequently surrendered, the adjacent owner takes the land to the middle of the street, discharged of all right of way. *Mercer v. Railroad Co.*, 36 Pa. St. 99; *Insurance Co. v. Stevens*, 101 N. Y. 411, 5 N. E. Rep. 353; *Kimball v. City of Kenosha*, 4 Wis. 336; and *Bailey v. Culter*, 84 Mo. 531,—are cases of this class. The adjudications standing in conflict with this view are perhaps more numerous than those supporting it; but which of the two conflicting doctrines is most consonant with right reason and sound public policy this court has no authority to decide. That question, like all other questions of legal title, falls within the exclusive jurisdiction of another tribunal.

The case mainly relied on by the complainants in vindication of the right on which they found their claim to an injunction is *Clark v. City of Elizabeth*, 40 N. J. Law, 172. The disputed question in that case was whether Clark, the plaintiff, was entitled to compensation for the land which the city authorities were about to take for a street. Clark, in 1869, conveyed certain of his land, and described them as abutting on a street called "Bayway." Bayway, at the date of the conveyance, had not been opened as a street in front of the land conveyed, but had been previously laid out as a street by commissioners having authority for that purpose, and so designated on a map made by them. When the city, in 1870, proceeded to appropriate the land for street purposes, Clark claimed compensation. The lands he conveyed in 1869 were not only described as abutting on Bayway, but a direct reference was made, in the description of them, to the commissioners' map. The question which the case presented for judgment was whether or not Clark had not, by his deed, so effectually dedicated his lands, within the lines of the street, to public use, as to extinguish all right to compensation. Both the supreme court and the court of errors and appeals decided that he had. The distinguished chancellor who wrote the opinion of the court of errors and appeals says, in substance, *arguendo*, to demonstrate that Clark had no right to be compensated for the land taken, that Clark's grantee, in the deed of 1869, acquired, by implied covenant, a right of way over all Clark's land in the site of the street, not only to the two next adjacent cross-streets, but as far as his lands extended. This was said, it must be remembered, in a case where the grantee was not before the court as a party, and where his rights were in no way presented for adjudication, and where the facts out of which the controversy grew were altogether different from those involved in the present litigation. But if we adopt the rule laid down in this opinion as a correct statement of the law on this subject, we are still without an authority vindicating the legal right set up by the complainants in this case. The right of way which, by this rule, is accorded to a grantee, is limited to the land of his grantor in the site of the street at the date of his conveyance. That is its utmost extent. His grantor, it is certain, could not, even by an express grant, give him a right in the lands of another person, nor in lands previously granted out by him to another person; much less would it be possible to effect such a result by means of a presumption or implication. The complainants' title originated, as has already been stated, in 1844 and 1845. Prior to that date, and as early as 1838, the proofs show that the defendants' predecessors in title—the New Jersey Railroad & Transportation Company—were in possession of that part of Green-street which has been vacated, and were using it for railroad purposes, and that they and the defendants have continued to so use it, without interruption or disturbance, from that time to the present. At the time the complainants' predecessors in title acquired title to the lands which the complainants now hold, the *locus in quo* was located very near the eastern terminus of the defendants' railroad, opposite the city of New York, and where, it was obvious, it would be necessary, as the business of the rail-

road increased, that the railroad corporation should provide itself, from time to time, with additional terminal facilities to enable it to discharge its duties properly to the public. There are now on the *locus in quo* 33 different railroad tracks, and a train movement of some kind over some part of it every 30 seconds each secular day, from 6 o'clock in the morning to 6 o'clock in the evening. The defendants' use of the *locus in quo* is practically exclusive, and has been so for years. The source of their title is not shown, but the fact that they have been in undisturbed possession for nearly 50 years, making such use of the land as, for a large part of that time, has been exclusive, would seem to exclude all doubt that they hold by a title which cannot be impeached. Their possession, from its commencement, must, under the circumstances, be regarded as rightful, and consequently their title must be held to stand prior in date to that of the complainants. The complainants predecessors in title undoubtedly took the land in question subject to the public right or easement therein; but that fact does not help the complainants. They claim that they have a private right in the land, distinct entirely from that which the public once held; and to maintain this claim they are bound to establish that it is settled, as a proposition of law, that it was competent for the original grantor of their title to create, by implied covenant, the right which they claim, not in his own lands, but in lands which he had previously granted to another person. That, I think it must be admitted, is a legal proposition which as yet has not received judicial sanction in this state.

The only reported case decided by our courts bearing a close resemblance to the case under consideration is that of *Railroad Co. v. Prudden*, reported, first, in 19 N. J. Eq. 386, and, on appeal, in 20 N. J. Eq. 531. The complainant, in that case, acquired title to lands abutting on Dickerson street, in the village of Dover, in 1837 and 1839. His grantor had dedicated the land in Dickerson street to public use as a highway as early as 1831. The defendants, in constructing their railroad through Dover, laid a single track, in 1847, longitudinally over Dickerson street. The street was vacated in 1848, and in the same year the defendants obtained a deed from the successors in title of the complainants' grantor, purporting to convey the fee of the street to them. The defendants, in 1867, attempted to lay a second track longitudinally over the land which, prior to the vacation, had constituted Dickerson street, but not upon that half which, by construction of law, passed to the complainant under his deed. The complainant then filed his bill, asking that the defendants be enjoined from laying the second track in front of his lands. Chancellor ZABRISKIE ordered an injunction to issue. This order, on appeal, was reversed. Mr. Justice DEPUE, in stating the reasons for reversal, said, among other things: "What rights the complainant acquired in the street beyond the *medium flum via*, by his deed of conveyance, and the effect of the vacation of the previously existing highway, are questions proper for the determination of a court at law." The questions involved there were the same precisely as those presented here. They are still open and undetermined.

On the ground that the legal right on which the complainants rest their claim to an injunction is, as a matter of law, wholly unsettled, they must be refused the writ they ask. When the *gravamen* of the complainant's case is, as it is here, that defendant has been guilty of unconscientious conduct, in depriving him of the enjoyment of his legal rights, to his irreparable injury, it is a condition precedent to the complainant's right to bring his adversary into a court of conscience, that his adversary's unconscientious conduct shall be either admitted, or shall have been established against him by a judgment at law. *Outcalt v. Helme*, 42 N. J. Eq. 665, 9 Atl. Rep. 683. It should be said in addition, I think, that, if an exactly opposite conclusion had been reached as to the character of the right which constitutes the foundation of the complainants' action, it would still have been the duty of the court to deny the writ they ask. The change which the defendants propose to make in

their road is one in which the public have a very deep interest. It will make travel, both on the railroad and the highways of Jersey City, more expeditious than it is at present, and it will give greater security to human life, by removing dangers which now exist, and which imperil it, to a greater or less extent, every day in the year. That the change is proper and necessary, to the end that life and property may be made more secure, and to promote the best interests of Jersey City, is a question which has been finally concluded by the judgment of that municipal body to which the legislature thought proper to submit it. From that judgment there can be no appeal to this court, except on the ground of fraud. It is the duty of this court, in ordinary cases affecting purely private rights, and where no public interest is involved, to exercise its prohibitory power with the utmost caution; to compare consequences in advance, to see whether, if it exercises this one of its attributes, it will not inflict upon the defendant greater injury than the complainant will suffer if it withholds its hand, and leaves him to pursue his ordinary legal remedy; but in cases like the present, where, if the court acts, an important public work, designed to free public travel from peril, and to give greater security to human life, will be arrested and seriously delayed, nothing short of the threatened destruction of property of great value, by acts of wanton lawlessness, inflicting injuries which, if not prevented, must result in irreparable damage, will justify the court in issuing a command that the work shall stop. The duty of granting or refusing an injunction is a matter resting in sound discretion. It should never be granted when it will operate oppressively, or contrary to the real justice of the case, or where it is not the fit and appropriate method of redress under all the circumstances of the case, or where it will or may work a fatal injury.

The injury against which the complainants ask to be protected is one arising entirely from inconvenience. The only harm which it is possible for them to suffer from the closing of Green street is that in going from their improvements on Green street to the ferry, across the Hudson river, and to some other places, the distance which they will be compelled to travel will be increased between eight and nine hundred feet. Green street, it will be remembered, is to be closed only at a single point, and for a distance of only 390 feet; all the rest of it is to remain a highway. The next parallel street to the west is distant only 400 feet from Green street; so that a person by going from Green street to the next parallel street, thus making a *detour* from a direct line of about 400 feet, and then passing along that street to a point beyond the railroad, and then down a cross-street, another distance of about 400 feet, will be back again in Green street at a point beyond where it is to be closed. The inconvenience arising from this increase in distance can scarcely be regarded as an injury sufficiently substantial or serious to make the interposition of this court, by injunction, necessary or proper, when the present condition of Green street, at the point where it is proposed to close it, is considered. There are 33 different railroad tracks there, over which trains are almost constantly moving. The complainants do not pretend that such occupancy and use of this part of the street by the defendants is unlawful. As a way, the street, at this point, is neither free, safe, nor convenient. On the contrary, it is almost constantly obstructed by moving trains, which render its use for the purposes for which a highway is ordinarily used both difficult and dangerous. Its condition is such that it is manifest that no prudent person would attempt to use it for the purposes of ordinary travel, except under the pressure of an urgent necessity. There is no proof that the complainants make any use of it at all. The only statement upon that subject to be found among their proofs is one made by their solicitor, who says, in his affidavit: "The premises and buildings on the complainants' land on the west side of Green street are principally occupied by the Dodge & Bliss Box Company for manufacturing boxes; and that almost all the boxes made by them are delivered in New York by

teams, which go there by the way of Green street and the ferry at the foot of Exchange place." But how many teams go,—one a day, or one a week? Where did the affiant get his information that the teams go by the way of Green street? Did somebody tell him, or does he speak from personal knowledge? That he speaks from personal knowledge would seem to be scarcely possible. He is a lawyer engaged in active practice, distinguished for his industry and the zeal with which he guards the interests of his clients, and whose time during the business hours of each day, it is reasonable to suppose, is wholly occupied by his engagements at his office and in the courts. The court cannot assume that, for weeks prior to the filing of the bill in this case, this gentleman took a position near this crossing, and stood there from day to day, to see that the teams which carried the boxes made by this corporation to New York always passed over this crossing, when, if that had been the route which the teams usually took, that fact could have been so easily and satisfactorily established by the oaths of the persons who drove the teams.

Both on the ground that the legal right on which the complainants' action rests is not clear, and that the injury against which they ask to be protected is too insignificant to entitle them to an injunction, their application must be denied, with costs.

#### SMITH v. STATE.

(Court of Appeals of Maryland. December 16, 1887.)

#### LOTTERIES—CONSTRUCTION OF STATUTE—EVIDENCE.

Rev. Code Md. art. 72, § 171, provides that the provisions of the statute in relation to lottery tickets shall be liberally construed, and courts "shall adjudge all tickets, parts of tickets, certificates, or any other device whatsoever by which money or any other thing is to be paid or delivered on the happening of any event or contingency in the nature of a lottery, to be a lottery ticket." On an indictment for selling a lottery ticket, it was shown that defendant sold a slip of paper, commonly called a "policy," and, on the contingency of the drawing of certain numbers in a lottery of the same date in another state, the purchaser would receive \$1.80. *Held*, that a conviction on such evidence would be sustained.

Appeal from criminal court of Baltimore city.

William Smith was indicted for selling a lottery ticket. He was convicted, and appealed.

*W. H. Whyte*, for appellant. *Atty. Gen. Roberts*, for the State.

**YELLOTT, J.** The appellant was indicted and tried in the criminal court of Baltimore city; the first count in the indictment charging him with having sold a lottery ticket to one William Bailey. On this count there was a verdict of guilty. At the trial, the state offered to prove by said Bailey "that he had played policy on the defendant," and that he paid for and received pieces of paper which are commonly known as "policies," and which, on the happening of the contingency of certain numbers being drawn in a lottery of the same date, but in another state, would entitle him to the sum of \$1.80. The evidence offered was objected to, but the court ruled that it was admissible, and the traverser excepted the ruling, and took an appeal.

The appellant contends that the evidence was not relevant to the issue, because he was indicted for selling a lottery ticket, and, coming into court to defend himself against this charge, had to encounter evidence tending to show that he had committed another and a different offense. In other words, he assumes that the sale of slips of paper commonly known as "policies" is not the sale of lottery tickets. And he relies on the case of *Stewart v. State*, 62 Md. 412, as authority in support of this assumption. But there is an apparent distinction between the case referred to and that presented by this record. In *Stewart v. State*, the indictment charged the traverser with stealing "certain promissory notes for the payment of money." The state offered in evidence a "silver certificate," and this court decided that a "silver

certificate" issued by the United States is not a promissory note, within the meaning of section 101, art. 30, Code. But in this case we are relieved from the difficulty of construction, as the legislative enactment, in unambiguous terms, clearly indicates how the statute shall be construed. Section 171, art. 72, Rev. Code, reads thus: "The courts shall construe the foregoing provisions relating to lotteries liberally, and shall adjudge all tickets, parts of tickets, certificates, or any other device whatsoever by which money or any other thing is to be paid or delivered on the happening of any event or contingency in the nature of a lottery, to be lottery tickets." It is plainly apparent, from the statutory provision thus transcribed, that it is the duty of this court to decide that any device whatsoever by which money or any other thing is to be paid or delivered on the happening of any event or contingency in the nature of a lottery, to be a lottery ticket. The traverser was indicted for selling a lottery ticket. The proof offered was that he had sold to the person named in the indictment pieces of paper commonly known as "policies," which entitled the purchaser to receive money on the happening of a certain contingency, dependent upon the drawing of numbers in a lottery. The Code designates any such device as a lottery ticket. It is so declared to be by statute. The evidence offered was therefore relevant to the issue and admissible.

As the court below committed no error in the ruling which forms the foundation for this appeal, its ruling should be affirmed. Ruling affirmed, and cause remanded.

#### WILSON v. OLD TOWN BANK OF BALTIMORE.

(Court of Appeals of Maryland. December 16, 1887.)

##### PRINCIPAL AND SURETY—NOTE GIVEN AS COLLATERAL—EFFECT OF RECITAL.

A railroad company borrowed money of a bank and gave notes of its directors as collateral security. The note of a director, dated May 1, 1884, recited that the company had given its note of even date to the bank, and pledged to said bank its receipts for May, 1884, in payment of the same, and that he agreed and promised, in case of default in payment of said note, to pay the bank his note. On April 25th the directors had appropriated all the funds accruing during May, or so much as might be necessary, to the payment of the interest of the mortgage bonds of the company falling due on the first day of said month, as the bank knew when it discounted the company's note. The receipts were paid into the bank, and by order of the company it paid the interest on the bonds. The receipts and the proceeds of the discounted note would have paid the interest and the note at maturity, but the bank allowed the company to overdraw its account, and the note was not paid. The company became insolvent, and the bank brought suit on the collateral note. *Held*, that the agreement recited in the collateral notes between the company and the directors did not bind the bank, and require it to apply the receipts to the payment of the company's note, and that, on the failure of the company to pay the note, the obligation of the directors as sureties became absolute; following *Street v. Bank*, 10 Atl. Rep. 319.

Appeal from circuit court, Baltimore county.

The Old Town Bank of Baltimore, plaintiff, sued Granville O. Wilson, defendant, on his note given as collateral security. Judgment for plaintiff, and defendant appealed.

*D. G. McIntosh* and *S. A. Williams*, for appellant. *W. A. Hammond*, for appellee.

**STONE, J.** This case is precisely similar to the case of *Street v. Bank*, 10 Atl. Rep. 319, (decided by this court at its last term,) and that case is decisive of this. It is supposed by the appellant that the difference in the form of the note sued on in that case from the one sued on in this might make a difference, but it does not. The note sued on in *Street's Case* recited that the railroad company "having given its note of even date herewith to the Old Town Bank of Baltimore for the sum of \$5,000, payable thirty days from date, and pledged its receipts for the month of May in payment of same." The note sued on in this case has the words, "Pledged to said bank." This is the only

difference. The note in *Street's Case* meant precisely what the note in this case does,—that the receipts for May were pledged to the bank; and what we have already said in that case applies to this. Judgment affirmed.

*MITCHELL et ux v. WEDDERBURN et ux.*

(Court of Appeals of Maryland. December 16, 1887.)

1. CONTRACTS—PERFORMANCE—CONDITION—PLEADING.

In an action for breach of contract for purchase of stock in a manufacturing company, defendants pleaded that it was to be paid for in fertilizer made by the company, on the express condition that, if the delivery of the fertilizer affected the interests of the creditors of the company, the contract should be void, which condition had happened. *Held*, that a demurrer to the plea was properly overruled.

2. SAME—CONSTRUCTION—SALE OF CORPORATE STOCK—ABANDONMENT.

One of the plaintiffs sold to one of the defendants stock in a fertilizer manufacturing company. By the first clause of the contract, the stock was to be paid for in fertilizers of its make. Another clause provided that, upon payment, the stock transferred to defendant should be retired for the benefit of the company, and that, if the payment interfered with the rights of the company creditors, the contract should be void. After a partial payment had been made, the directors of the company determined that further delivery of the fertilizer would impair creditors' rights, and the contract was abandoned. *Held*, that it was a contract for the sale to the company, and, the condition under which it became void having happened, there was no claim against defendant individually.

Appeal from superior court of Baltimore city.

Cecil Wallace Mitchell and Lydia P. Mitchell, plaintiffs, sued Alexander J. Wedderburn and Jane Sarah Wedderburn, defendants, for breach of contract; judgment for defendants, and plaintiffs appealed.

*W. Reynolds*, for appellants. *John T. Mason*, for appellees.

ROBINSON, J. This is an action to recover damages for the breach of a contract in writing, by the terms of which the plaintiff Mrs. Mitchell alleges she sold 260 shares of stock of the Ceres Manufacturing Company to the defendant Mrs. Wedderburn for the sum of \$18,000. The stock was to be paid for in "The Ceres Superphosphate," a fertilizer manufactured by the company, at a valuation of \$22 per ton; not more than 400 tons to be delivered to Mrs. Mitchell in any one year. The sixth clause provides that, upon the payment of the whole purchase money, the stock was to be "transferred to Mrs. Wedderburn, to be retired by the Ceres Manufacturing Company in accordance with law;" and, further, that "all the terms of this contract are hereby declared and intended to be subject to the rights of the creditors of the Ceres Manufacturing Company, of Baltimore city, and of no effect to alter the *status* of the parties hereto with respect to said creditors as regards the respective interest of said parties in the assets of said company." To this action the defendants pleaded that the contract sued on, as appears from the terms thereof, was part of a plan proposed between the plaintiff Mrs. Mitchell and the defendant Mrs. Wedderburn,—they being the holders of the majority of the stock of the Ceres Manufacturing Company,—by which Mrs. Mitchell was to sell her stock to the company through Mrs. Wedderburn, and, when paid for, to be retired for the benefit of the remaining stockholders; all parties to the transaction believing, at the time, that the stock could be paid for in fertilizers belonging to the company without impairing the rights or interests of its creditors, but that the contract was made upon the express condition, as appears from its terms, that if it should turn out that the delivery of the fertilizer in the payment of stock impaired in any manner the rights of the creditors of the company, then the contract was to be void and of no effect. The plea further alleges that, after a partial delivery of the fertilizers under the

contract, it became plain and apparent to all the parties thereto that the further delivery could not be made in justice to the rights of creditors, and thereupon the contract was, with the consent of the plaintiff, abandoned. To this plea, the plaintiffs file a general demurrer, and, as special demurrers for defects in matter of form are no longer allowed by the Code, the only question under the general demurrer is whether this plea sets forth a substantial defense to the action.

Now, if we reject all unnecessary verbiage and all unnecessary matter as mere surplusage, the defense set up by the plea is that the contract sued on is by its terms a sale of Mrs. Mitchell's stock to the Ceres Company, to be paid for in fertilizer manufactured by the company; subject, however, to the express condition that, if the delivery of the fertilizer in payment of the stock should affect the rights and interests of its creditors, then the contract was to be void and of no effect,—a condition which in fact did happen; in short, that the contract became inoperative and void, because of the happening of a dependent condition. So, whatever objection there may be to the plea for defects in matters of form, it does set forth substantially a good ground of defense, and, this being so, the demurrer was properly overruled.

We come, then, to the construction of the contract itself, for upon this depends the right of the plaintiffs to maintain this action. And here we must admit that there is some difficulty in finding out precisely what the parties meant, because the different clauses in the contract are utterly inconsistent with each other. The first part of the contract is in terms an out and out sale of the stock by Mrs. Mitchell to Mrs. Wedderburn, and yet thus inconsistent with the sixth and other clauses. The sixth provides that, upon the payment of the whole purchase money, the stock was to be transferred to Mrs. Wedderburn; to be retired, however, for the benefit of the company. If the sale was in fact made to her, then the stock, on the payment of the purchase money, belonged to her, and we are at loss to understand why it was to be retired for the benefit of the other stockholders. Then, again, it provides that "all the terms of this contract are hereby declared and intended to be subject to the rights of the creditors of the Ceres Manufacturing Company, and of no effect to alter the *status* of the parties," etc. In other words, if it should happen that the payment of the purchase money in fertilizers belonging to the company impaired the rights of its creditors, then the contract was to be void. Now, if the sale was made to Mrs. Wedderburn, how could the payment of the purchase money by her in a fertilizer manufactured by the Ceres Company affect injuriously the rights of its creditors? She would be obliged to buy the fertilizer, and, instead of its fertilizer, the company would have the money as assets for its creditors. The contract is drawn in a bungling manner, but, as we construe it, the stock was not sold to Mrs. Wedderburn individually, but through her to the Ceres Company, to be paid for in the fertilizer of the company; and if it should turn out that the delivery of the fertilizer in payment of the purchase money interfered in any manner with the rights of the creditors, then it was to be void and of no effect. And that it was so understood is plain from the subsequent acts and conduct of the parties. The contract was made September 1st, and from that time until the fourth November more than a thousand dollars worth of fertilizer was delivered by the company under it. In the early part of November, however, the board of directors, of which Mr. Mitchell, the husband and agent of the plaintiff, was a member and its president, determined that the further delivery of fertilizer to Mrs. Mitchell could not be made without impairing the rights of the creditors of the company, and thereupon, with the assent and acquiescence of all parties, the contract was abandoned. *Insurance Co. v. Bossiere*, 9 Gill & J. 155; *Abrams v. Sheehan*, 40 Md. 457; *Scurlett v. Stein*, Id. 525; *Insurance Co. v. Doll*, 35 Md. 107; *Topliff v. Topliff*, 122 U. S. 121, 7 Sup. Ct. Rep. 1057.

Such, then, being the construction of the contract, and the condition on which it was to become inoperative and void having happened, there was no ground, at least, on which Mrs. Wedderburn could be held personally liable under it. Judgment affirmed.

CLARK *et al.* v. STATE.

(*Court of Appeals of Maryland.* December 16, 1887.)

APPEAL—TIME OF TAKING—DELAY—CONSENT OF OPPOSING COUNSEL.

Rule 28, Maryland court of appeals, provides that in criminal cases the appeal or writ of error allowed by law shall be taken without delay, and the transcript of the record shall forthwith, or as soon as the same can be made out, be transmitted to the court of appeals. Where it appears that the record was not transmitted for more than four months after verdict rendered, appeal prayed, and affidavit that the same was not taken for delay filed, no pretense being made that the time was necessary for the preparation of the bill of exceptions, the appeal will be dismissed, notwithstanding the delay was with the consent of opposing counsel.

Appeal from criminal court of Baltimore city.

Motion to dismiss appeal.

*Thos. C. Ruddell*, for appellant. *Atty. Gen. Roberts*, for the State.

IRVING, J. The motion of the attorney general to dismiss this appeal must prevail. The twenty-eighth rule of this court provides, in criminal cases, "the appeal or writ of error allowed by law shall be taken without delay, and the transcript of the record shall forthwith, or as soon as the same can be made out, be transmitted to the court of appeals." In the case of *State v. Bowers*, 65 Md. 363, the writ of error was sued out 21 days after judgment rendered, and this court said the same was not sued out without delay, as provided by the rule, and the writ was dismissed. In that case, the court says that what will amount to delay within the rule must be determined by the character of each case as it arises. A longer time will be allowed where the exceptions are numerous, or where the case is such that time is required for preparing the petition or writ of error. But in a simple case like that was, the delay indulged was "unquestionably an infraction of the rule." The same ruling was followed in *State v. Long*, 65 Md. 365, where there was a delay of over 30 days. We see nothing in this case to relieve it from the requirements of the rule, and the construction given to it in the decisions cited. The verdict was rendered on the twenty-first day of June, 1887, yet the record was not transmitted to this court until the twenty-fourth day of October following,—more than four months after verdict was rendered. By the docket entries, the exceptions are noted as taken on the twenty-first day of June, and the appeal prayed, and affidavit that it was not taken for delay, is entered as of the same day. Now, assuming the record in that regard to be absolutely correct and true, then the record was not transmitted with that promptness which the rule contemplates. That this was not the fault of the clerk is apparent from the fact that the bills of exception were not actually filed until the first day of October. These exceptions are simple, and there is no allegation that time was consumed in preparation, and obtaining the signature of the judge. Counsel simply withheld them until that time on the theory that it would make no difference, as this court was not then in session, as is claimed by the counsel for appellant; and which, it seems, was with the assent of counsel for the state. But assent of counsel cannot set aside the requirements of the rule, made to secure strict compliance with law in such case provided. In point of fact, however, according to the affidavit of the clerk, the prayer for appeal, and affidavit that the same was not taken for delay, was not taken and filed until the day the record was actually transmitted to the court of appeals, and the entry was made *nunc pro tunc*, as of the twenty-first of June. Thus it appears the prayer for appeal, and affidavit

that it was not taken for delay, was in fact not made and taken for four months after verdict rendered,—a much longer period than the delay in either of the cases we have cited. The practice of doing so long after verdict what the law requires to be done “without delay,” and then noting it as if the law had been complied with, cannot be sanctioned. Such a method of avoiding the requirements of the law and the rule of the court is justly censurable, as making the law of no effect. Appeal dismissed.

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WATERS v. MOMENTHY.

(Court of Appeals of Maryland. December 16, 1887.)

1. **INSOLVENCY—DISCHARGE—CREDITOR MAY APPEAL—CANNOT ATTACK BY PETITION.**

Upon the final discharge of a debtor in insolvency proceedings a creditor may appeal from the order of discharge for any defects or irregularities in the proceedings, but he cannot attack it by petition to have the same vacated upon those grounds.

2. **SAME—APPEAL—CERTIFICATE OF COURT.**

On appeal in insolvency proceedings where the questions raised and decided in the court below have not been certified by such court as provided by Rev. Code. Md. art. 71, § 6, the appeal will be dismissed.

Appeal from Baltimore court of common pleas.

This was an appeal by John Waters from an order of discharge of Bruno Momenty in insolvency proceedings. The opinion states the facts.

*T. R. Clendinen*, for appellant. *E. C. Carrington, Jr.*, for appellee.

**ALVEY, C. J.** The appeal in this case must be dismissed. It appears that the appellee, Momenty, applied for the benefit of the insolvent law on the fourth of August, 1879, and, after publication of notice to creditors, he obtained from the court of common pleas of the city of Baltimore, on the fifteenth of November, 1879, an order of final discharge under that law; the order reciting that the applicant had fully complied with the terms of the law. On the tenth of May, 1887, the appellant, who was one of the creditors of Momenty at the time of his application for the benefit of the insolvent law, filed his petition in the insolvent proceedings, alleging that the final discharge granted the appellee was void, because of certain defects and omission in the proceedings which had the effect of depriving the court of common pleas of the right and jurisdiction to grant the final discharge to the appellee. The answer to the petition insists that the appellee had fully complied with all the requirements of the law, and acted fairly and *bona fide*, and that the court had acquired jurisdiction and authority to grant the final discharge, and that the same cannot now be impeached. Upon hearing the petition and answer, and argument thereon the court below simply ordered the petition to be dismissed, with costs, without in any manner indicating the ground of its action in so dismissing the petition. It is the final order of discharge that is sought to be vacated by this application, thus making the present petition serve the purpose of a sort of bill of review. But from the order sought to be vacated the appellant had his right of appeal, within the time and in the manner prescribed by law; and not having availed himself of the right within the time prescribed, he cannot be allowed to revive the right by any such proceeding as that adopted in this case. Besides, this is a matter in insolvency, and the appeal can only be prosecuted according to the terms of the insolvent law, which grants the right of appeal. By article 71, § 6, of the Revised Code, it is provided, “that the court from whose judgment or order, under the insolvent laws, an appeal shall be taken, shall, immediately upon the entry of such appeal, certify and state the questions in and decided by such court; and no question which shall not appear by such certificate to have been raised in said court shall be considered by the court of appeals.” This provision of the statute restricts the power given this court by the previous section of the Code, to review the order of the court below; and unless there be a certificate, or

something equivalent to a certificate, defining the exact point or question considered and decided by the court below, this court clearly has no power of review. Here the petition sets up and relies upon several supposed defects in the proceedings as causes for declaring the whole proceeding void, but the legal validity of the proceedings is asserted and relied upon by the appellee; and the order of the court simply dismisses the petition. Without the certificate required by the statute, this court is not advised, and is not authorized to conjecture, upon what ground the court below acted in dismissing the petition. This court, as we have seen, is strictly confined, in its powers of review, to the point or question considered and decided by the court below, and is forbidden to consider upon the appeal authorized by the statute, any other point or question than such as may be certified. And as no point is certified here, we decide nothing in regard to the validity of the proceedings. *Wright v. Kuhn*, 20 Md. 421, 424; *Jaeger v. Requardt*, 25 Md. 231.

There has been an application to this court for an order to the court below, directing a certificate to be furnished, such as is required by the statute. But clearly, if it were even conceded that the certificate could be made at this late day, this court has no power to pass such order upon the court below. The whole matter is of statutory regulation, and this court has no power in the premises other than that granted by the statute. Appeal dismissed.

*PRESSTMAN et al. v. MASON et al.*

*LYMAN et al. v. SAME.*

(Court of Appeals of Maryland. December 15, 1887.)

1. CORPORATIONS—ACTIONS AGAINST—ADMISSION OF SERVICE BY SOLICITOR—ESTOPPEL.

A writ was served on the solicitor of a defendant corporation, who subscribed an admission of service. The complainants asked for an interlocutory decree for want of appearance, and obtained a decree for sale, which at their instance was carried out. Several years afterwards some of the complainants sought to set aside the decree on the ground that the corporation was never summoned. *Held*, that having taken advantage of the service they could not complain of the manner in which it was effected.

2. JUDICIAL SALES—ACTION TO SET ASIDE—ESTOPPEL.

Complainants sought to set aside a sale of land made under a decree on the ground of inadequacy of price. At the time they insisted that the sale should be made, and the sale was ratified at their instance, and they received and gave releases for their share of the proceeds. *Held*, that the sale could not be set aside.<sup>1</sup>

3. SAME—BILL OF REVIEW—TIME OF FILING—ESTOPPEL—KNOWLEDGE OF COUNSEL.

A decree for sale of real estate was obtained in April, 1874. In December, 1885, some of the parties filed a bill of review, and sought to set aside the decree on the ground of irregularities of which they alleged they had no knowledge until recently. *Held*, that the bill was not filed within the time allowed, and that they were bound by the knowledge with which their counsel was chargeable.

Appeals from circuit court, Baltimore county, in equity.

John T. Mason, Dwight E. Lyman, Cumberland Dugan and others, were in 1873 complainants in a proceeding for the sale and partition of land. After decree, John T. Mason and others filed a bill of review against their co-complainants and the defendants. Lyman and Dugan answered, as did also Mary H. Presstman, George R. Presstman and others, purchasers under the decree, who were made defendants to the bill at their own request. A decree was made setting aside the original decree. From this decree there are two appeals in one record, one by Mary H. Presstman, George R. Presstman and others, the other by Dwight E. Lyman and Cumberland Dugan.

*Geo. H. Williams, R. R. Boorman, and J. T. Mason*, for appellants. *Benjamin Carter, Wm. F. Wharton, and W. G. Smith*, for appellees.

<sup>1</sup>A judicial or quasi judicial sale will not be set aside for mere inadequacy of price. *Sigerson v. Sigerson*, (Iowa,) 32 N. W. Rep. 463, and note; *Trust Co. v. Shrope*, (Iowa,) 34 N. W. Rep. 867; *Black v. Steele*, (Ky.) 6 S. W. Rep. 23.

IRVING, J. On the nineteenth of June, 1873, the appellees in these appeals, with certain other persons, filed a bill in the circuit court for Baltimore county, averring a tenancy in common with the mayor and city council of Baltimore, in an undivided fourth part of certain lands mentioned in certain exhibits filed with the bill; and averring that it would be for the interest and advantage of all the parties to have the same sold. Subpœna was issued for the mayor and city council of Baltimore. The sheriff returned the writ, "Summoned;" and on the writ the city solicitor entered admission of service and subscribed it. By successive stages the case went to decree on the sixth of April, 1874. The decree was for a sale, and a trustee was appointed to make it. The sale, however, did not take place until the thirteenth of October, 1881, when the trustee did sell the property. The sale was duly reported, and the same was finally ratified in April, 1882. An auditor's report was made, and the proceeds were duly distributed between the complainants and the defendants, the mayor and city council; and the proceeds were duly paid over accordingly; and these appellees executed releases for their shares, which releases are a part of the record in this case. On the fourth of December, 1885, the appellees, who were some of the complainants, asked and obtained leave of the court to file a bill of review; and on the same day filed a bill of review against their co-complainants and the mayor and city council of Baltimore. The bill of review avers certain irregularities in the proceedings in the former case, which are alleged to have been fatal to its validity, and rendered the decree ineffective to pass good title to the land sold, and also charges a great sacrifice of the land and their interests by the sale, which they charge brought a grossly inadequate price. The irregularities insisted upon are, that in fact the mayor and city council were never "summoned," though so returned by the sheriff; and that the admission of service by the city solicitor was unauthorized, and ineffectual to do away with the need of actual and regular service; and that consequently the interlocutory decree was irregular and improvident; and that, as a consequence, all subsequent proceedings were invalid. To this bill, Lyman and Dugan, appellants, demurred; but the demurrer was overruled, and they answered. Subsequently, the appellants Mary H. Prestman and others filed a petition as purchasers under the former decree asking leave to be made defendants; which prayer was granted and they were accordingly made defendants and answered, as also did Lyman and Dugan, and the other defendants, who were originally complainants. All resisted a disturbance of the former decree, except the mayor and city council. Afterwards the appellees filed their petition alleging that the answer of some of the defendants made it necessary for them to amend their bill, and asked leave to amend the same. This leave being granted, they amended their bill by alleging a want of jurisdiction in the courts "to decree a partition of land, or a sale without having before it all the tenants in common of such land, and that in this instance the owners of one undivided fourth part only of the land of which partition was sought to be made were made parties to that suit, and that the entire proceeding is therefore null and void." They also averred that knowledge of the mistake had only recently come to their knowledge; and that they had not intended to ratify the proceeding by taking the money arising from the sale. Answers to the amended bill were filed; issue joined, and after testimony the court passed the decree setting aside the original decree, and from that decree appeal was taken.

We are all of opinion that there was error in entertaining this bill of review, and setting the original decree aside. The bill of review ought to have been dismissed. In so deciding it is not necessary for us to determine whether an undivided interest in land may be sold under such a proceeding as was had and which it is sought to review. In fact we ought to note that the question, as argued in this court, is not presented by allegation in the bill of review. The only question as to jurisdiction raised by the bill of review, by the

fair reading thereof, is the failure to make certain persons parties defendants. Nor is it necessary for us to decide whether there are any irregularities or defects in the proceeding such as are claimed; for we do not think these appellees are so situated as to be entitled through bill of review to a consideration of any of those questions. Both on the ground of laches and estoppel are they disentitled to the relief they seek. "It is the universal law, that if a man, by words or conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been done without his consent, and he induces others thereby to do what they would otherwise have abstained from doing, he cannot question the legality of the act he sanctioned to the prejudice of those who have so given faith to his words or the fair inferences from his conduct." 2 Story, Eq. Jur. § 1547. Now, what have these appellees done? They asked the court to exercise the jurisdiction, under section 99, art. 16, of the Code, and to sell the property. They claimed the benefit of the return of the sheriff, notwithstanding it may not be technically sufficient for a return of service on a corporation. They claimed the benefit of the admission of service by the city solicitor. They asked for interlocutory decree for want of appearance. They took testimony, and claimed a decree for sale, and obtained it. All this they did by a most competent solicitor; and what he did for them was their doing. They insisted the trustee should make the sale which he had been deferring in hope of a better price than he had been offered. On their importunities, the land was sold, and the purchaser is in court resisting a review of the decree under which he bought, and paid his money; which purchase money, after ratification of the sale at their instance, has been divided by the auditor among the parties; and they have received their share and executed releases therefor. Now, more than eleven years after the decree for sale was passed, they ask its review and rescission. More than four years after the sale and its ratification and the payment of the money by the purchaser; and more than three years after they received their money, the whole thing is asked to be set aside by some of the very persons who procured it to be done. Under such circumstances a very strong case ought to be made of serious injury to the party complaining to justify a court in entertaining a bill for review and disturbing a decree passed so long ago. Such case the appellees did not make in their bill or proof. It is well settled that a party to entitle himself to a bill of review, must show himself to have been injured. *Lansing v. Insurance Co.*, Hopk. Ch. 116; *Hughes v. Stickney*, 13 Wend. 280. This the appellees have entirely failed to do. Indeed, it is difficult to see in what respect, on their own contention, they have been injured, unless it be in the inadequate price which it is alleged the land brought; and so far as this proceeding is concerned they have no testimony on that subject, and rely wholly on what was testified to in the original proceeding on that subject before decree was passed. Yet the sale was made and ratified without objection; and now the sale is sought to be set aside through a review of the decree. Clearly the price which the property brought can have no bearing on whether the original decree was right or wrong. If a plaintiff who has caused an execution to be issued on a judgment he has procured, and which has been returned satisfied, and receipted by his attorney, cannot be allowed a writ of error, which is clearly the law, (Herm. Estop. § 552,) it is clear that parties situated as these appellees are, under all the facts of this case, must be estopped from claiming a bill of review. Having received their money and released the trustee, they cannot be heard now in a court of equity to say that the court had no right to do what they asked and procured to be done. *Long v. Long*, 62 Md. 33. But besides all this, these appellees have failed to file their bill of review within the time which practice in this state has thoroughly established as necessary. Both in England and in this country the filing of bills of review is ordinarily restricted to a period within which an appeal may be

taken. 2 Daniell, Ch. Pr. 1580, 1581, and note; Alex. Ch. Pr. 179; *Canal Co. v. Railroad Co.*, 4 Gill & J. 7; *Hitch v. Fenby*, 4 Md. Ch. 190, 6 Md. 218. The Maryland authorities just cited fix the period after which bills of review ordinarily cannot be filed at nine months, which was the period within which appeals in equity could be prosecuted before the adoption of the new equity rules, which have shortened the time for appeal; and as this court, under constitutional authority, has made a rule for the expediting of business, requiring all appeals to be taken within 60 days, we are not hereby to be understood as deciding that hereafter bills of review must be filed within that period, instead of nine months as heretofore practiced. Parties are required to use reasonable diligence; and as respects the ignorance alleged, the question is not what a party actually did know, but what, by using due diligence, he might have known. *Hitch v. Fenby*, 4 Md. Ch. 190. Here the only ignorance alleged is of alleged irregularities in the proceedings. That the land brought less than its value, we do not understand the bill to allege ignorance; for that of necessity, if true, they must have known as well then as now. The evidence of its value was given before original decree, and none on this proceeding; and, as we have already said, that cannot now possibly be a ground for disturbing the original decree, whatever its effect might have been, if the sale had been excepted to before ratification. As to the irregularities, of which ignorance is averred, we have already said that, if they be irregularities, they were availed of to secure the decree; and although they personally may not have known of them till recently, the facts were known to their counsel, or must from their nature have been known to him, a very competent person, or ought to have been; and the appellees, as to such matters, are to be held as affected by the actual or constructive knowledge of their solicitor intrusted with the case; unless it could be shown that they were the victims of fraud practiced on them by their solicitor, which in this case is not supportable, and was not suggested as possible, but on the contrary, was actually disclaimed. *Weeks, Atty's at Law*, § 327; *Worsley v. Scarborough*, 3 Atk. 392; *Pepper v. George*, 51 Ala. 190; *May v. Le Claire*, 11 Wall. 217.

In no aspect of this case do we think there were any sufficient grounds laid to justify the decree setting aside the original decree. If the proceeding was absolutely null and void on its face, a proceeding to set aside would seem useless. If in fact, as is contended, the appellants' title was defective because of it, the appellees were not the persons to seek to remedy it. The decree must be reversed and bill must be dismissed.

#### STATE v. FITZPATRICK.

(*Supreme Court of Rhode Island. January 7, 1888.*)

##### INTOXICATING LIQUORS—STATUTE PROHIBITING SALE—CONSTITUTIONALITY.

Pub. Laws R. I. cc. 538, 634, (forbidding the manufacture or sale of intoxicating liquors,) are not unconstitutional, or in violation of article 1, § 8, Const. U. S., because of the omission to make a distinction between a sale within the state and a sale without the state.

Complaint against William Fitzpatrick for keeping intoxicating liquors "for the purpose of sale" in violation of the statute. The case is brought here from the Tenth judicial district by certificate on a constitutional question.

*Asst. Atty. Gen. Clarence A. Aldrich*, for the State. *Hugh J. Carroll*, for defendant.

DURFEE, C. J. This case comes before us from the district court of the Tenth judicial district by certificate on a constitutional question. It is a complaint under Pub. Laws R. I. cc. 538, 634, against the defendant for keeping, without lawful authority, intoxicating liquors "for the purpose of sale," in violation of chapter 634, § 1, in amendment of chapter 538, § 1, charging the

offense substantially in the language of the statute. In the district court, the defendant made the following motion, to-wit: "The defendant moves that the above-entitled complaint be dismissed, because it is brought under section 1, c. 634, Pub. St., which attempts to prohibit the keeping for the purpose of sale of any of the liquors enumerated in said section, without making any distinction as to whether the sale is to be within or without this state; and he claims that he has a right to keep the same for the purpose of sale without this state. Article 1, § 8, Const. U. S." The district court overruled the motion, and, having found the defendant guilty, has certified the question involved in it to this court for decision.

The first section of chapter 634, so far as it is necessary to recite it for the purposes of the question, is as follows, to-wit: "No person shall manufacture or sell, or suffer to be manufactured or sold, or keep, or suffer to be kept, on his premises or possessions, or under his charge, for the purpose of sale, any ale, wine, rum, or other strong or malt or intoxicating liquors, a part of which is ale, wine, rum, or other strong or malt or intoxicating liquors, unless as hereinafter provided." The corresponding sections in earlier statutes, whether license or prohibitory, contained the words "within this state" after the words "for the purpose of sale;" thus making the keeping illegal only when it was for the purpose of selling the forbidden liquors within the state. The defendant contends that, in consequence of the alteration, the keeping is prohibited, if the liquors are kept in the state for the purpose of sale, even though they are intended to be sold out of the state, and that the section is therefore repugnant to section 8, art. 1, Const. U. S., which confers upon congress a variety of powers, and, among them, power "to regulate commerce with foreign nations, and among the several states."

It will be well to determine the scope and import of the question thus raised before we proceed to consider and decide it. First, then, when is it that liquors, which are in the possession of a person in this state, are kept by him for the purpose of sale, within the meaning of the statute? They are clearly not so kept when they are kept by him for his own use without any intention of selling them. Suppose he has the liquors in the state in the act of transporting them through this to another state, for the purpose of selling them in the latter, are they then being kept by him for the purpose of sale within the meaning of the statute? We think not, for though, in a general sense, he keeps such liquors for the purpose of sale, it is not the purpose for which he is keeping them in this state; the purpose for which he keeps them here being not sale, but transportation. If such a person were complained of for illegal keeping, the charge would be that in some particular town he did, without lawful authority, keep the liquors for the purpose of sale, and he could truly reply that he did not keep them in that town for that purpose, and was therefore not guilty. The same construction will hold if intoxicating liquors are kept in this state for storage simply, though they are intended to be ultimately carried elsewhere and sold. But if keeping in either of these ways is not prohibited, then the operation of section 1, in so far as it can interfere with commerce with foreign nations, and among the states, is extremely limited. We do not say, however, that liquors may not be kept in this state for the purpose of sale in other states in such way that the keeping would violate section 1. For instance, if intoxicating liquors were kept in this state to be sold on orders received or procured in other states or to customers coming from other states, we think the keeping would be within the prohibition, even though the sales were meant not to be completed in this state. In such a case, the place of keeping would be the headquarters of the traffic, or at least the place from which, if not at which, the sales would be made. Making the sales would be the purpose for which the liquors were kept there, and we think the general assembly must be held to have intended that no such place should be tolerated in the state. But no other way occurs to us in which liquors not intended for

sale in this state can be kept here so that the keeping would be within the prohibition of section 1. The question presented, then, is whether, because such keeping is prohibited, section 1 is in conflict with the constitution of the United States. It will be seen that the question as presented assumes that the prohibition, if it be unconstitutional as it applies to intoxicating liquors kept in this state for sale elsewhere, is likewise unconstitutional as it applies to such liquors kept in this state for sale within it. This is not clear to us. *State v. Amery*, 12 R. I. 64. Nor are we clear that the question presented can be properly raised by a mere motion to quash. *Mugler v. Kansas*, 8 Sup. Ct. Rep. 273. But, passing these points, which have not been argued at the bar, we proceed to consider the question in the larger way in which it has been discussed.

We deem it perfectly well settled by the decisions of the supreme court of the United States that the several states have power to restrict, and even to prohibit altogether, the sale of intoxicating liquors for use as a beverage within their borders, and consequently, of course, to prohibit the keeping of them for sale to the same extent. *Cooley*, Const. Lim. 582, 583, and cases cited. *Mugler v. Kansas*, *supra*. The power to do this has been denominated a "police power,"—a power not delegated to the general government, but remaining to the states, to enable them to regulate for their own welfare, as they understand their welfare, their internal or domestic concerns. The power is signally exercised in legislation designed to promote popular education, to protect the public health and morals, to punish and prevent crime, to alleviate and prevent pauperism, and especially to diminish and prevent the demoralization and impoverishment, and the numberless vices and miseries, which are the sure concomitants and consequences of a free traffic in intoxicating liquors, by restraining or prohibiting it. The power was exhaustively discussed and considered in the supreme court of the United States in the *License Cases*, 5 How. 504, with particular reference to the exercise in legislation for the restraint of the liquor traffic; and, while the justices did not fully agree in the reasons given by them for decision, they did agree in fully affirming the authority of the states within their own borders. Chief Justice TANEY and Justices CATRON and NELSON rested their judgment distinctly on the ground that the power of the state to pass restrictive laws in the matter was complete, notwithstanding the laws might indirectly interfere with interstate commerce, so long as they did not come in conflict with any law or regulations of congress; and some of the other justices, enough to make a majority of the court, unless we misunderstand their opinions, concurred with them, though they preferred to take their stand upon a still deeper and broader ground of state rights. If this doctrine of Chief Justice TANEY and Justices CATRON and NELSON be correct, and is still adhered to by the supreme court of the United States, the defendant's contention, of course, cannot prevail, for it is not pretended that there is any federal regulation of interstate commerce with which the provisions under which he is complained of comes into conflict. But, not to put too much reliance on this view, we will proceed to the broader consideration of the question.

As we have seen, there can be no doubt of the power of the states to prohibit altogether the sale of intoxicating liquors within their border, and yet it is perfectly evident that such a proposition does obstruct the freedom and lessen the extent of commerce among the states. For example, a manufacturer of intoxicating liquors of another state could not send the product of his manufactory to a prohibitory state, and sell it there. He could not even receive orders for his liquors from such a state, and fill them, if a delivery in such state were necessary to a complete compliance with the orders. Nor could a person, living in another state, go into such a state and purchase intoxicating liquors there, to carry home with him, though it might be very advantageous for him to do so if he were not prevented by the law. In the *Li-*

*cense Cases*, 5 How. 504, a law of New Hampshire, under which a sale in that state of gin imported from Boston was punished, was held not to be void for interfering with the power of congress to regulate commerce among the states, though the gin was sold in the cask in which it was imported. In the same case, in reply to the argument that the restrictive legislation tended to lessen importation, Mr. Justice McLEAN said that "a law of the state is not rendered unconstitutional by an incidental reduction of importation; and especially not, when the state regulation has a salutary tendency on society, and is founded on the highest moral considerations." And he further remarked: "When, in the appropriate exercise of their federal and state powers, contingently and incidentally, their lines of action run into each other, if the state power be necessary to the preservation of the morals or safety of the community, it must be maintained." The doctrine of the justices who took the broader view, if we rightly understand their opinions, was that if a state law, passed in good faith, for the suppression of intemperance, or of the traffic in intoxicating liquors, it could not be condemned as unconstitutional because it might incidentally, among its effects, hamper the freedom or lessen the extent of interstate commerce. And see *State v. Peckham*, 3 R. I. 289.

The question which we now propose to consider is whether this state has transcended the power thus conceded to it by the enactment under which the defendant was complained of. In considering this question, we will in the first place recur to a matter to which we have already adverted, namely, that the quantity of intoxicating liquors kept in this state solely for the purpose of selling them elsewhere, must, from the nature of things, be very small: for what is there to induce any person who has liquors to sell in other states to keep them in this state for that purpose? Some such persons there may have been when the law first enacted under the prohibitory amendment went into effect; but that law did not prohibit the keeping for the purpose of sale out of the state, and there was ample time to dispose of liquors so kept before this present law went into effect. There might be such persons if the manufacturing of intoxicating liquors were permitted, but manufacturing is prohibited equally with selling. In its practical operation, therefore, the enactment laws have but little effect on interstate commerce. In the second place, we remark that the more unlimited the prohibition is, the more effective it is likely to be; for, if intoxicating liquors can be lawfully kept in the state for the purpose of sale elsewhere, the fact that they can be so kept is liable to be availed of as a blind or feint under which to cover a keeping of them for sale in this state. The state borders would afford a favorable ground for the practice of such an evasion or circumvention of the law. Moreover, if the traffic be an evil, can the state permit itself to be the starting point from which the evil shall proceed into other states, without some loss of the moral prestige and power which it must preserve in order to secure for its laws that popular homage and respect without which they cannot be effectually enforced. Certainly, the state would have full power to follow its own judgment, and to legislate as it has done in this matter, unless it thereby encroaches unwarrantably upon the power of congress; and in that regard we find it difficult to see how a law which forbids the keeping of intoxicating liquors in one state for sale in another interferes with interstate commerce, any more than a law which forbids the sale of such liquors in one state which have been imported from another; and yet, as we have seen, a law of the latter description has been held to be a proper exercise of the police power of the states by the supreme court of the United States. And see *Pearson v. Distillery*, 34 N. W. Rep. 1.

We see no reason to doubt that our law was passed in perfect good faith for the purpose of carrying the prohibitory amendment into effect, or to suppose that, if it interferes with foreign or interstate commerce, the interfer-

ence is other than a merely incidental effect or consequence. It is our duty to uphold it as constitutional until we are satisfied that it is unconstitutional. We are not satisfied that the provision of our prohibitory law, under which the defendant has been complained of, is unconstitutional. We sustain it as valid, and send the case back to the district court for sentence.

SULLIVAN *et ux.* v. WEBSTER *et al.*

(*Supreme Court of Rhode Island. December 9, 1887.*)

NUISANCES—PUBLIC, WHAT IS—ERECTION OF BRIDGE ACROSS HIGHWAY—LIABILITY OF COMMISSIONERS.

Under authority of Pub. Laws R. I. c. 349, commissioners built a bridge across a river, so locating its abutment on one side as to close permanently a public highway; the act authorizing the commissioners to condemn, if necessary, the private property of any person or of any municipal or other corporation, but containing no authority to close a public highway, except to build the bridge in such place and manner as the commissioners should determine. No proceedings were taken to declare the public highway condemned or abandoned, nor was it necessary so to close the highway. Upon action brought in trespass on the case by parties whose estates were cut off from travel on the public highway closed by said abutment, against the commissioners individually for having exceeded their authority, *held*, the action will not lie. Although the abutment closed the public highway, it was lawfully erected and consequently was not a public nuisance.

This action was trespass on the case. At the trial, before a jury, at the April term, A. D. 1887, of this court it appeared: That the defendants were appointed and commissioned under Pub. Laws R. I. c. 349, of March 28, 1883, known as the "Seekonk Bridge Act." That under said act they made a plan and built the existing bridge. In doing so they located an abutment across Warren avenue, which is a public highway in East Providence. The abutment permanently stopped public travel at its location. That the line of the bridge is a continuation of the line of Warren avenue. That to meet the bridge it became necessary to raise the grade of Warren avenue. That a bridge might have been built upon the same location on the river as the present bridge, and at the old grade of Warren avenue, without building a barrier across said Warren avenue. But the bridge as built by the commissioners is at a higher grade than Warren avenue, and the bridge abutment prevents travel along Warren avenue between the abutment and the river, to the great injury, as is claimed, of the plaintiffs. That the plaintiffs own an estate on Warren avenue not far from the bridge abutment, and are cut off from traveling on Warren avenue as formerly. That no part of Warren avenue has been declared useless as a public highway, and no proceedings have been taken by the town council to abandon it, nor by the bridge commissioners, except in locating the bridge and paying all damages to the abutting owners. Plats and photographs of the premises were produced in illustration. The presiding justice directed a verdict for the defendants, and the plaintiffs excepted.

*Amasa M. Eaton and James C. Ripley*, for plaintiffs.

The act in question conferred no authority upon the commissioners to close permanently a public highway in this manner; and therefore the commissioners are individually liable for the special private damage to the plaintiffs by this public nuisance. *Ang. & D. Highw.* (3d Ed.) §§ 285-301; *Co. Litt.* 56a; *Chichester v. Lethbridge*, Willes, 71; *Spratley v. Wilson*, Holt, 10, and comments thereon in *Soltan v. De Held*, 2 Sim. (N. S.) 133, 145-148; *Re v. Higginson*, 1 Ld. Raym. 537; *Mills v. Hall*, 9 Wend. 315; *Mayor v. Henley*, 1 Bing. N. C. 222; *Thayer v. Boston*, 19 Pick. 511, 514, by SHAW, C. J.; *Spooner v. McConnell*, 1 McLean, 377; *Rose v. Groves*, 7 Jur. 951; *Cole v. Sprowl*, 35 Me. 161; *Reynolds v. Clarke*, 1 Pittsb. R. 9; *Brown v. Watson*, 47 Me. 161; *Gerrish v. Brown*, 51 Me. 256; *Gas-Light Co. v. Thompson*, 39 Ill. 598; *Blanc v. Klumpke*, 29 Cal. 156, 159; *Wesson v. Iron Co.*, 13 Allen, 95; *Yolo*

*Co. v. City of Sacramento*, 36 Cal. 193; *Powers v. Irish*, 23 Mich. 429; *Francis v. Schuellkopf*, 53 N. Y. 152, 153. Also the following, in which, as in the case at bar, the obstruction was not in front of the plaintiff's lot: *Wilkes v. Market Co.*, 2 Bing. N. C. 281; *Stetson v. Faxon*, 19 Pick. 147, by PUTNAM, J., at 180. The principle has been adopted in Rhode Island. *Hughes v. Railroad Co.*, 2 R. I. 493; *Williams v. Tripp*, 11 R. I. 447. Such a power must be strictly followed and construed. 2 Dill. Mun. Corp. § 469, p. 569; *Cooley*, Const. Lim. \*528 *et seq.*, \*541; Redf. R. R. § 64; Ang. & D. Highw. (3d Ed.) §§ 220, 303; *Van Wickel v. Transportation Co.*, 14 N. J. Law, 162; *Cincinnati v. Coombs*, 16 Ohio, 181, 188; *In re Exchange Alley*, 4 La. Ann. 4; *Dyckman v. City of New York*, 5 N. Y. 434-439; *Adams v. Railroad Co.*, 10 N. Y. 328; *Nichols v. Bridgeport*, 23 Conn. 189, 208; *State v. Mayor*, 25 N. J. Law, 309, *Kyle v. Malin*, 8 Ind. 84, 87; *Judson v. Bridgeport*, 25 Conn. 426; *Ruggles v. Washington Co.*, 3 Mo. 264, 272; *Betts v. Wise*, 11 Ohio, 219, 222; *People v. Brighton*, 20 Mich. 57; *Specht v. Detroit*, Id. 168, 172; *Trumpler v. Bemery*, 39 Cal. 490; *Leslie v. St. Louis*, 47 Mo. 475, 477-479; Sedg. St. & Const. Law, 329. Although a party may not be entitled to compensation as for a taking of his property, if injured, he may have his action for damages. Ang. & D. Highw. (3d Ed.) § 103, note; *Protzman v. Railroad Co.*, 9 Ind. 467; *Railroad Co. v. Dick*, Id. 433-435; *Railroad Co. v. Cummins*, 14 Ohio St. 523, 546; *Lackland v. Railroad Co.*, 31 Mo. 180. The abutment on the highway may recover for consequential damages, although none of his land be taken. *Tinsman v. Railroad Co.*, 26 N. J. Law, 148, 160 *et seq.* Doubtful grants are to be construed most favorably towards those seeking to defend their property from invasion. Redf. R. R. § 64, p. 251.

*Nicholas Van Slyck*, *Stephen A. Cooke, Jr.*, and *Cyrus M. Van Slyck*, for defendants, cited *Fearing v. Irwin*, 55 N. Y. 486; *Kellinger v. Railroad Co.*, 50 N. Y. 206; *Coster v. Mayor*, 43 N. Y. 399; *People v. Kerr*, 27 N. Y. 188-192; *Smith v. Boston*, 7 Cush. 254.

DURFEE, C. J. The question is whether the Seekonk river bridge commissioners, in building the bridge over the river exceeded their authority by extending it beyond the eastern bank to Warren avenue, and there establishing the eastern abutment. We think not. The act (Pub. Laws R. I. c. 349, §§ 3, 4,) of March 28, 1883, provides that, in a certain event which occurred, the bridge should be built "over the river," on or near the site of the old bridge "in such place and manner" as the commissioners should determine, and "according to the plans and specifications by them approved." The power is very broadly given. The location of the bridge and the manner of constructing it are both left wholly to the commissioners. The plaintiff contends that the authority given is to build "over the river," but not beyond it; that the commissioners might have built over without building beyond it if they had built at grade with the river bank; and that they therefore exceeded their authority when they built beyond it. We think such a construction is too narrow. The bridge was in fact reared high above the river, and we do not see how there can be any question but that the commissioners, under their power to build it in "such manner as they might determine," were authorized to build it in that manner. The bridge so built required strong and massive abutments correspondingly high; and such abutments would, as a matter of reasonable, if not absolute, necessity, be erected out of the river on the solid ground. The commissioners were authorized by the fifth section of the act to "take and appropriate, if necessary for the purposes of the bridge, the private property of any person or of any municipal or other corporation," and, by a later act, to "purchase any real estate" required. It may be said that it does not follow that they were authorized to carry the bridge to Warren avenue and plant the abutment there, since they might have established it immediately on the river bank. Doubt-

less their power should be construed as limited by the purpose for which it was conferred, and an extension of the bridge beyond the river bank without reason, or for reasons having no proper relation to the bridge, as such, would be unauthorized; but such does not appear to have been the case here. On the contrary, it appears, from an inspection of the photograph and plat, that the bridge was extended at the height at which it is built for the accommodation of a street and of diverse railway tracks beneath it. If the abutment had been erected directly on the bank, it would have been necessary to connect the bridge with the highway beyond by a long slope or incline for the safe and easy descent of the public travel. This would have blocked the street below, and would have either displaced the railway tracks or would have left them to be crossed at grade at the foot of the slope, greatly to the peril and inconvenience of travel. Manifestly, therefore, the extension of the bridge was designed and executed in subservience to the purpose for which the bridge was built; namely, to furnish a safe and convenient highway across the river. The bridge accomplished its purpose the better for being thus extended. Our conclusion is that the abutment was lawfully erected in Warren avenue, and consequently was not a public nuisance. This being so, the plaintiff's action cannot be maintained. New trial denied.

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STATE v. FITZPATRICK.

(Supreme Court of Rhode Island. 1887.)

1. INTOXICATING LIQUORS—CONSTITUTIONALITY OF STATUTE—FORFEITURE OF LIQUORS.

Pub. Laws R. I. c. 634, § 15, regarding the sale and forfeiture of liquors unlawfully kept, is not unconstitutional, in giving to district courts power to condemn prohibited liquors, whatever their value may be, because the right of trial by jury is not invaded; the act reserving a right of appeal to the court of common pleas.<sup>1</sup>

2. SAME—SEIZURE—COMPLAINT.

Under Pub. Laws R. I. c. 596, § 27, providing for the seizure and forfeiture of liquors unlawfully kept for sale, a complaint was made which described the liquors as "a certain quantity of rum, being about and not exceeding one hundred gallons; \* \* \* other strong and malt and intoxicating liquors, being about and not exceeding one hundred gallons; \* \* \* contained in barrels, kegs, jugs, jars, bottles, decanters, and other vessels." Held sufficient, under Const. R. I. art. 1, § 6, which requires that such a complaint shall describe, as nearly as may be, the things to be seized.

3. SAME—PROVISIONS OF FEDERAL CONSTITUTION.

Proceedings in Rhode Island for the seizure of liquors unlawfully kept are not subject to articles 4, 5, 6, and 7, in amendment of the constitution of the United States, these articles being limited in their operation to the government of the United States.

Liquors claimed by William Fitzpatrick, the defendant, were seized, and proceedings taken to condemn them. The defendant moved to quash the proceedings as being illegal, and the cause came to this court upon the certificate of the court below of constitutional questions raised.

*Asst. Atty. Gen. Clarence A. Aldrich*, for the State. *Hugh J. Carroll*, for defendant.

DURFEE, C. J. This is a proceeding under Pub. Laws, c. 596, 634, for the seizure and forfeiture of certain intoxicating liquors, and the vessels containing them. The proceeding was begun in the district court of the Tenth judicial district by complaint and warrant, under which certain liquors claimed by the defendant were seized, and brought before said court. The defendant moved the court to quash the proceedings, for the reason that it, and the law purporting to authorize it, are illegal and unconstitutional. The court overruled the motion, and the cause now comes before us upon its certificate of the constitutional questions raised.

The only questions which can be brought before us by such certificate are questions involving the constitutionality of an act of the general assembly,

<sup>1</sup> See note at end of case.

and therefore any question in regard to the legality or constitutionality of the proceeding cannot properly be considered here, unless the question is in effect a question in regard to the constitutionality of the act under which the proceeding was instituted or carried on. The better mode of presenting such questions is to present them directly as questions in regard to the acts, or parts of acts, meant to be impeached, mentioning the acts, or parts of acts.

The first ground assigned for quashing the proceeding is because "it does not definitely describe the liquors to be seized and condemned, nor does it definitely give the value of the same; for which reason it does not appear that a district court has the power to condemn by forfeiture the goods seized." The objection, on the face of it, is simply an objection to the sufficiency of the complaint, and therefore, unless we go below the face, does not present any proper question for decision or certificate. The complaint, however, follows substantially the form given to be used in proceedings for seizure and forfeiture in Pub. Laws, R. I. c. 596, § 27, and it is therefore constitutional if the section is constitutional. We will treat the objection as if made to the act. The first point made is that the liquors to be seized are not definitely described. The description begins: "A certain quantity of rum, being about and not exceeding one hundred gallons," and goes on to specify whiskey, gin, brandy, ale, wine, strong beer, lager beer, describing them severally in the same manner, also, "other strong and malt and intoxicating liquors, being about and not exceeding one hundred gallons," etc., and adds, by way of further description, "contained in barrels, kegs, jugs, jars, bottles, decanters, and other vessels." The constitution of the state requires that a search-warrant, when issued, shall describe, "as nearly as may be, the place to be searched, and the persons or things to be seized." We think the description given in the complaint and warrant in this proceeding is full enough, and definite enough, considering what were the objects of the search, to answer the requirement. In *Com. v. Intoxicating Liquors*, 97 Mass. 63, the liquors to be seized were described as certain quantities of rum, gin, brandy, whisky, strong beer, ale, and wine, being "about and not exceeding 500 gallons" each. The officer made returns that he had searched and seized "the honors described in the written warrant, to-wit: About 125 gallons of whisky, about 49 gallons of gin, about 75 gallons of rum, and about 12 gallons of wine." The court held that the description of the liquors intended to be seized was sufficient, and that the variation between the quantities described and seized was not cause enough for dismissal of the complaint. See, also, *Downing v. Porter*, 8 Gray, 589; *Com. v. Intoxicating Liquors*, 13 Allen, 52, 58. The second point is that the liquors mentioned are not valued, and therefore the complaint does not show that the proceeding is within the jurisdiction of a district court. This point, so far as it is a proper matter for consideration, will be more appropriately considered under the second ground.

The second ground assigned for quashing the proceedings is "because section 15, c. 634, P. L., is unconstitutional in giving power to district courts to condemn prohibited liquors, whatever may be the value of the property seized." Under this ground, the question is whether there is anything in the constitution to prevent the general assembly from conferring original jurisdiction on district courts in proceedings like this, whatever the value of the property seized may be. We know of nothing. The constitution, (article 10, § 2,) declares that "the several courts shall have such jurisdiction as may from time to time be prescribed by law." The power is broadly given, and we do not know of any limit upon it, except such as may result from provisions in the constitution, which secure the right of jury trial. These provisions debar the general assembly from conferring final jurisdiction in many matters on courts sitting without jury, but it is well settled that they do not debar the general assembly from conferring original jurisdiction over civil and criminal cases, subject to appeal to courts sitting with jury, except criminal cases, in which the

accused can only be put on trial "on presentment or indictment by a grand jury." *Weater v. Sturtevant*, 12 R. I. 537; *Beers v. Beers*, 4 Conn. 535; *Stewart v. Mayor, etc.*, 7 Md. 500; *Morford v. Barnes*, 8 Yerg. 444; *Jones v. Robbins*, 8 Gray, 329, 341; *Hupgood v. Doherty*, Id. 373; *O'Loughlin v. Bird*, 128 Mass. 600. Prior to the adoption of our constitution, the civil jurisdiction of justices of the peace was limited to actions in which the debt or damages demanded did not exceed \$20. Since then the jurisdiction of justices, or tribunals substituted for them, has been several times increased, and every increase has been unconstitutional unless the appeal permitted has been sufficient to satisfy the constitutional provisions referred to. In proceedings for seizure and forfeiture under chapters 596 and 634, a right to appeal to the court of common pleas is reserved. And see *In re Liquors of McSoley*, Index A.A. 95, 10 Atl. Rep. 659.

The third and last ground assigned is "because the proceeding is contrary to sections 6, 14, art. 1, Const. R. I., and articles 4-7, in amendment of the constitution of the United States." So far as this ground depends on the federal constitution, it suffices to say that it is well settled that the first 10 amendments to that constitution are limited in their operations to the government of the United States. *Barron v. Mayor, etc.*, 7 Pet. 247; *State v. Paul*, 5 R. I. 185-196; *Fox v. Ohio*, 5 How. 410-434; *Edwards v. Elliott*, 21 Wall. 532-557; *Cooley, Const. Lim.* 19. Section 6 of article 1 of the state constitution is as follows, to-wit: "The right of the people to be secure in their persons, papers, and possessions against unreasonable searches and seizures shall not be violated; and no warrant shall issue but on complaint in writing, upon probable cause, supported by oath or affirmation, and describing as nearly as may be, the place to be searched, and the persons or things to be seized." The defendant does not point out any particular in which the proceeding violates this section; except that which we have already passed upon, namely, an alleged want of definiteness in the description of the liquors intended to be seized. We do not think that the searches and seizures which are authorized by chapters 596 and 634, if conducted in due form, can be regarded as unconstitutional because they are unreasonable, especially in view of the duty which is imposed on the general assembly by the fifth or prohibitory amendment to "provide by law for carrying the amendment into effect." Section 14 of article 14 declares: "Every man being presumed innocent until he is pronounced guilty by the law, no act of severity which is not necessary to secure an accused person shall be permitted." No particular whatever is indicated in which this declaration is violated; we have not discovered any.

The questions, therefore, which are presented for decision by the certificate, must be answered adversely to the defendant, and the case sent back to the district court for further proceeding in pursuance of the decision.

#### NOTE.

**TRIAL BY JURY—DUE PROCESS OF LAW.** In a proceeding at common law, a citizen of the United States cannot be divested of his property except by verdict of a jury, under due process of law, in a proceeding in which he is in some manner a party, having opportunity to be heard, and having a day in court. *The J. W. French*, 13 Fed. Rep. 916. A statute authorizing the judge to commit to jail a party who refuses to obey an order, in proceedings auxiliary to execution, directing him to turn over property in his possession to the court, held not to be a violation of the provisions of the Iowa constitution, which provide for the right of trial by jury, and that no person shall be deprived of life, liberty, or property without due process of law. *Elkenbury v. Edwards*, (Iowa,) 25 N. W. Rep. 833. The right of trial by jury in chancery cases not being guaranteed by any constitutional provision, and the courts of chancery in Iowa having had, prior to the enactment of the statute regulating the sale of intoxicating liquors, a well-settled jurisdiction of suits to abate nuisances, that statute is not unconstitutional because it denounces the illegal sale of intoxicating liquors as a nuisance, and provides for its abatement by proceedings in chancery; nor is it unconstitutional as depriving the guilty person of his property without due process of law,—the proper and orderly proceedings of a court of chancery being "due process of law," within the meaning of the constitutional guaranty. *State v. Jordan*, (Iowa,) 34 N. W. Rep. 285. One who instigates a criminal prosecution

maliciously, and without probable cause, and who is committed to jail until he pays the costs of the prosecution, by order of the municipal judge, under a statute authorizing such order, cannot complain that the proceeding is without due process of law, or that trial by jury has been denied him. *State v. Smith*, (Wis.) 26 N. W. Rep. 258. The fourteenth amendment to the constitution of the United States, which provides that a state shall not "deprive any person of life, liberty, or property without due process of law," does not preclude a state from giving jurisdiction to a court of equity of a suit brought by the owner of an equitable interest in land to establish a trust in the holder of the legal title, because it deprives the latter of a right to trial by jury, which he would have in a suit at law. *Church v. Kelsey*, 7 Sup. Ct. Rep. 897.

### BEALOR v. HAHN.

(*Supreme Court of Pennsylvania*. October 3, 1887.)

#### 1. CURTESY—FORFEITURE BY WILLFUL DESERTION.

Under act Pa. May 5, 1885, forfeiting a husband's curtesy for willful and malicious desertion of his wife for a year preceding her death, proof of willful desertion for such period throws on the husband the burden of proving that the desertion was for reasonable and lawful cause.

#### 2. SAME—EVIDENCE OF DESERTION—ORDER FOR MAINTENANCE.

In an action by a husband to enforce his right to curtesy, an order of the quarter sessions on him for his wife's maintenance is admissible to prove that he had deserted her, and, under the act of May 5, 1885, forfeited his right to curtesy.

#### 3. SAME—EVIDENCE—RES GESTÆ.

In an action by a husband to enforce his right to curtesy, the declarations and manifestations of sorrow of his wife at the time of an alleged desertion by him are admissible as part of the *res gestæ* to prove such desertion.<sup>1</sup>

Error to court of common pleas, Lancaster county.

Action to enforce right of curtesy. Verdict and judgment for plaintiff. Defendant brings error.

*Marriott Brosius*, for plaintiff in error. *J. Hay Brown* and *Jacob B. Amwake*, for defendant in error.

GORDON, C. J. This is an action brought by a husband to enforce his right of curtesy in the estate of his deceased wife. The defense was that he had forfeited this right in consequence of a violation of the conditions of the act of May 5, 1885, by his willful and malicious desertion of his wife for the period of one year or more previous to her death. That there was such a desertion seems, from the evidence, very clear. The court, however, ruled that proof of willful desertion was not enough, but that on the defense lay the burden of establishing that it was also in fact malicious; and, conceiving that there was a failure in this part of the defendant's case, directed a verdict for the plaintiff. That this was a mistake we have no doubt. If malice is not to be inferred from the commission of an unlawful act, its proof would often be difficult, and sometimes impossible. It would certainly be an astounding proposition that, where one man had unlawfully and deliberately killed another, malice was not to be presumed from the act itself. But, as to the question in hand, we are not without authority in point. In *Ingersoll v. Ingersoll*, 49 Pa. St. 249, in defining willful and malicious desertion in cases of divorce, we held that "the guilty intent is manifested when, without cause or consent,

<sup>1</sup>As to the admissibility of declarations as part of the *res gestæ*, see *Patterson v. Railway Co.*, (Mich.) 19 N. W. Rep. 761; *Merkle v. Bennington Tp.*, (Mich.) 24 N. W. Rep. 776; *Armit v. Railroad Co.*, (Iowa.) 30 N. W. Rep. 42; *Conlan v. Grace*, (Minn.) 30 N. W. Rep. 880; *Clunie v. Lumber Co.*, (Cal.) 7 Pac. Rep. 708; *Edmunds v. Curtis*, (Colo.) 9 Pac. Rep. 793; *Durkee v. Railroad Co.*, (Cal.) 9 Pac. Rep. 99; *Boxes of Opium v. U. S.*, 23 Fed. Rep. 367; *Brown v. Kenyon*, (Ind.) 9 N. E. Rep. 283; *Porter v. Walz*, (Ind.) 8 N. E. Rep. 705; *Express Co. v. Rawson*, (Ind.) 6 N. E. Rep. 337; *County of Tompkins v. Bristol*, (N. Y.) 1 N. E. Rep. 878; *Hallahan v. Railroad Co.*, (N. Y.) 6 N. E. Rep. 337; *Citizens' Co. v. O'Brien*, (Ill.) 8 N. E. Rep. 810; *Mitchell v. Colglazier*, (Ind.) 7 N. E. Rep. 199; *Williamson v. Railroad Co.*, (Mass.) 10 N. E. Rep. 790; *Insurance Co. v. La Pointe*, (Ill.) 8 N. E. Rep. 353; *Martin v. Railroad Co.*, (N. Y.) 9 N. E. Rep. 505; *Railroad Co. v. Wood*, (Ind.) 14 N. E. Rep. 572.

either party withdraws from the residence of the other." The same doctrine was also held in *McClurg's Appeal*, 66 Pa. St. 366. It follows that the case should have been given to the jury with instruction that if they found there was a willful desertion by the plaintiff of his wife, Rebecca, for the period of one year or more immediately preceding her death, malice must be presumed, and that the burden of proof was thereby thrown on him to show that he had reasonable and lawful cause for such desertion.

So it was also error not to admit the proceedings in the quarter sessions, which resulted in an order on him for her maintenance. They were pertinent to show, not only the fact of desertion, but that he had failed to voluntarily provide for her support. The order was the judgment of a court of competent jurisdiction, in a case between the same parties, and embracing the same subject of complaint; hence was relevant to the controversy in hand.

Nor can we see why the offer covered by the third assignment was not admissible. Clearly her declarations and manifestations of sorrow, immediately after his abandonment of her, were properly introduced as part of the *res gestæ*, and if authority is wanting, on a point so obvious, it may be found in *Cattison v. Cattison*, 22 Pa. St. 275.

The judgment is reversed, and a new *venire* ordered.

#### GARBER v. DOERSOM *et al.*

(Supreme Court of Pennsylvania. October 3, 1887.)

##### 1. TROVER AND CONVERSION—ESTOPPEL OF DEFENDANT TO ASSERT OWNERSHIP.

The defendant in an action of trover is estopped from claiming ownership of the property alleged to have been converted, when he has, in a sworn petition to the court, in relation to the same property, claimed it to be the personal property of his son; and the record of such petition is admissible in evidence.

##### 2. SAME—WHEN ACTION LIES—BY VENDEE OF JOINT OWNER.

Trover will lie against a defendant, alleging himself to be one of two joint owners of certain personal property, by the vendee of the other joint owner, when defendant is estopped from claiming his ownership.

##### 3. SAME—EVIDENCE.

Where the question as to whether one held certain land as tenant or proprietor was not in dispute, evidence as to a parol lease was properly refused.

Error to court of common pleas, Lancaster county.

Action of trover by Philip Doersom and Philip Rudy against Andrew Garber. Judgment for the plaintiffs, and defendant brings error.

*John E. Malone, H. M. North, and J. L. Steinmetz*, for plaintiff in error.  
*J. H. Brown and B. F. Davis*, *contra*.

GORDON, C. J. A brief statement of the facts of this case will, we apprehend, very clearly demonstrate that the plaintiff in error had no good reason to complain of the rulings and judgment in the court below. The plaintiffs below had two several judgments against Jonas B. Garber. On these judgments executions were issued, and levies made on the property in controversy as the property of the said Jonas B. Garber, November 11, 1884. Preceding these executions, October 23, 1884, Andrew Garber issued an attachment, under the act of 1869, against this same defendant, who is his son, and also a second writ of the same kind on the eighth of November following. Neither of these attachments was successful, for the reason that the sheriff failed to make a lawful levy on the property intended to be attached. Then, after the plaintiff's levy, November 20, 1884, the defendant having discovered the mistake by which his writs were rendered nugatory, made application to the court below to restrain the sheriff from selling the property under the plaintiff's executions. On this application of Garber, accompanied by his affidavit, the court granted a rule to show cause, which was, after hearing,

January 17, 1885, finally discharged. The petition and affidavit set forth, *inter alia*, as follows:

"That since said writs of attachment came into the hands of the said sheriff, and he attached all the goods and chattels of the said defendant, but failed to make an inventory which contained all the goods, chattels, etc., of said defendant, by reason of the said defendant refusing to give said sheriff any items or names of articles of personal property belonging to him, though requested so to do by the said sheriff, the said defendant confessed two judgments, one in favor of Philip Doersom, and the other in favor of Philip Rudy. Executions were duly issued November 11, 1884, on said two judgments against Jonas B. Garber, and the said sheriff of said county, by virtue of said executions or *fi. fa.*, on November 11, 1884, levied on the following of the defendants' personal property, viz., 3 iron hog-troughs, 1 fat hog, about 30 tons of hay, about 18 tons of straw, a lot of lumber, planks, boards, scantlings and bill stuff, 9 bundles of No. 2 shingles, 2 sets of tobacco ladders, one-half interest in 14 acres of corn and fodder, also rope and 3 pulleys, one chopping-machine and scalding-trough; and advertised by hand-bills to sell said last-mentioned personal property levied on under said *fi. fa.*, at public sale, on Wednesday, November 29, 1884. Your petitioner further represents that all of said property levied on under said *fi. fa.* was defendant's personal property, and in said county at the time of issuing said writs of attachments."

It thus appears that this attempted interference with the plaintiff's writs was founded on the fact that the goods seized belonged exclusively to Jonas B. Garber, and with what conscience the defendant now sets up the contrary in order to defeat the execution of these same writs ought to be, to an honest man, inconceivable. At all events, justice will permit nothing of the kind; one cannot be permitted to play fast and loose with the efforts of creditors to secure their just dues. *Strouse's Ex'r v. Becker*, 38 Pa. St. 190; *Huey's Appeal*, 29 Pa. St. 219. Therefore, for all purposes of this case, the goods in question belonged, until sold on the plaintiff's writs, to Jonas B. Garber, and, as against the sheriff's vendees, the defendant unlawfully detained them; hence the action of trover was well brought to recover their value. It is true, were we to assume the defendant's hypothesis, that Garber and his son were joint owners of the goods, the former being in the lawful possession thereof, trespass or trover would not lie for the son's share, unless it were proved that there had been an actual destruction of them by Garber. *Trout v. Kennedy*, 47 Pa. St. 387. But as the hypothesis assumed is not admissible, neither does the doctrine founded on it apply. As it was not of the least consequence by what arrangement the plaintiffs, as between themselves, claimed to hold the property in suit, so the court properly disallowed the questions covered by the first and second assignments. It was enough for all purposes of the case that the goods were sold on their writs, and bid in by one of them for both. The declarations of Jonas B. were not admissible to establish a parol lease between himself and his father, or to prove its contents. Such declarations, made when he was in possession of the farm, might have been introduced to prove *how* he held, whether as tenant or proprietor, (*Sheaffer v. Eakman*, 56 Pa. St. 144;) but as the fact of his tenancy was not in dispute, the proposed evidence was admissible for no purpose. That the records in the case of *Doersom v. Garber* were properly admitted is not doubtful, and if there were papers among them which ought not to have gone to the jury they ought to have been specially objected to. The judgment is affirmed.

## ROMMEL v. SCHAMBACHER.

(Supreme Court of Pennsylvania. October 10, 1887.)

## INNKEEPERS—DUTY OF SALOON KEEPERS TO PROTECT GUEST FROM INSULT.

Plaintiff and one F. became intoxicated in defendant's saloon, and F. there, in defendant's presence, pinned paper to plaintiff's back, and set it on fire. *Held*, that defendant was liable for the injury thus sustained by plaintiff.

Error to court of common pleas, Philadelphia county.

Action on the case by William Rommel against Jacob Schambacher for personal injuries. The trial court directed a nonsuit, and plaintiff brings error.

*Henry D. Wireman*, for plaintiff in error. *Charles H. Downing*, for defendant in error.

GORDON, C. J. From the evidence in the case we gather the following facts: On the evening of the ninth of August, 1884, the plaintiff, William Rommel, a minor, entered the tavern of the defendant, Jacob Schambacher, and there found one Edward Flanagan. They both became intoxicated on liquor furnished them by Schambacher. While the plaintiff was standing on the outside of the bar, engaged in conversation with the defendant, who was on the inside thereof, Flanagan pinned a piece of paper to Rommel's back, and set it on fire. The consequence was that Rommel's clothes were soon in flames, and before they could be extinguished he was very badly injured. He brought the present suit to recover damages from the defendant for the injury thus sustained.

The court below adjudged the facts as stated above to be insufficient to sustain the plaintiff's case, and directed a nonsuit. In this we think it made a mistake. There is no doubt that the defendant, from the position he occupied, had a full view of the room outside of the bar, and did see, or might have seen, all that was going on in it. If, in fact, he did see Flanagan setting fire to the plaintiff, and did not interfere to protect his guest from so flagrant an outrage, his responsibility for the consequences is undoubted. If, on the other hand, he was guilty of making Flanagan drunk, or if he came there drunk, and Schambacher knew that fact, he was bound to see that he did no injury to his customers. All this is a plain matter of common law and good sense, and does not depend on the act of 1854, or any other statute. Where one enters a saloon or tavern, opened for the entertainment of the public, the proprietor is bound to see that he is properly protected from the assaults or insults, as well of those who are in his employ, as of the drunken and vicious men whom he may choose to harbor. To illustrate the principle here stated, we need go no further than the case of *Railroad Co. v. Pillow*, 76 Pa. St. 510. In the case cited, a drunken row occurred on board one of the defendant's cars, and during the quarrel a bottle was broken, and a piece of the glass struck the plaintiff, a peaceable passenger, in the eye, and put it out. *Held*, that the company was responsible for the injury thus done. In the opinion of this court, the following language was used: "The plaintiff lost his eye through the quarrel of a couple of drunken men, who should not have been permitted aboard the cars, or, if so permitted, should have been so guarded or separated from the sober and orderly part of the passengers that no injury could have resulted from their brawls." If, then, a railroad company is liable for the conduct of drunken men who may chance to board its cars, much more the tavern keeper who not only permits drunken men about his premises, but furnishes liquor to make them drunk, and who is thus instrumental in fitting them for the accomplishment of just such an insane and brutal trick as that disclosed by the evidence of the case in hand.

The judgment of the court below is now reversed, and a new *venire* ordered.

## COOPER v. WEAVER'S ADM'R.

(Supreme Court of Pennsylvania. October 3, 1887.)

## INSURANCE—LIFE—ASSIGNMENT OF POLICY TO CREDITOR—WAGER.

W. assigned a life-policy of \$3,000 to B., to secure a debt of \$100, who assigned, without the knowledge of W., a half interest to C. After the death of W., \$1,800 of the policy was paid to C. and the residue to B. On a trial between W.'s administrator and the assignees, the court below ruled that the disproportion between the insurance and the debt, as a matter of law, constituted the transaction a wager, and the assignees had no right to retain more than the amount of the debt, plus the premiums paid and interest. *Held*, that the ruling of the court below embodied the law, and there was no error.

Error to court of common pleas, Lebanon county.

Action by plaintiff, Weaver's administrator, against defendants, Bloach and Cooper, to recover money paid them as assignees of an insurance policy on Weaver's life. Judgment for plaintiff, and defendant Cooper brings error.

*J. P. S. Gobin*, for plaintiff in error. *Bossler Boyer*, for defendant in error.

STERRETT, J. It is conceded that the policy of \$3,000 on the life of Weaver was taken out, and immediately assigned to Bloach, for the purpose of securing a debt of \$100 due by the former to the latter. Subsequently, one-half interest in the policy was assigned by Bloach to plaintiff in error, but Weaver was not in any manner a party to that transaction. On the death of Weaver, the insurance company, recognizing its liability for the amount insured, paid \$1,800 thereof to Cooper, and the residue to Bloach. In view of the undisputed facts, the learned judge of the common pleas held that the disproportion between the insurance, \$3,000, and the debt, \$100, was so great as to require him to say, as matter of law, that the transaction was a wager, and that the assignees of the policy had no right to retain more of the insurance money recovered by them than the amount of the debt, plus the premiums paid, and interest thereon. In this he was clearly right. The disproportion is so great as to make the insurance a palpable wager, and no court should hesitate to declare it so as matter of law.

It has heretofore been correctly said that the sum insured must not be disproportionate to the interest the holder of the policy has in the life of the insured, but we have never found it necessary to adopt any rule by which such disproportionate interest may be determined. Speaking for himself, our Brother PAXSON, in *Grant's Adm'rs v. Kline*, 19 Wkly. Notes Cas. 260, 9 Atl. Rep. 150, suggests that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt, with interest, and the amount of premiums, with interest thereon, during the expectancy of the life insured, according to the Carlisle tables. This appears to be a just and practicable rule. It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wagering policies; but as is said in *Corson's Appeal*, 113 Pa. St. 438, 445, 6 Atl. Rep. 213: "In all cases there must be a reasonable ground, founded on the relations of the parties to each other, either pecuniary, or by blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are therefore, independently of any statute on the subject, condemned as against public policy." But in such a case as the one before us, where the disproportion is so great, there can be no doubt as to the character of the transaction.

There is no merit in either of the specifications of error. Judgment affirmed.

MURRAY *et al.* v. WEIGLE *et al.*

(Supreme Court of Pennsylvania. January 3, 1888.)

## 1. JUDGMENT—COLLATERAL ATTACK—SCIRE FACIAS ON MORTGAGE.

A judgment, regular on its face, taken upon a *scire facias* upon two returns of *nil*, cannot, in the absence of any allegation of fraud or collusion, be attacked collaterally.<sup>1</sup>

## 2. SAME—DEATH OF MORTGAGOR WHEN SCIRE FACIAS ISSUED.

On the trial of an action of ejectment, where the defendants' title was founded on a judgment upon a *scire facias* taken upon two returns of *nil*, plaintiffs' counsel offered, and the court admitted, proof of the death of the mortgagor at the time the *scire facias* issued. *Held* error.

## 3. SAME—JUDGMENT NON OBSTANTE VEREDICTO.

Where it is shown, in an action of ejectment, that the judgment on the mortgage, and sale, and sheriff's deed to defendant are sufficient to convey to him the interest in question, judgment should be entered in his favor *non obstante veredicto*.

Error to court of common pleas, Allegheny county; EWING, Judge.

The plaintiffs, Frederick Weigle, Priscilla J. Burlap and George Burlap, her husband, Laura Rector and Martin Rector, her husband, and Catherine Stevenson, brought ejectment against Thomas Murray and William Richards, terre-tenant, defendants, for a lot of ground on Taust street, Pittsburgh. Plaintiffs claimed title as the surviving children and heirs at law of Henry Weigle, deceased, who died, February 22, 1871, intestate, seized of the land in dispute. The decedent left surviving him a widow, Catherine, who afterwards married Daniel Haphey, who subsequently died, and she then married a third husband, Charles Stevenson; and five minor children, two of whom, before the mortgage under which defendants claim was given, died intestate, unmarried, and without issue. Thomas Murray, defendant, claimed the title which descended to the widow and heirs at law of Henry Weigle, deceased, which he claimed they were divested of in the following manner: After the death of Henry Weigle, E. G. Krehan was appointed guardian of his minor children, including the parties to this action, at a term of the orphans' court of Allegheny county in 1872. The court subsequently made an order directing the guardian to pay to their mother two dollars per week for each of the children for maintenance. Said guardian afterwards filed an account for a large amount advanced by him for the support of said minors, and at the March term of the orphans' court, 1876, said guardian presented a petition for leave to raise money to pay off this claim, and the court ordered the guardian to execute a mortgage on the land now in dispute, for said purpose, in the sum of \$600, requiring bond, which was duly filed and approved June 3, 1876. In pursuance of this order, said mortgage was executed by said guardian, in which the widow and her then husband joined, in favor of Robert Robb, and duly filed and recorded, and afterwards assigned for a valuable consideration to the defendant Thomas Murray. At No. 500, December term, 1881, common pleas No. 1, of Allegheny county, this mortgage was foreclosed, and on January 13, 1882, judgment regularly entered. Execution issued thereon, and the land in dispute was on March 10, 1882, sold to Thomas Murray, and a deed therefor made to him, and he thereupon took possession of the premises, and has been in possession ever since. On September 1, 1885, plaintiffs, the widow and surviving children of Henry Weigle, deceased, brought this action. At the close of the trial, at the court's suggestion, the cause was

<sup>1</sup> Respecting the grounds on which the court will permit a judgment to be collaterally attacked, see *Jasper Co. v. Mickey*, (Mo.) 4 S. W. Rep. 424; *Crawford v. Wilcox*, (Tex.) 3 S. W. Rep. 695, and note; *Grimmett v. Askew*, (Ark.) 2 S. W. Rep. 707, and note; *Rollins v. Love*, (N. C.) 2 S. E. Rep. 166; *Jones v. Coffey*, Id. 165; *Seamster v. Blackstock*, (Va.) Id. 86; *Hollingsworth v. State*, (Ind.) 12 N. E. Rep. 490; *Strieb v. Cox*, Id. 481; *Hall v. Durham*, (Ind.) 9 N. E. Rep. 926, and note; *Fahey v. Mottu*, (Md.) 10 Atl. Rep. 68; *Hayley v. Simons*, (Ill.) 14 N. E. Rep. 7; *Head v. Daniels*, (Kan.) 15 Pac. Rep. 911; *Kleyla v. Hasket*, (Ind.) 14 N. E. Rep. 387.

discontinued by plaintiffs' attorney as to Catherine Stevenson. The jury returned a verdict in favor of the remaining plaintiffs for the undivided two-fifths of the land in dispute. The court also admitted testimony on the trial to show that E. G. Krehan was dead at the time the *scire facias* issued upon the mortgage, and also permitted the validity of the mortgage to be inquired into, and gave judgment on the special verdict in favor of plaintiffs, holding that the proceedings in the orphans' court, common pleas No. 1, were insufficient to divest the title of Henry Weigle's children. Defendants bring error.

*W. B. Rodgers and J. M. Swearingen*, for plaintiffs in error. *W. G. Crawford and John Barton*, for defendants in error.

**PAXSON, J.** We think it was error to admit the evidence referred to in the first specification. The judgment upon the *scire facias* was taken upon two returns of *nilhil*. That this is the equivalent of a return *scire feci* to a mortgage is settled by *Hartman v. Ogborn*, 54 Pa. St. 120; *Tryon v. Munson*, 71 Pa. St. 250. And this is so, even if the mortgagor be dead at the time the writ issues. *Warder v. Tainter*, 4 Watts, 270.

The second assignment alleges that the court below erred in entering judgment for the plaintiff upon the verdict. This was an ejectment, brought by the heirs of Harry Weigle, deceased, against the purchaser, at a sheriff's sale of the premises in dispute. He claims the title of the widow and heirs of the said Weigle by virtue of a sale under a mortgage given by a former guardian of the minor children of said Weigle, in which the widow joined as a party in interest. Judgment had been obtained upon the mortgage; the property sold upon a *letari facias*, and was bought by the plaintiff in error. The court below held that the mortgage was invalid, and that the purchaser took no title. Various reasons were given for this ruling; the principle one of which was that it did not appear by the proceedings in the orphans' court that the guardian had made a return to the order to mortgage, and there was no confirmation thereof. *Morgan v. Mountney* was cited in support of this position. But the learned judge entirely overlooked the fact that in that case no rights of third parties had intervened. Here we have a purchase at sheriff's sale of the mortgaged premises. He was not bound to look beyond the judgment on the mortgage. That is conclusive between the parties to the mortgage as to its amount, and that the interest of the mortgage at the date of the mortgage should be taken in execution for this payment thereon. *Dorris v. Erwin*, 101 Pa. St. 239. After a *scire facias* on a mortgage has ripened into a judgment, the mortgage is merged in it, and, even if null and void, is no longer open to attack. *Hartman v. Ogborn*, *supra*.

The judgment is reversed, and judgment for the defendant *non obstante veredicto*.

#### ROSENBERGER v. COMMONWEALTH.

(Supreme Court of Pennsylvania. January 3, 1888.)

##### 1. LARCENY—LIMITATION OF ACTION—PERIOD OF ABSENCE FROM STATE—INDICTMENT.

Act Pa. March 31, 1860, § 82, provides that a prosecution for larceny must be brought within two years from the date of the offense, except, if the person against whom the indictment shall be brought shall not have been an inhabitant of the state during the time for which he would be liable, then indictment may be brought against him at any period within a similar space of time, during which he shall be an inhabitant of the state. *Held*, that an indictment which alleged such absence as would take the case out of the operation of the statute, though not incorporated in the count charging the crime, was sufficient.

##### 2. SAME—OWNERSHIP OF PROPERTY—AMENDMENT OF INDICTMENT.

Act Pa. March 31, 1860, § 14, provides that in prosecutions for felony or misdemeanor the indictment may be amended where there is a variance between the statement of the indictment and the evidence in relation to the ownership of the

property. *Held*, that where the indictment alleged a joint ownership of property stolen, and the proof was that the property belonged to the alleged owners individually, amendment accordingly was proper.

3. SAME—LOST INDICTMENT—TRIAL UPON SECOND INDICTMENT.

Where an indictment has been found against a party and has been lost, or not accounted for, and another is found against him for the same offense, it is immaterial upon which one he is tried.

Error to court of quarter sessions, Armstrong county; JAMES B. NEALE, Presiding Judge.

The defendant, Peter H. Rosenberger, was indicted for the crime of larceny, at the December sessions, 1886, the crime having been committed in April, 1883. The defendant with others had been previously indicted, and, having escaped from the officer and fled from the state, was not tried at the same time his associates were, but remained out of the state more than three years. The present prosecution was had upon this second indictment against him. Trial by jury, and verdict finding defendant guilty, upon which sentence was pronounced. Defendant brings error.

J. R. Henderson, F. Mechling, and W. D. Patton, for plaintiff in error. D. B. Heiner and James P. Colter, for defendant in error.

PAXSON, J. It is seldom that a case comes before us with so little merit as this. The plaintiff in error was convicted of larceny in the court below, and now asks us to relieve him from the effect of his crime because he says that it appears from the face of the indictment that the offense was barred by the statute of limitations. The larceny was committed on the night of April 3, 1884. The property stolen consisted of a quantity of hams and pork, which was found concealed in a closet in the plaintiff's house. When arrested he induced the officer to remove his handcuffs on the pretense of changing his clothing, and took advantage of this indulgence by jumping out of the window. He then fled to the state of Ohio, where he remained for about three years. While there he sent on the sum of \$234.70 to this state, to get the prosecution settled. This effort failed, and shortly thereafter the bill of indictment against him was surreptitiously taken out of the proper office and has not since been found. It was probably stolen. A new indictment was found upon which he was tried. This is not a savory record, yet it is our duty to examine it, and give the plaintiff his legal rights under it. This we now proceed to do.

The information upon which the plaintiff was rearrested after his return to this state, states distinctly that the plaintiff for three years and upwards immediately succeeding the commission of said offense was not an inhabitant of this state. The indictment upon which he was tried contains two counts; the first count charges larceny; the second, receiving the property with guilty knowledge. Then followed a distinct averment substantially in the language of the exception in the statute of limitations, that the said P. H. Rosenberger (plaintiff in error) for three years and upwards immediately succeeding the committing of the offense aforesaid was not an inhabitant of the state of Pennsylvania or a resident therein, but was a non-resident of said state, and only returned to said state in August, 1886, etc. Upon the trial a *nolle prosequi* was entered upon the second count, and the trial proceeded upon the first count only, with the result as before stated. It will thus be seen that both upon the information and the indictment the exception in the statute is distinctly stated. That it is not in the body of the first count is not material. It is as applicable to the one count as the other. The pleader has first set forth the offense, and then the facts which take the case out of the operation of the statute. No reasonable objection can be taken to this form of pleading. The question of the statute is without merit. The court allowed an amendment in regard to the ownership of the property stolen. This was harmless, and moreover is expressly authorized by act of assembly.

It was also urged that no conviction could be had upon the second indictment so long as the first (the missing indictment) was undisposed of. There is no merit in this. If both indictments had been in court the plaintiff could have been tried upon either.

The judgment is affirmed, and it is ordered that the plaintiff in error surrender himself forthwith to the proper authorities of Armstrong county, in order to serve out his sentence, as imposed by the court below.

### Appeal of McINTIRE.

(*Supreme Court of Pennsylvania.* January 8, 1888.)

#### PARTNERSHIP—ACCOUNTING—GUARANTY.

In a suit in equity for a settlement of the accounts of a partnership, the tripartite articles of copartnership provided that the profits of the business should be divided into tenths, and the first party receive six-tenths, the second three-tenths, and the third, one-tenth. The ascertained net profits were \$14,488.89. *Held*, that the share of the second party was three-tenths of that sum, or \$4,346.67, and a provision in the articles that the first party guarantied that the profits should be made to the second party equal to 20 per cent. per annum of his capital of \$20,000, was an individual guaranty, not binding on the firm.<sup>1</sup>

#### Appeal from court of common pleas, Allegheny county.

Plaintiff S. P. Shriver, filed his bill in equity in March, 1884, against defendants D. R. McIntire, A. J. Nellis in his own right, and as executor of Eliza J. Nellis, deceased, and J. H. Stokes, who was not served, for a settlement of the partnership accounts of Nellis, Shriver & Co., composed of A. J. Nellis, S. P. Shriver and J. H. Stokes. D. R. McIntire, the appellant, became involved in this controversy by becoming surety for Aaron J. Nellis, and afterwards Nellis assigned to him his interest in the partnership. On the fourth day of November, 1878, Aaron J. Nellis, Samuel P. Shriver, and James H. Stokes entered into a manufacturing partnership for the term of three years. The capital stock was fixed at the nominal sum of \$100,000. Nellis contributed the stock, tools, machinery, etc., which he had on hand in the manufactory prior to the formation of the partnership. Shriver contributed \$10,000 in cash, and agreed to contribute \$10,000 more when the same might be necessary for the business. James H. Stokes contributed nothing but his services as book-keeper. The profits of the business were to be divided as follows: A. J. Nellis, six-tenths; S. P. Shriver, three-tenths; James H. Stokes, one-tenth. It will be observed that the plaintiff, S. P. Shriver, is to receive two-tenths of the profits more than his cash contribution of capital. The clauses of this prudent agreement bearing upon this case are as follows:

"The party of the second part shall put in as his share of the capital stock \$20,000, in the manner and form as hereinafter stipulated, viz.: \$10,000 in cash, and \$10,000 as soon as the requirements of the business may demand it, and until such payment is made by the party of the second part he shall be chargeable with interest on the same." "The party of the third part is to have a one-tenth (1-10) part of the net profits of the business, for which interest, on \$10,000 at the rate of six per cent. (6 per cent.) per annum, is to be deducted from his portion of the profits, and the remainder to be considered as his capital stock until the amount of \$10,000 is so accumulated, when his interest in the business shall be considered as that much capital." "As a guaranty by the party of the first part to the party of the second part, on account of his not being familiar with the business, and as an inducement by the party of the first part, he guaranties that the profits of the business shall

<sup>1</sup> As to how far a contract of guaranty entered into by one partner is binding upon the firm, see *Avery v. Rowell*, (Wis.) 17 N. W. Rep. 875; *Osborne v. Carr*, (Minn.) 13 N. W. Rep. 922; *D. M. Osborne & Co. v. Thompson*, (Minn.) 28 N. W. Rep. 260.

be made to the party of the second equal to twenty per cent. (20 per cent.) per annum on his capital of \$20,000."

During the continuance of this partnership, an execution was levied upon the interest of A. J. Nellis in the firm of Nellis, Shriver & Co., and the same was bid in by S. P. Shriver, the plaintiff, for \$———. The business of the partnership was continued until the tenth day of February, 1882, when it was dissolved. At the date of this dissolution, David R. McIntire appears as a party to the articles of dissolution. The essential portion of this article reads: "And whereas, a bill in equity has been filed in the court of common pleas No. 1 of Allegheny county, at No. 544, December term, 1881, by the receivers of the Crawford Manufacturing Company to recover the interest which was of said A. J. Nellis in said firm against said Shriver & Stokes, and cross-bill, etc., filed, and the cause is now pending for trial; now, therefore, the said McIntire agrees to give to said Shriver & Stokes an obligation with sufficient sureties, conditioned that he will cause the proper defense to be made to said action, and that he will pay and satisfy any decree or judgment that may be recovered against said Shriver & Stokes for or on account of said interest, and shall indemnify and save them harmless from any and all loss, liability, damage, and cost on account of said action, and also that McIntire shall pay to Shriver any amount of money, if any, which may be necessary upon final settlement of the affairs of Nellis, Shriver & Co., to make said Shriver whole upon his capital of \$10,000 and profits, according to the terms of the articles of copartnership, and to Stokes whatever amount of money, if any, is necessary to give Stokes the amount which, upon such final settlement, may be due him."

Among other things the master to whom the case was referred found, "that no demand was ever made on Shriver to pay in the additional or second \$10,000 spoken of in the article of agreement; and, further, that the requirements of the business did not demand it; that paying interest on that amount is a compliance on his (Shriver's) part with the article of copartnership relative to it; and the guaranty clause binding as against McIntire because he stands in the place of Nellis, and has bound himself in the article of February 10th, the article of dissolution, to pay to Shriver his ten thousand dollars (\$10,000) and such profits as he is entitled to under the article of copartnership, which is equal to twenty (20) per cent. per annum on \$20,000, less six (6) per cent. on \$10,000 for three years and three months. And the court entered a decree in accordance with the finding of the master, and D. R. McIntire and A. J. Nellis appealed.

*Marshalls & Imbrie*, for appellants. *Kirk Q. Bigham*, for appellees.

STERRETT, J. The main contention in this case is that the court below erred in construing the agreement of February 10, 1882, and charging appellant with \$8,653.33, the difference between Shriver's share of profits actually earned and the nominal profits, of 20 per cent. per annum, claimed by him under the Nellis guaranty. That guaranty, embodied in the tripartite agreement of November 4, 1878, between Nellis of the first, Shriver of the second, and Stokes of the third part, is as follows: "As a guaranty by the party of the first part to the party of the second part, on account of his not being familiar with the business, and as an inducement by the party of the first part, he guaranties that the profits of the business shall be made to the party of the second part equal to twenty (20) per cent. per annum on his capital of \$20,000." It is claimed by Shriver that this personal obligation of Nellis was assumed by appellant in that clause of the agreement of February 10, 1882, wherein the latter undertakes to indemnify Shriver and Stokes "from any and all loss, liability, damages, and costs on account of or by reason of" a certain action then pending, and also pay to Shriver any amount of money if any, which may be necessary, upon final settlement of the affairs of Nellis, Shriver

& Co., to make said Shriver whole upon his capital of \$10,000, and profits, according to the terms of the articles of copartnership; and to Stokes, whatever amount of money, if any, is necessary to give Stokes the amount which, upon such final settlement, may be due him." The court appears to have regarded this as an undertaking on the part of appellant to make Shriver whole not only as to his \$10,000 capital invested in the business, and his full share of the profits actually earned, according to the articles of copartnership, but also to make him whole as to the nominal profits of 20 per cent. per annum on \$20,000, according to the personal guaranty of Nellis; and he was accordingly charged with the difference of \$8,658.33, above mentioned. We cannot regard this as the correct construction of the contract in question. The items specified therein are Shriver's "capital of \$10,000, and profits, according to the terms of the articles of copartnership." Referring to those articles, we find Shriver's paid-in capital is \$10,000, about which there is no dispute, and we further find this provision: "The capital stock being \$100,000, the profits of the business shall be divided into tenths, A. J. Nellis of the first part to receive six-tenths, S. P. Shriver of the second part to receive three-tenths, and James H. Stokes of the third part to receive one-tenth." This is the only agreement between the partners, as to profits. Shriver's share, therefore, "according to the terms of the articles of copartnership," is three-tenths of \$14,488.89, ascertained net profits of the business, or \$4,346.67, and no more. Although incorporated in the articles of copartnership, the individual guaranty of Nellis to Shriver cannot be regarded as one of the terms of the copartnership agreement. It is strictly a matter between Nellis and Shriver, individually, with which the other partner, Stokes, never had nor could have any concern. The guaranty clause might be stricken out of the instrument and its integrity as articles of copartnership would be unaffected thereby. It has also been suggested that Shriver's transfer to Mrs. Nellis of the interest which he acquired by purchase at sheriff's sale was "subject to his (Shriver's) rights under the articles of association of Nellis, Shriver & Co.," and therefore Shriver has a claim on that interest, now represented by appellant, for the nominal profits guaranteed by Nellis. There would be some force in this suggestion if the Nellis guaranty was in any proper sense an integral part of the articles of association entered into by the three persons who composed the firm of Nellis, Shriver & Co. But, as we have seen, the guaranty was a matter that concerned two of the partners only, as individuals and not as members of the firm. It does not appear that anything was ever done to change its character from an individual transaction to that of a copartnership transaction. Shriver's claim against Nellis, individually, under the guaranty still remains in full force.

In so far, therefore, as the specifications of error involve the liability of appellant for nominal profits under the personal guaranty of Nellis, they are sustained. There is nothing in the remaining specifications that requires special notice. They are not sustained. Decree reversed at costs of appellees, and record remitted, with instructions to enter decree in accordance with the foregoing opinion.

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APPEAL OF NELLIS *et al.*

(*Supreme Court of Pennsylvania. January 8, 1888.*)

Appeal from court of common pleas, Allegheny county.

STERRETT, J. The only questions that require any notice in this case have been considered and disposed of in *Appeal of McIntire*, ante, 784, (No. 70, October term, 1887.) For reasons given in opinion just filed in that case, the decree must be reversed.

Decree reversed, at costs of appellees, and record remitted, with instructions to enter decree in accordance with that opinion.

## Appeal of REED.

(Supreme Court of Pennsylvania. January 8, 1888.)

## WILL—LEGACIES—NATURE OF ESTATE—VESTED INTEREST.

A testator directed his executors to divide a certain fund into nine equal parts, and to invest the whole and pay over annually one-ninth part of the interest to each of his grand children, or if any of them died leaving heirs, then to such heirs, and at the full expiration of 12 years from the time of his decease to pay over all the principal in like manner; and that neither principal nor interest should be liable to attachment. *Held*, that the grandchildren took vested interests.<sup>1</sup>

Appeal from orphans' court, Allegheny county; P. J. HAWKINS, Judge.

C. E. Reed was the husband and executor of Mary Reed, who was entitled under the will of her grandfather to one-ninth share in the proceeds of certain real estate. After her death, the time for distribution having come, a decree was made by the orphans' court of Allegheny county declaring the interests of the legatees to have been contingent, and directing the distribution of the share of Mary Reed among her husband C. E. Reed and her five children, Wm. A. Reed, Mary F. Reed, Chas. L. Reed, John B. Reed, and Elizabeth Reel. Against this decree C. E. Reed appealed. Albert I. Klaus, against whom the appeal was prosecuted, was guardian of the infant children of C. E. Reed, the appellant, and Mary Reed, deceased.

*James Bredin*, for appellant. *J. H. Baldwin*, for appellee.

PAXSON, J. Thomas Morrow, the testator, died September 11, 1874. He left one daughter and nine grandchildren, children of a deceased daughter. By his will he gave his executors charge of his real estate, and directed that after they should realize from the rents, etc., sufficient to pay his debts, funeral expenses, and a legacy of \$1,000 to a grandchild, and \$500 to a great-grandchild, they should sell a certain described portion of his farm. The executors were to be the sole judges of the time when it should be sold, as well as of the terms of sale. The will then provides: "That when all that part or my farm has been disposed of, having nine (9) grandchildren, viz., Thomas M., John K., Harry, and Charles Blair, Fanny Eichbaum, Mary Reed, Jane Meanual, Eliza Rind, and Eleanor Blair, all children of my deceased daughter, Nancy, who was intermarried with John Blair, deceased, I will and direct that the net proceeds arising from the sale shall be divided into nine (9) equal parts, and that my executors, or the survivors of them, shall, for the period of twelve years from the time of my death, keep said net proceeds invested at interest, and pay over annually to each of my above-named grandchildren one-ninth of the interest thereof annually; or if any of them died leaving heirs, then pay the same to said heirs, and at the full expiration of twelve years from the time of my decease shall in like manner pay over all the principal. But neither interest or principal shall be liable to attachment."

The question for consideration is whether the legacies given by the will to the grandchildren are vested or contingent. If vested, the executor or administrator of a deceased grandchild would take; if contingent, the heirs of such deceased grandchild would be entitled to the fund. The court below held that the legacies were contingent, and distributed the fund to the heirs. It will be observed that the testator, after reciting the fact that he had nine grandchildren, directs that the net proceeds arising from the sale of the farm shall be divided into nine equal parts, being one for each grandchild; that

<sup>1</sup> Respecting the construction of wills, and when the interests thereby created are vested, and when contingent, see *Chasy v. Gowdry*, (N. J.) 9 Atl. Rep. 580; *Parker v. Glover*, Id. 217; *Wiggin v. Perkins*, (N. H.) 5 Atl. Rep. 904, and note; *Davidson v. Bates*, (Ind.) 12 N. E. Rep. 687, and note; *Lenz v. Prescott*, (Mass.) 11 N. E. Rep. 928; *Dodd v. Winship*, Id. 588; *Williams v. Williams*, (Cal.) 14 Pac. Rep. 894, and note; *Roundtree v. Roundtree*, (S. C.) 2 S. E. Rep. 474; *Wills v. Wills*, (Ky.) 3 S. W. Rep. 900, and note.

said proceeds shall be kept invested for 12 years after his death; that his executors shall pay over annually to each grandchild the one-ninth part thereof, or if any of them "have died leaving heirs, then pay the same to said heirs," and after the expiration of 12 years to pay over to each the one-ninth of the principal, etc. In other words each grandchild was to have the interest on one-ninth for 12 years, and then receive the principal. The general rule undoubtedly is that when a legacy is given to a person to be paid at a future time it vested immediately. But where it is not given until a certain future time it does not vest until that time, and if the legatee dies before, it is lost. *Patterson v. Hawthorn*, 12 Serg. & R. 112. It was said in *Letchworth's Appeal*, 30 Pa. St. 175 that the law always inclines to treat the whole interest in property as vested rather than contingent, and therefore, in case of doubt, it declares the interest vested. And in *McClure's Appeal*, 72 Pa. St. 414, it was said by the late Justice WILLIAMS: "The point which determines the vesting is not whether time is annexed to the gift, but whether it is annexed to the substance of the gift, as a condition precedent. Where there is an antecedent absolute gift, independent of the direction and time of payment, the legacy is vested; but where there is no substantial gift, and it is only implied from the direction to pay, the legacy is contingent, unless, from particular circumstances or the whole face of the will, a contrary intention is to be collected." In general, when a legacy is given for an object which fails, the legacy will be lapsed; as where a sum of money is given to an infant for the purpose of binding him apprentice, and he dies before the proper age. So where a legacy is given to a female expressly for a marriage portion, and she dies before marriage, there is great reason for supposing it was not intended to give it to her representatives.

Here we have legacies given by a testator to his grandchildren, and in case of their death to their heirs. It is true it is not a direct gift in terms, but it is a substantive gift notwithstanding. They are to have the interest for 12 years, and then the principal is to be paid over. The time for the payment of the principal is postponed, but it is sure to come. And it is to be noted that there is not in this will the faintest trace of an intent in case of the death of any of the grandchildren before the expiration of the 12 years to give the share of those so dying to the survivors. The share of a grandchild that shall "have died" is to go to his "heirs." It is contended that the words "have died" refer to the period of distribution. They are, however, appropriate words to designate a death between the making of the will and the death of the testator. A will speaks as of the death of the testator. But we regard this point as unimportant. What did the testator mean by the word "heirs" as used in this connection? I understand it to mean that in case of the death of one of the nine enumerated grandchildren, the share of such grandchild,—that is, one of the nine equal parts set apart for his or her own,—shall be paid to such person or persons as would be entitled to it as his or her legal representatives by the law of the land; that is to say it was not, in the case of the death of one, to go to the survivors, but to be considered as vested in the deceased child. This was the construction placed upon the same words by this court in *Patterson v. Hawthorn*, *supra*, where a testator directed the proceeds of his estate to be divided between his six sons and their heirs upon the death of his wife. The same principle is recognized in the later cases of *King v. King*, 1 Watts & S. 205, and *McGill's Appeal*, 61 Pa. St. 46. In *Mull v. Mull*, 81 Pa. St. 393, where the testator directed a sum of money to be "equally divided among all my children or their legal heirs," this court held that the words "or their legal heirs" were not used to individuate grandchildren, but to supply a legal succession in the event of the death of any one, and mean simply legal representatives. The gift of a legacy under the form of a direction to pay at a future time, or upon a future event, is not less favorable to vesting than a simple and direct bequest of a legacy at a like future

time, or upon a like event. The question is one of substance, and not of form; and in all cases it is whether the testator intended it as a condition precedent that the legatees should survive the time appointed by him for the payment of their legacies; and the answer to this question must be sought for out of the whole will, and not in the particular expressions in which the gift is made. *Leeming v. Sherratt*, 2 Hare, 14.

It was urged, however, that the words in the will, "but neither principal nor interest shall be liable to attachment," coupled with the trust, indicate that the postponement of the gift was on account of the character of the donees, and an indication of an intent that the legacies should not vest until the expiration of the 12 years. There is some force in this, but we do not think it sufficient to prevent the vesting of the legacies. It is at least doubtful, from a reading of the entire will, whether the testator had not in his mind the convenience of his estate, rather than the character of the donees, when he directed the postponement of the payment of the principal. And while it is true as a general rule, as before observed, that where the time or other condition is annexed to the substance of the gift, and not merely to the payment, the legacy is contingent; yet it is equally true that a well-recognized exception to the rule is that where interest, whether by way of maintenance or otherwise, is given to the legatee in the meantime, the legacy shall, notwithstanding the gift appears to be postponed, vest immediately on the death of the testator. This circumstance indicates an intention that the beneficial enjoyment shall begin at once, and payment only of the principal or capital be postponed. When a legacy is given by a direction to pay when the legatee attains a certain age, the direction to pay may import either a gift at the specified age, or a present gift with a postponed payment; and if the interest is given in the mean time, it shows that a present gift was intended. *Provenchere's Appeal*, 67 Pa. St. 463; *In re Hart's Trusts*, 3 De Gex & J. 195.

While this is a close case, and not by any means free from doubt, we are of opinion that the testator intended to give each of his grandchildren a vested interest in the one-ninth share referred to, and that distribution must be made to the personal representatives of such as are deceased. And were it even more doubtful than it is we would be constrained, by the rule above referred to, to resolve the doubt in favor of vesting.

The decree is reversed, at the costs of the appellees, and distribution ordered, in accordance with this opinion.

#### ALLEGHENY HEATING CO. v. ROHAN.

(*Supreme Court of Pennsylvania*. January 3, 1888.)

##### MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT—DIRECTING VERDICT.

In an action to recover for personal injuries alleged to have been sustained through the negligence of defendant, the evidence showed that the injury was caused directly by the negligence of a fellow-workman, and no negligence on the part of defendant was proved. *Held*, that a specific instruction should have been given to return a verdict for defendant.<sup>1</sup>

Error to court of common pleas, Allegheny county; JOHN H. BAILEY, Judge.

<sup>1</sup> In the absence of statute, the negligence of a co-servant is one of the risks of employment assumed by an employee, and for which the master is not liable. *Thompson v. Railway Co.*, 14 Fed. Rep. 564. The exemption of the master from liability for injuries resulting to a servant from such negligence is held to continue, though the negligent employee may be the superior in rank of the injured one in the same general undertaking, unless he occupies the place of vice-principal. *Railway Co. v. Adams*, (Ind.) 5 N. E. Rep. 187. But in the courts of the United States the master has been held liable for injuries incurred by an employee through the negligent exercise of authority conferred upon a co-employee. *Mason v. Machine-Works*, 28 Fed. Rep. 228. As to who are fellow-servants, see *Reddon v. Railroad Co.*, (Utah,) 15 Pac. Rep. 262, and note; *Van Wickie v. Railway Co.*, 32 Fed. Rep. 278; *Theleman v. Moeller*, (Iowa,) 84 N. W. Rep. 765.

John Rohan brought this action against the Allegheny Heating Company to recover damages for personal injuries sustained while engaged in his duties as one of its workmen. Judgment for plaintiff. Defendant brings error.

*William S. Pier*, for plaintiff in error. *A. V. D. Watterson*, for defendant in error.

GREEN, J. In no point of view is it possible to sustain the verdict and judgment in this case. The learned court below, in the charge to the jury, said: "You must be satisfied that the escape of that gas was the result of the negligence of this defendant company through its servants. There seems to be no evidence to the contrary that this business was conducted in the ordinarily prudent, careful way that such work is done according to the best lights which persons engaged in that business possessed, and that there was no escape of gas beyond what necessarily or ordinarily resulted from the transaction of the business in the mode in which it was done here; which seemingly was done, as I have said, according to the best lights possessed. But it is for you to say whether that was a negligent act upon the part of the company or its servants." As a matter of course, if there was no evidence to prove negligence on the part of the company or its agents, it was error to tell the jury that it was for them to decide whether there was negligence or not. If there was no evidence to prove negligence, it was not for the jury, but for the court, to decide the case, by a specific instruction to return a verdict for the defendant. No principle of the law is more familiar or more deeply rooted in our system of jurisprudence than this. It would be a mere affectation to cite the authorities. Having most carefully read and studied every particle of the testimony, we are bound to say that the court was entirely correct in saying that there was no evidence to prove negligence of the defendant. On the contrary, it was affirmatively and positively proved that the appliances used in making the test were of the best and most approved kind, and such as were in common and constant use for that purpose. John Bell, a witness for the plaintiff, being asked, "*Question*. Do you know the condition of the plug? was it put on properly?" answered, "Yes, sir; to the best of my belief it was. They used all precautions necessary." All of the defendant's testimony was to the same effect, and that a person of great experience and capacity for this kind of work was specially employed by the defendant to conduct the operations. Against all this evidence, there is not a scrap of testimony to prove negligence, either in the appliances used, or in the selection of the persons to do the work. That there was some escape of gas when the test was applied proves nothing in support of a charge of negligence. It was for the very purpose of discovering whether gas could escape that the test was applied. It would have been negligence not to apply the test, and the defendant was strictly in the line of its duty when it did so. The plaintiff admits that he heard the gas escaping, which was precisely what was to be expected. But the mere escape of the gas inflicted no injury. It was the explosion that did the mischief, and as to the cause of this there is an absolute concurrence of testimony on both sides. The plaintiff testifies that McGinty, a fellow-workman, who stood a few feet from him, told him that he struck a match to light his pipe, and the explosion instantly followed. The plaintiff's physician, examined on his behalf, testified that the plaintiff told him that the injury was caused by McGinty lighting a match. He was asked: "*Question*. Did you hear this man [plaintiff] say anything with reference to what caused the injury?" *Answer*. I did. *Q*. What did you hear him say? *A*. He said it had originated from McGinty lighting a match. *Q*. Did he charge McGinty with it? *A*. He did, bitterly; said it was McGinty's fault all the way through." McGinty himself was called by the plaintiff, and he also swore that he struck the match, and nearly lost his life over it. Other witnesses testified to the same fact, so that it was an absolutely undisputed fact, proved on both sides.

and it was simply fatal to the plaintiff's case. It was also proved by several of the defendant's witnesses that notice was given to these very men, only a few minutes before the explosion, that they must not smoke. Some of the plaintiff's witnesses who were at remote points said they did not hear the notice, which is merely negative, and goes for nothing, and McGinty said no notice was given; but it is quite immaterial, as the case does not depend upon the giving or omitting to give notice. The injury was directly caused by a clear act of negligence of a fellow-workman, and, even if the plaintiff were entitled to recover upon other grounds, this alone would prevent a recovery. Judgment reversed.

### OVERSEERS OF GILPIN TP. v. OVERSEERS OF PARK TP.

(*Supreme Court of Pennsylvania. January 8, 1888.*)

#### POOR AND POOR LAWS—REMOVAL OF PAUPERS—NOTICE OF HEARING.

In proceedings under act Pa. June 13, 1836, § 16, providing for the removal of those who are likely to become chargeable upon the town, to the place of their legal settlement, it is necessary that notice of the hearing before the magistrate should be given to the person to be removed, and that an adjudication be had upon the question; otherwise the proceedings are void.

*Certiorari* to court of quarter sessions, Armstrong county; JAMES B. MALE, Judge.

*S. M. Crosby and David Barclay*, for plaintiffs in error. *McCain & Leason*, for defendants in error.

WILLIAMS, J. The facts important to a correct understanding of the question in this case are few and free from controversy. One Alexander Williams, a colored laborer, with his wife and seven children, lived in Park township, Armstrong county, in December, 1884, and for nearly two years prior thereto. He had supported his family by his own labor and that of his older children, supplemented at times by the gifts of kind-hearted neighbors. He had not applied to the overseers for aid, nor had any one made application on his behalf. The overseers of the poor, however, fearing that he might become chargeable to the district which they represented at some time, and not willing that his residence in the district should ripen into a settlement under the poor laws, went before a justice of the peace and made an affidavit that Williams and his family were likely to become chargeable to the township of Park, and that his last settlement was in Gilpin township. The justice thereupon, as his entries show, without notice to Williams, without the testimony of a witness, and without any form of adjudication, issued an order authorizing and requiring the overseers to remove Williams and his family to Gilpin township. Armed with this order, they came to the cabin of the colored man while he and his family were at breakfast, loaded the father, mother, and four children into a wagon, and proceeded to "remove" them from Park township. The colored man tells the story of this removal with simplicity and pathos, thus: "I told him [the overseer] he needn't bother me; I had plenty to eat. He said he was going to take me if I did have plenty to eat. Me and my family got into the wagon. It reminded me of old times. \* \* \* I told him I was not going. He said I should go; if I did not they would make me; that if I rebelled they would take me by force. He never said why I would have to go." The overseers of Gilpin to whom Williams and his family were taken appealed from the order of removal, and on the trial asked the court of quarter sessions to hold "that it does not anywhere appear in this case that in granting the order there was an adjudication by the justice." This the court declined. The appellant also asked the court to quash the order of removal, which was declined. This ruling of the court was erroneous. When the overseers of Park township made their complaint against Williams, alleging his liability to become chargeable, it was the duty of the justice to direct

notice to him of the complaint, and upon such notice to inquire into and adjudicate upon the truth of the complaint. If Williams had been a pauper, he would not have been entitled to notice of the proceedings for his removal. The contest in that case would have been between the poor-districts in order to determine which of them should be held for the support of one who was a public burden. In that contest he could have no interest. Here, however, the proceeding was against one who was not a public burden. The complaint against him was that he was likely to become chargeable. He was the party against whom the proceeding was in the first instance directed, and it was his privilege to show that the complaint was unfounded. If unable to satisfy the justice that he was not likely to become chargeable, he had the right to give suitable security to indemnify the township against liability for his support. If he could do neither of these things, and the evidence justified such action, the justice could properly adjudge that the complaint was sustained, and that Williams should be removed to his last legal settlement. Such an adjudication would support an order removing the person affected thereby from his actual residence to his legal settlement, and for the manner of its execution the "poor person" would be dependent upon the humanity of the officers whose duty it might be to remove him.

It follows from what has now been said, that the order of removal made in this case, without notice to the person to be affected by it, and without an adjudication upon the complaint, was not merely irregular, but void. Its execution in the manner described by the witnesses was a violation of the bill of rights. It is a familiar and a favorite maxim of the law that a man's house is his castle. It is applicable to the cabin of the colored man as truly as to the mansion of the rich. Until his liability to become chargeable was established in accordance with the forms of law, Williams could not be removed from his house without his consent.

The judgment of the court of quarter sessions of Armstrong county is now reversed and the order of removal quashed.

### KNOX *et al* v. HILTY.

(*Supreme Court of Pennsylvania*. January 8, 1888.)

#### MECHANICS' LIENS—PROCEDURE—AMENDMENT—ADDITION OF NEW PARTIES.

Act Pa. June 11, 1879, § 3, provides that courts shall allow amendments in cases of mechanics' claim or lien filed at any stage of proceedings, in the furtherance of justice by changing, adding to, or striking out the names of claimants, or owners and contractors. A claimant of a lien, after the statutory period of six months for filing liens had expired, procured an order of court, striking off a judgment obtained on a lien, amending the claim, striking out the name of defendant as owner, and inserting that of his wife, as owner and co-defendant. *Held*, that there was no provision in the law by which a person could be introduced into the case by amendment after the statutory period for filing a lien had expired.

Error to court of common pleas, Allegheny county.

Daniel Hilty, plaintiff, filed a claim of lien March 1, 1885, against Andrew Knox, defendant. Judgment was entered for plaintiff June 8, 1885, and *levari facias* issued July 7th.

On September 5, 1885, by rule taken upon the defendants below, the court was asked by plaintiff below, as preliminary to the amendment of the lien, to stay the *levari facias* of September term, 1885, also strike off the verdict and judgment obtained by him, June term, 1885, and then amend the mechanics' lien, March term, 1885, so as to make Marcia J. Knox, wife of Andrew Knox, owner or reputed owner, instead of the said Andrew Knox. This was more than eight months after the completion of the work. The rule was granted by the court, and defendants bring error.

*Robb & Fitzsimons*, for plaintiffs in error. *F. Walter Day*, for defendant in error.

GREEN, J. The original claim of lien in this case was filed on January 30, 1885. The last item in the bill of particulars was for labor done on January 7, 1885. The claim was filed against Andrew Knox alone, and contained no averments of any kind against Marcia J. Knox. A *scire facias* was issued against Andrew Knox on March 18, 1885, and a trial was had on June 2, 1885, which resulted in a verdict for the plaintiff for \$704.37. Judgment was entered on the verdict on June 8, 1885, and a writ of *levari facias* was issued July 7th, and the property advertised for sale on September 7, 1885. After this, on September 8th, the court, at the instance of the plaintiff, made an order staying the *levari facias*, striking off the judgment, and amending the original claim of lien by striking out the name of Andrew Knox, as owner or reputed owner, and adding the name of Marcia J. Knox, wife of Andrew Knox, so as to make her a co-defendant with her husband; and also further amended the lien by introducing averments of the wife's ownership, and her authority for doing the work in question. When this amendment was ordered, there was no kind of lien or claim against the wife on the record, and no averments in the lien filed which would make it at all possible to recover against her. On September 8, 1885, when the amendment was made, eight months had expired from the completion of the building, and the date of the last item of the claim. It is needless to argue that at that time no valid lien could have been filed against the wife, the statutory period of six months for filing liens having fully expired. It is almost unnecessary to say that we have repeatedly decided that amendments introducing new parties cannot be made after the statutory period has expired. *Russell v. Bell*, 44 Pa. St. 47; *Church v. Schreiner*, 88 Pa. St. 124. This is conceded by the learned council for the defendant in error, but he contends that such an amendment can be made under the provisions of the second section of the act of June 11, 1879, (P. L. 122.) The words of that section are as follows: "That in case of any mechanics' claim or lien, filed according to existing laws in any county of this commonwealth, the court having jurisdiction in such case is hereby authorized and required, in any stage of the proceedings, to permit amendments conducive to justice and a fair trial upon the merits, including the changing, adding, and striking out the names of claimants, and by adding the names of owners and contractors, respectively, whenever it shall appear to said court that the names of the proper parties have been omitted, or that a mistake has been made in the names of such parties, or too many or not enough have been joined in such case." There is nothing in this act which in the least degree gives sanction to the idea that the time for filing a lien may be extended beyond the six months by way of amendment, or that any person may be thus introduced against whom no right to file a lien existed when the amendment was made. If the legislature had any such purpose in view they certainly would have said so. As a matter of course we could not attribute such a meaning to the act by mere construction, especially as some of our decisions on this subject were made prior to the act. Moreover this act is not materially different from some of our other statutes allowing amendments of the same character, and for the same causes. They are collected in *Purd. Dig.* p. 92, pl. 1-7. Independently of this the amendments are to be allowed under the act for the purpose of conducting "to justice and to a fair trial upon the merits." If they are to conduce to a fair trial they would have to be made either before or at the trial, not long after the trial was finished, judgment entered, and execution issued.

We cannot understand how, under this, or any other act, it is possible for a court after final judgment, and execution issued, to strike off the judgment, perfectly regular on its face, reopen the entire case, amend the cause of action so as to take in other persons than the original parties, and then proceed to a new trial and judgment as to such other persons. We have not been referred to any case holding such a doctrine, and it seems so entirely incon-

sistent with all the well-established rules of pleading and practice that we have the gravest possible doubts of its correctness. It is not necessary to decide the question in this case because the other views we have above expressed dispose of it finally. We reverse the judgment on the first, second, sixth, and seventh assignments, saying nothing as to the others. Judgment reversed.

**KNOX et ux v. HILTY. (Two Cases.)**

(*Supreme Court of Pennsylvania. January 8, 1883.*)

Following *Knox v. Hilty*, ante, 792.

Error to the court of common pleas, Allegheny county.

GREEN, J. For the reasons stated in the opinion just filed in the case of *Knox v. Hilty*, ante, 792, (No. 196, October term, 1887,) the judgments in these two cases are reversed, and writs of *venire de novo* awarded as to Andrew Knox only.

**PRICE et al. v. GRANTZ.**

(*Supreme Court of Pennsylvania. January 8, 1883.*)

**1. NUISANCE—NOXIOUS GASES—PECULIAR SUSCEPTIBILITY.**

In an action for damages by causing a common nuisance by permitting noxious gases to escape from lead-works, an instruction that "the effect of a peculiar and very exceptional idiosyncrasy or susceptibility on the part of a person by which he or she may be affected by a slight trace of arsenic or lead, which would not in any degree affect other persons, would not be such an injury as would of itself condemn the source of such effect as a nuisance," was improperly refused, when there was testimony from which the jury might infer that plaintiff's wife was of that peculiar susceptibility.<sup>1</sup>

**2. SAME—PUBLIC NUISANCE—AVERMENT OF SPECIAL DAMAGE—INSTRUCTIONS.**

Where plaintiff declared for a public nuisance, with averment of special damage, an instruction that, under the pleadings, plaintiff must show that, in opening the manufactory complained of, defendants were guilty of maintaining a common nuisance, was improperly refused.

**3. SAME—PROVINCE OF JURY.**

In a suit for maintaining a common nuisance, with averment of special damage, an instruction that under the evidence the plaintiff has not shown that the manufactory complained of was a common nuisance was properly denied, as the question of nuisance was for the jury.

**4. SAME—PROOF OF DAMAGES—INJURY MUST BE MATERIAL.**

In an action for maintaining a common nuisance, by carrying on lead-works, with a claim of special damages from noxious gases, plaintiff, in order to recover, must show a real and substantial injury, and not merely a trifling one, necessarily resulting from the business.<sup>2</sup>

**5. SAME—INSTRUCTIONS.**

In an action for maintaining a nuisance by erecting lead-works and a shot-tower, from which gases mixed with lead and arsenical poisons were alleged to escape, the court, in its charge to the jury, referred to a decision that a smelting company was a nuisance, and that, as both it and the defendants used lead and arsenic in their business, in its opinion it was a nuisance to erect works producing like effects, though the business were different. *Held*, that it was error, in that the difference in degree was overlooked; the defendants claiming to throw off so small a quantity of noxious gas as not to affect the comfort of the neighborhood.

Error to court of common pleas, Allegheny county.

George Grantz, plaintiff, sued William G. Price and Mary Lane, copartners as William G. Price & Co., A. H. Lane and Mary Lane, his wife, and William G. Price, and the Berlin Iron & Lead Company, defendants, for maintaining

<sup>1</sup> As to what constitutes a nuisance against which relief may be had, see *Hurlbut v. McKone*, (Conn.) 10 Atl. Rep. 104, and note; *Trulock v. Merte*, (Iowa,) 84 N. W. Rep. 307, and note.

<sup>2</sup> Respecting the rights of individuals in regard to nuisances which are public in their nature, see *McDonald v. City of Newark*, (N. J.) 7 Atl. Rep. 855; *Broome v. Telephone Co.*, Id. 851; *Wheeler v. Bedford*, (Conn.) 7 Atl. Rep. 22; *Palmer v. Railroad Co.*, (Ind.) 8 N. E. Rep. 905; *Hogan v. Railway Co.*, (Cal.) 11 Pac. Rep. 876, and note; *De Vaughn v. Minor*, (Ga.) 1 S. E. Rep. 433; *Snyder v. Cabell*, (W. Va.) 1 S. E. Rep. 241.

a common nuisance, alleging special damage; claiming that the lead-works and shot-tower of defendants allowed noxious gases, containing lead and arsenical poison, to escape, causing sickness on the part of his wife and other members of his family. The evidence tended to show that the wife alone suffered from the gases; and that the amount escaping was so small in quantity as not to affect the general health and comfort of the neighborhood. The court refused to instruct the jury, at request of defendants, as follows: "(10) The effect of a peculiar and very exceptional idiosyncrasy or susceptibility on the part of a person, by which he or she may be affected by a slight trace of arsenic or lead, which would not in any degree affect other persons, would not be such an injury as would of itself condemn the source of such effect as a nuisance." "(1) Under the pleadings in this case, the plaintiff must show that the defendants, in operating the lead-works and shot-tower, or one of them, were guilty of maintaining a common nuisance, which was inconvenient and troublesome to the whole neighboring community in general, and that from the same the plaintiff suffered a special or peculiar injury. (2) Under all the evidence, the plaintiff has not shown that either the lead-works or shot-tower was a common nuisance." "(5) The plaintiff, to recover, must show an actual and substantial interference with and annoyance to him or his property in the use and occupation of this property, and a slight and rare damage would not entitle him to recover." But did instruct them in the following words: "I need not discuss the subject further than to cite from *Lead Co.'s Appeal*, 96 Pa. St. 116. In that case, Judge GORDON, quoting from Blackstone, says: 'If one erects a smelting-house for lead so near the land of another that the vapor and smoke kill his corn and grass, and damage his cattle therein, this is held to be a nuisance.' He also adds: 'All intelligent persons are aware that lead vapors are poisonous; and this the more so, as they are often, as in this case in hand, accompanied with arsenic.' The Pennsylvania Lead Company was engaged in smelting ores, while the present defendants are not so engaged; but in both cases the product of the works is obtained by the use of lead and arsenic in its manufacture. Under the authority of this decision, I am of the opinion that it is a nuisance to erect and conduct works which produce like effects to that of the Pennsylvania Lead Company, although not engaged in the same business." To all of which the defendants objected. Judgment for plaintiff for \$700, and defendants bring error.

*D. T. Watson and W. S. Pier*, for plaintiffs in error. *John Barton, W. D. Moore, and F. C. McGirr*, for defendant in error.

PAXSON, J. The learned court below declined to affirm the defendants' tenth point, (first assignment,) for the reason that it was only a naked proposition, unconnected with the facts of the case. I assume the learned judge would not have denied the point had he considered that there was evidence from which the jury might have found the facts of which it is predicated. An injury to a single individual from lead poisoning, because of a peculiar and exceptional susceptibility of such person to such influence, when the trace of arsenic or lead was so slight as not in any degree to affect other persons, would not be sufficient to make the lead-works a common or public nuisance. So plain a proposition does not need elaboration.

We turn, then, to the question whether the court was correct in assuming that the point was a mere abstract proposition, unconnected with the facts of the case. Here, we think, the learned judge inadvertently fell into error. It is true there is no direct testimony as to the alleged peculiarity and susceptibility of the wife of the plaintiff below to the influence of lead and arsenic; and it was doubtless this circumstance which, in the hurry of trial, misled the court below. The fact was overlooked that there was testimony from which the jury might have drawn such an inference. Thus, if we have the proof that one person has sustained injury from the fumes thrown out by the lead-

works, while one hundred other persons, equally exposed to its influence, are not affected by it in any degree, the jury would have a right to infer that the one person had "a peculiar and very exceptional idiosyncrasy or susceptibility" to the influence of lead and arsenic. We think there was enough evidence to submit upon this question, and that the point should have been affirmed.

We also sustain the second assignment of error. The plaintiff declared as for a common and public nuisance, with an averment of special damage. The plea was the general issue. By the defendants' first point, the court was asked to instruct the jury that, "under the pleadings in this case, the plaintiff must show that the defendants, in opening the lead-works and shot-tower, or one of them, were guilty of maintaining a common nuisance, which was inconvenient and troublesome to the whole neighboring community in general, and that from the same the plaintiff suffered a special or peculiar injury." This point the court refused, and the jury found a verdict in favor of the plaintiff for \$700. As between the parties, as the record now stands, the effect of the verdict is to establish the fact conclusively that the works of the defendant are a common nuisance. With the fact thus established by a verdict at law, it might be a question whether a court of equity could refuse to enjoin the further operation of the works as a continuing nuisance; yet if the jury had been instructed that, under the pleadings, they must find the works were a common nuisance, to entitle the plaintiff to recover, they might well have hesitated to do so under the evidence. The weight of the evidence was the other way. An error is sometimes rendered more palpable by a consideration of the results which logically follow it. Were there nothing else in the case, we would hesitate to reverse for this reason, as the narr might have been amended below; but, as the case must go back, it is proper to refer to it. The defendants' second point, if affirmed, would have withdrawn the question of nuisance from the jury, and it was not error to decline it. By the defendants' fifth point, the court was asked to instruct the jury that "the plaintiff, to recover, must show an actual and substantial interference with and annoyance to him or his property in the use and occupation of his property; and a slight and rare damage would not entitle him to recover." This point was answered as follows: "This point, as an entire proposition, is refused. While it is true that an actual and substantial interference must exist, the plaintiff may still recover for a slight and rare damage, if that damage be actual and substantial, and the result and effect of a nuisance created and maintained by the defendants." I do not regard this answer as clear, or as consistent with itself. As the case must go back for a retrial, it is proper to say that in our opinion the plaintiff can only recover for a substantial injury. The defendants were engaged in a lawful business. Whether they made a judicious selection of a site, therefore, in view of its character, and the nature of its surroundings, is a question as to which I express no opinion. But they are entitled to a reasonable enjoyment of their property; and mere trifling annoyances or injuries, necessarily incident thereto, would not move a chancellor to restrain their operations. *Rhodes v. Dunbar*, 57 Pa. St. 274; *Huckensstine's Appeal*, 70 Pa. St. 102; *Rex v. Tindall*, 6 Adol. & E. 143; *Tipping v. Smelting Co.*, 116 E. C. L. 608. So, I apprehend a rare and trifling injury necessarily resulting from a lawful business would not sustain an action at law. It must be a real, substantial injury. Were it otherwise, many occupations could not be carried on at all in large cities. There are some injuries too slight and exceptional to be recognized as a bar to the active industries of the country. Every lawful enterprise contributes to the public good. It furnishes employment to the idle, promotes every other branch of industry, and in this way indirectly benefits the whole community. It is not unreasonable that the individual members of the community thus benefited should make some slight sacrifices for the public welfare.

The fifth and last assignment alleges that the court erred in that portion of its charge in which reference was made to *Lead Co.'s Appeal*, 96 Pa. St. 116. We think it was an unfortunate reference for the defendants, and, under the circumstances, could not have failed to influence the jury. The cases are widely different; and although the learned judge told the jury that "the Pennsylvania Lead Company was engaged in smelting ore, while the present defendants are not so engaged, but in both cases the products of the works is obtained by the use of lead and arsenic in its manufacture," yet the court failed to point out the essential difference between them. This is apparent from the next sentence of the charge: "Under the authority of this decision, I am of the opinion that it is a nuisance to erect and conduct works which produce like effects to that of the Pennsylvania Lead Company, although not engaged in the same business." From this language the jury could hardly fail to draw the inference that, inasmuch as the Pennsylvania lead-works had been declared to be a nuisance, if the defendants' plant produced like results, it must also be a nuisance. The difference in degree was wholly overlooked; whereas it is claimed by the defendants that if their works do throw off the noxious substances referred to in the case of the Pennsylvania Lead Company, it is such small quantity as not to affect the general health and comfort of the neighborhood. It would be better in the next trial of this case to omit all reference to the case in 96 Pa. St.

Judgment reversed, and a *venire facias de novo* awarded.

### Appeal of GLEGHORNE.

(*Supreme Court of Pennsylvania*. January 8, 1888.)

#### 1. EQUITY—PLEADING—ANSWERS RESPONSIVE TO BILL—EVIDENCE.

A suit was brought in equity by a wife against her husband, to recover a sum of money which was alleged to have been paid by her in building and furnishing their house, and for which defendant had given her no security. Defendant alleged that the money had been given him by complainant, and that there was no agreement, contract, or understanding that he was to repay or in any way secure the money. *Held*, that the answer was responsive to the bill, and could only be overcome by the testimony of two witnesses, or of one witness corroborated by circumstances.

#### 2. HUSBAND AND WIFE—LOAN OF MONEY TO HUSBAND—EVIDENCE.

Complainant testified that, when she gave defendant the money, she told him to pay it on their home. "He took the money, and paid it out. It went into the house. It was for the purpose of paying the contractor." *Held* to be entirely inconsistent with the idea of a loan or a trust.

Appeal from court of common pleas, Allegheny county.

Bill in equity filed by Sarah Gleghorne against her husband, W. D. Gleghorne, to recover money of her own which she claimed to have expended in the construction and furnishing of a home. There was judgment for complainant, and defendant appealed.

*Robb & Fitzsimmons*, for appellant. *J. McF. Carpenter*, for appellee.

PAXSON, J. The question of jurisdiction was directly raised in this case. The master found, however, that it was not raised by the pleadings, and was "therefore of opinion that the question of jurisdiction cannot be entertained, so as to allow the objection to prevail after the parties have volunteered to proceed to a hearing upon the merits." This was a bill filed by a wife against her husband for the sole purpose of recovering a sum of money which she gave him to aid in the erection of a house for their joint home. The husband had bought the lot before marriage. After that event he contracted for the building of a house thereon to cost about \$2,500. The wife alleged she contributed \$1,500 towards this object. To use her own words: "I gave that money to my husband towards paying for our home." There was no allegation that anything was said about its being a loan to her husband, or that he was to repay her.

It is certain that no action at law would lie by the wife against her husband for this money. So much was settled by *Ritter v. Ritter*, 31 Pa. St. 396. There are, however, authorities which hold that, as concerns her separate estate, a wife may file a bill against her husband. Brightly, Eq. Jur. 521; 1 Daniell, Ch. 142. Whether these authorities are applicable to this case will not now be discussed, as we propose to decide it upon other grounds. The question of jurisdiction is left open.

It may be mentioned as one of the results of such a proceeding as this that the wife was called and examined as a witness directly against her husband; indeed, the bill could not be sustained without her testimony. The defendant, in his answer, admits that he received about \$800 from the plaintiff, but alleges that it was a gift. His precise language is: "The respondent avers that the said sum of \$800 was given him (the respondent) by complainant." He had previously averred that "there was no agreement, contract, or understanding between the complainant and respondent that he was to repay or return said money or secure the same in any way." This makes a distinct averment of a gift of the money, as opposed to a loan. If it is responsive to the bill, the case comes within the familiar rule in equity that the answer must have more than the oath of the plaintiff to overcome it. There must be two witnesses, or the oath of one and corroborating circumstances. The learned master evidently felt the strain of this, and he avoided it by holding that the answer was not responsive, but set up new matter by way of avoidance. He says: "The matter of a gift was not stated or inquired of in the bill, but the defendant introduces it in his answer affirmatively against the demand in the bill." The case was disposed of upon the theory of a loan to the defendant; yet there is not a word in the bill or in the testimony to indicate that it was a loan. There is merely averment and proof that plaintiff gave defendant a certain sum of money to aid him "to pay on our house." The answer is not only responsive, but it is in entire harmony with the averments of the bill. There being no sufficient proof to overcome the answer, the bill should have been dismissed for that reason. Even if we are mistaken in this, we think the case is ruled by *Johnston v. Johnston's Adm'r*, 31 Pa. St. 450. There, the wife's money was received by the husband under circumstances very similar to those existing in this case, and was appropriated by him, at her request, towards the fitting up of a house for her own comfort, and that of her family; and the court held that she could not recover it back in an action against her husband's administrator. I am unable to see any material distinction between fitting up a house for a home, and assisting in building a house for a home. In each case, the wife expected to use and enjoy the fruits of her money in a home which she would occupy in common with her husband. In the case in hand, the money may have been unwisely employed; but the law cannot supply wisdom to those who lack it, nor can it remedy all the mistakes which a man or woman may make in the course of a life-time. In the present case, the wife evidently contributed this money for the completion of a house which was to be her home without a word or a thought about repayment. The husband cannot be treated as her trustee, because he appropriated the money as she directed. The plaintiff says, in her testimony: "When I gave him the money, I told him to pay it on our home. \* \* \* He took the money, and paid it out. It went into the home. It was for the purpose of paying the contractor." This is entirely inconsistent with a loan, or with a trust on the part of the husband.

The decree is reversed, and the bill dismissed, at the costs of the appellee.

## AHLBORN v. WOLFF.

(Supreme Court of Pennsylvania. January 3, 1883.)

## 1. EQUITY—MISTAKE—REFORMATION OF PROMISSORY NOTE—EVIDENCE.

In defense to an action on a promissory note, A., the payee and first indorser, set up mistake in so indorsing, and on that ground claimed reformation of the note, so that B., the plaintiff, should be substituted in his place. The evidence was that the note was the last of several renewal notes; that one C. was the real debtor; that C. made the original note and the other renewal notes payable to B., and then, for C.'s accommodation, first B. and then A. indorsed them, and C. delivered them to D., who had them discounted by a bank; that, at the time of A.'s indorsement of the note in suit, there were no other indorsements on it, and that, in the usual course of the dealings, C. procured A.'s indorsement, then B.'s above A.'s, and delivered the note to D.; that A. had no special understanding with B. as to the manner of the filling, or as to the order of their liability as indorsers. The evidence as to whether the body of the note was filled before A. indorsed it was conflicting. On C.'s default, B. paid the bank the amount of the note, and claimed as a *bona fide* purchaser for value. Held, that the evidence was not sufficient to warrant the reformation.<sup>1</sup>

## 2. SAME—RENEWAL NOTES—EVIDENCE—INSTRUCTIONS.

In an action on a promissory note against one as first indorser, the evidence tended to show that the note was the last of several renewal notes, whereon plaintiff and defendant were accommodation indorsers; that, in the usual course of the dealing, the notes had been filled in with plaintiff as payee; and that, at the time of defendant's indorsement of the note in suit, there were no other indorsements on it, and the body of the note was blank. In this note defendant was made payee. The jury were instructed that, if it was one of the renewal notes, they might infer that the parties intended it to be filled and indorsed like the former notes, and that, by mistake, B. paid the bank the amount of the note, and claimed as a *bona fide* purchaser for value. Held, that such inference was not warranted by the evidence.

Error to court of common pleas, Allegheny county; E. H. STOWE, Judge.

This was an action of *assumpsit* brought by August Ahlborn, plaintiff in error, against William Wolff, defendant in error, to recover the contents of a promissory note, a copy of which is as follows:

"\$746.79.

PITTSBURGH, December 18, 1885.

"Four months after date, I promise to pay to the order of William Wolff seven hundred and forty-six dollars and seventy-nine cents, (\$746.79.)

"At \_\_\_\_\_.

R. C. WOLFF.

"Value received."

Indorsed:

"AUGUST AHLBORN.

"WILLIAM WOLFF.

"J. H. ORTMAN & Co."

R. C. Wolff, the maker of the note in suit, was the real debtor. The note was discounted by the Duquesne National Bank of Pittsburgh for J. H. Ortmann & Co., the last indorsers. Not being paid at maturity, it was duly protested, and notice given to all the indorsers. It was afterwards paid off, and lifted from the bank, by August Ahlborn, the plaintiff, who (treating his indorsement of the note before that of the payee as irregular, and creating no liability, and treating himself as the owner and holder of the note for value by purchase from the bank) brought this suit to recover from William Wolff, as the first regular indorser thereon. On the trial below, the defendant was permitted by the court, under objection, to prove, substantially, the following state of facts: That the note in suit was the last of a series of renewal notes, the original note having been given by R. C. Wolff, the maker, to J. H. Ortmann & Co., for merchandise; that the original note, and all the subsequent

<sup>1</sup>As to the mistakes against which equity will relieve, and the proof necessary to obtain a reformation of a written instrument, see *Benson v. Markoe*, (Minn.) 33 N. W. Rep. 38; *Gulmartin v. Urquhart*, (Ala.) 1 South. Rep. 897, and note; *Griffith v. County of Sebastian*, (Ark.) 8 S. W. Rep. 886, and note; *Bailey v. Insurance Co.*, 13 Fed. Rep. 250, 256; *Hutchinson v. Ainsworth*, (Cal.) 15 Pac. Rep. 83; *Dod v. Paul*, (N. J.) 7 Atl. Rep. 670.

renewals thereof, except the note in suit, were made by R. C. Wolff, payable to the order of August Ahlborn, and indorsed—*First*, by August Ahlborn; *second*, by William Wolff; and, *third*, by J. H. Ortman & Co., for which firm the notes were, from time to time, discounted by the Duquesne National Bank of Pittsburgh; that the defendant indorsed the note at the request of R. C. Wolff, for the purpose of enabling him to renew the preceding note; that at the time the defendant put his name on the back of the note the body of the note was in blank, though the evidence on this point was conflicting; and there were no other indorsements on the back of it; that the defendant indorsed the note, and handed it to R. C. Wolff, in the absence of August Ahlborn, and without any understanding or agreement, or even conversation, with Ahlborn, or with any one else, as to the way in which the note should be filled up, or whose name should be inserted as payee, or as to the order in which they (the plaintiff and defendant) should be liable as indorsers thereon; that after note in suit had been indorsed by the plaintiff and defendant, as aforesaid, it was delivered by R. C. Wolff to J. H. Ortman & Co., who filled up the blanks in the body of the note, and indorsed it, and had it discounted. Plaintiff, being defeated below, took this writ.

STERRETT, J. In the absence of evidence *dehors* the note in suit and its indorsements, the legal relation of defendant to plaintiff is that of payee and first indorser; and, the note having been duly protested for non-payment, he is *prima facie* liable for principal, interest, and costs of protest. To escape that liability, defendant undertook to show that, by mistake, his name, instead of plaintiff's, was inserted in the body of the note as payee; in other words, he assumed the burden of so reforming the instrument as to make plaintiff payee and first indorser instead of himself. Under our peculiar system of jurisprudence, this may sometimes be done, even in the case of a negotiable instrument; but the evidence that will warrant such reformation of the instrument, on the ground of mistake, must be clear, precise, and indubitable. In such cases, the trial judge exercises the functions of a chancellor, and, unless the alleged mistake is so clearly and conclusively established that he would not hesitate to reform the instrument, the questions of fact on which the right to equitable relief depends should not be submitted to the jury.

In this case, it may be conceded there was some evidence tending, perhaps, in a slight degree, to show the mistake alleged; but was it of such a clear, precise, and indubitable character as would warrant a chancellor in reforming the note? We think not, and therefore the learned judge erred in submitting the question of mistake to the jury.

Evidence was introduced tending to prove that the note in suit was given in renewal of a former note payable to the order of and indorsed by plaintiff, and the jury were instructed that, if such was the fact, they might infer therefrom that the parties to the note in suit intended it should be filled and indorsed precisely as the former note was, and that by mistake it was not so done. In this we think there was error. The assumed fact which the evidence tended to prove, and which may have been found by the jury, did not warrant the inference they were permitted to draw therefrom. In view of all the testimony, the defendant failed to present such evidence of mistake as warranted the submission of that question to the jury.

Judgment reversed, and a *venue facias de novo* awarded.

## PITTSBURGH BOAT-YARD CO. v. WESTERN ASSUR. CO.

*(Supreme Court of Pennsylvania. January 3, 1888.)*

## INSURANCE—PAYMENT OF PREMIUMS TO AGENT.

Plaintiff sent to one C. to obtain insurance on his property, and gave C. money to pay the premium. C. procured a policy from the general agent of defendant, and delivered it to plaintiff. C. offered to pay the premium; but the general agent, expecting to obtain another policy, told C. to keep it until that was done, and charged C. on his books, and credited defendant with the amount, and in due course remitted it to defendant. *Held*, in an action on the policy, that the question of payment of the premiums was for the jury, and an instruction to find for defendant was error.

Error to court of common pleas, Allegheny county.

Action by the Pittsburgh Boat-Yard Company against the Western Assurance Company on a fire insurance policy. Judgment for defendant. Plaintiff brings error.

*Weir & Garrison*, for plaintiff in error. *J. M. Cook* and *J. S. Ferguson*, for defendant in error.

**WILLIAMS, J.** This action was brought upon a policy of insurance against loss by fire. The defense was the non-payment of the premium. The important question raised by the assignments of error is whether there was evidence upon this subject that should go to the jury. The facts were not involved in controversy, and are as follows: Speer, acting for the plaintiff, applied to Conway, an insurance broker and solicitor of risks, for insurance upon the plaintiff's property. Conway took the risks to Biggert, who was an insurance agent, and the general agent in Pennsylvania for the defendant company, to be placed in suitable companies. As general agent, he placed \$1,500 of the amount desired in the defendant company, and countersigned and delivered a policy therefor. Conway had \$105 of the plaintiff's money in his hands, with instructions to use it for paying premiums on policies of insurance. He communicated this fact to Biggert, and offered to pay the premium on this policy, amounting to \$90; but Biggert, who was negotiating for another policy of like amount, upon the same property, said it might just as well remain in the hands of Conway until the other policy was obtained, when both could be paid for at the same time. The premium was then charged on Biggert's books to Conway, in whose hands he knew the money to be, and the company defendant was credited with it. In due course of business, he remitted it to the company, in whose hands it remained until after this suit was brought. This is not, therefore, the case of one who attempts to receive the benefit of insurance without the payment of the premium; for the money with which to pay it had left the hands of the assured, and been placed in those of the broker before the policy was obtained. The real question is whether the assured, notwithstanding the payment of the money by, and the delivery of the policy to, him, is to lose the benefit of his contract by reason of the course of dealing between the intermediate agents. Speer had paid to Conway, the broker. Conway had offered the money to Biggert, the general agent of the defendant. Biggert had charged it up to Conway, and paid his principal in the ordinary course of his business. The policy had been delivered. What remained to be done except for Biggert and Conway to settle the transaction between themselves which each had in effect settled with his principal?

We are decidedly of opinion that, upon this state of facts, the question of payment was for the jury. It was not a question whether the adjuster had waived or could waive a condition in the policy; nor whether Biggert, the general agent, had power to change the terms or conditions of insurance; but whether there was actual payment. As to the assured, there was no doubt, for it was admitted that the money had left Speer's hands for this very purpose. As to the insurer, there was the fact that the money had been actually paid in the usual way to Biggert, and received without objection. The open

question was over the credit given by Biggert to Conway. If this had been given in the usual manner, making Conway his debtor for the amount which he paid for him to defendant, the jury would have been fully justified in finding the fact that the premium was paid. This was for the jury. The giving of a binding instruction to find for the defendant was therefore error, and for this the case must go back for another trial.

Judgment reversed, and *venue facias de novo* awarded.

### BASSETT v. HAWK.

(Supreme Court of Pennsylvania. January 3, 1883.)

#### 1. WILLS—DEVISE—"HEIRS"—RULE IN SHELLEY'S CASE.

A devise was to D. "as long as he shall live, and to his legal heirs, if he have any at his death; and if D. do not have any legal heirs at his death, then," etc. *Held*, that *heirs* is a word of limitation, and the devisee takes a fee-tail according to the rule in *Shelley's Case*.

#### 2. LIMITATION OF ACTIONS—ADVERSE POSSESSION—TENANT IN TAIL—REMAINDER-MAN.

Under the act of April 13, 1859, providing that the statute of limitations shall run against the remainder-man unless arrested by the tenant in tail, adverse possession of land for 20 years will bar both the tenant in tail and the remainder-man.

Error to court of common pleas, Armstrong county.

Ejectment by A. E. Bassett against Simon Hawk. The jury found for the plaintiff as to one-third of the land in controversy, and for the defendant as to the remaining two-thirds. Judgment was entered on the verdict, and thereupon both plaintiff and defendant sue out writs of error.

*Austin Clark and David Barclay*, for plaintiff. *Chas. McCandless and Calvin Rayburn*, for defendant.

GORDON, C. J. This was an action of ejectment for the recovery of the possession of a tract of 25 acres of land, more or less, situate in the township of South Buffalo, in the county of Armstrong, brought by A. E. Bassett against Simon Hawk. The land in controversy was part of a larger tract, owned by Columbus McGinley in his life-time, who, previously to his decease, in 1843, made his will, which, so far as it affects this case, reads as follows: "The farm on which I live, in Buffalo township aforesaid, I give and bequeath the one-half of the same to my daughter, Nancy Clark, being the end next William Morrison, and adjoining lands of William Todds and George Keener, Sr., with the buildings and orchard; the balance of the land, or the other half of said tract, I will to my son, Daniel McGinley, to his use as long as he shall live, and to his legal heirs, if he have any, at his death; and if my son Daniel do not have any legal heirs at his death, then, and in that case, this part of the farm aforesaid which is not devised to my daughter, Nancy Clark, I will to be given to my grandchildren, Charlotte Clark, Mary Clark, and Columbus Clark." In pursuance of an amicable partition made between Nancy Clark and her husband, John, of the one part, and Daniel McGinley of the other part, dated August 16, 1850, the said Daniel deeded in fee to the said John and Nancy Clark 36 acres of the land claimed by him under the said will, which is the land now in controversy. The parties last named, afterwards, January 4, 1855, deeded the property in question to Simon Hawk, the defendant below. It would appear further from the evidence that, during or before the year 1850, Nancy Clark entered upon this land, claiming it as her own, built a cabin house upon it and occupied it until she sold it to Hawk, who has resided upon it continuously from that time to this.

From the facts thus detailed, the defense may be stated in brief as follows: Under the will of Columbus McGinley, Daniel took a fee, if not a fee-simple, yet a fee-tail, and, as he died without issue, the remainder-men have been barred by the statute of limitations. On the other hand, the plaintiff claims through Charlotte Forcade, one of the three grandchildren mentioned in the

will of Columbus McGinley, and the only one who survived Daniel McGinley, the life-tenant, who deceased in 1879, without lineal heirs. Now, the plaintiff's contention is that Daniel, under the will of his father, took but a life-estate; that, as a consequence, his vendees took nothing by his conveyance but the right of possession in the premises during his life, and that the statute could not begin to run as against the remainder-men until their right of entry accrued, which was not until his death. Admitting the premises here stated, that is, that Daniel was but a life-tenant, and the conclusion is undoubtedly correct, and so the court held. But the plaintiff's counsel and the court differed in this; the former insisted that the remainder devised to the grandchildren was contingent, and became vested only on the death of Daniel without issue; hence, Charlotte, being the only survivor of the three grandchildren at the time of Daniel's decease, took the entire estate. The court, however, refused to adopt this view of the case, and held that while Daniel had a life-estate only, yet that the devised remainder vested, and on the death of Mary and Columbus Clark their interests passed to their mother, Nancy Clark, for life. Admitting the premises assumed both by court and counsel, and we cannot pronounce this ruling erroneous. It is true, the remainder was in abeyance, and so remained until the decease of the life-tenant; but, as was said in *Kelso v. Dickey*, 7 Watts & S. 279, the contingency was not attached to the capacity of the remainder-men to take, but to an event independent of, and not affecting either their capacity to take, or to transmit the right to their representatives. So, in *Chess' Appeal*, 87 Pa. St. 362, where a testator devised real estate to his son, and should he die without legitimate issue, then the property to be sold, and after paying certain legacies, the balance to be distributed among his grandchildren, it was held, that the representatives of those grandchildren who died before the son's death should share in the distribution with those living. "Attaching a contingency to the gift of the second bequest ought not, and does not, affect the case unless that contingency relates to the capacity of the second legatee, or donee, to take." *McClure's Appeal*, 72 Pa. St. 414.

From the authorities here cited, it is obvious that the assignments of error on the plaintiff's writ cannot be sustained. But a more serious question arises on the writ taken by the defendant. As we have seen, the court held that Daniel McGinley took, under his father's testament, but a life-estate. To this ruling the defendant excepted, and thus is raised the main question of the case. It is contended, on part of Hawk, that the estate vested in Daniel was a fee-simple, or, at least, a fee-tail. The learned president of the common pleas refused to adopt this view of the matter in controversy, holding that the word "heirs" in the will must be construed to mean children, who, had there been any, would have taken as purchasers, and not as by descent from their father, and that, as a consequence, the remainder was vested in the grandchildren at the death of the testator, which not having been defeated by the occurrence of the contingency, that is, the birth of lawful issue, the entire estate in fee passed to the remainder-men at Daniel's death. In this ruling of the court below we cannot concur, for by it an unwarranted interpretation is put upon the word "heirs." This is strictly a word of limitation, and there is nothing apparent on the face of the will which tends to show that the testator intended the contrary. "The other half of said tract I will to my son Daniel McGinley, to use as long as he shall live, and to his legal heirs, if he have any, at his death; and if my son Daniel McGinley do not have any legal heirs at his death, then," etc. This is all of the will which at all bears on the point in controversy, and there is surely nothing in it which warrants the construction adopted below. The single reason for this construction is, that as the testator evidently intended to give Daniel but a life-estate, the issue, if any, would take as purchasers. But this conclusion is not sound, in that regard is had to the particular rather than to the general

intent. We agree that the intention of the testator is, in the construction of his will, the imperative rule by which it must be interpreted.

Here, then, our first inquiry is, what did Columbus McGinley intend by the language of which he made use? We may admit that he intended to give Daniel but a life-estate, but this of itself is not sufficient to prevent the application of the rule in *Shelley's Case*, for the further question is, what did he intend by the word "heirs?" And what is there in the context to show that he did not intend to use that word in its technical sense? The testator was evidently not speaking of children as such, for there were none then in existence, but of those, whether children or grandchildren, who should be born of his blood, and be living at the time of his death, and who, in consequence, would be capable of taking from him. In other words, Daniel is the one who shall give character to those who may take after him; he is made the *stirps*, or stock of the succession which is to take the devised property, and so, by the rule above stated, the inheritance is vested in him, and he is vested with an estate of inheritance. As we said in *Yarnall's Appeal*, 70 Pa. St. 835: "The life-estate incorporates with the inheritance because of the failure of the testator to designate any other legal line of descent. In short, he calls the devisee a tenant for life, yet vests the fee in him." So, in *Findlay v. Riddle*, 8 Bin. 189, it was held by Mr. Justice TILGHMAN, that, though a testator may intend to give a life-estate, yet, if the main or general intent is to give other estates, inconsistent with an estate for life, there the particular intent, being of less importance, must give way to the general intent. He instances a devise to A. for-life, remainder to his issue as tenants in common, and in default of such issue, the remainder to B. in fee, and holds that in such case A. takes an estate tail, because the main intent was that B. should take nothing until there was a failure of the issue of A. A case more nearly parallel to the one in hand could hardly be devised, for without doubt the main intent of Columbus McGinley was that the issue of Daniel should take to the exclusion of the children of Mrs. Clark. Also, in *Will's Case*, 6 Coke, 461, it was held, if there be a devise to A. and his children, and there be no children then in being, it creates an estate tail in A.; and this because the devise being in words *de presenti*, the children, if any, must take by way of limitation, and thus the general is made to override the particular intent. We may also call attention to the case of *Allen v. Markle*, 36 Pa. St. 117, where we held, per Mr. Justice STRONG, that, where there was a devise to A. for life, and at his decease to his legitimate offspring forever, and on failure of such issue, then over to other devisees, A. took an estate tail. But it is useless to multiply authorities, for, unquestionably, *Shelley's Case* governs the controversy in hand, and that is the end of the matter. This rule may be an unreasonable one, and admittedly does generally defeat the particular intent of the testator, but it is so thoroughly fixed in our law, and upon it depend so many valuable land titles, that it would be a very serious breach of our judicial duty to even hesitate to enforce it. As the devise was made previously to 1855, it becomes important for us to consider whether under it Daniel took in fee or in tail.

After a careful consideration of the language of the will, we have come to the conclusion that the devise was of a fee-tail. The hypothesis on which the testator made the devise over would seem to rebut the idea that he meant heirs general, for he gives the remainder to the children of Daniel's sister, who, on the happening of the contemplated event would be his heirs. He certainly did not contemplate that when his son died he would have no heirs of any kind, for he negatives such a presumption by appointing Daniel's nephew and nieces to take after him. He must, therefore, by the use of the word "heirs" have intended heirs of the body, for he might well have supposed that Daniel might die without having had lawful issue. We think, therefore, that there can be no serious doubt that the intention was to limit the devise to heirs of the body. Daniel being thus a tenant in tail, one holding adversely

to him for 21 years would, as well according to the case of *Baldrige v. McFarland*, 26 Pa. St. 338, as by virtue of the provisions of the second section of the act of the thirteenth of April, 1859, acquire title not only as against the tenant in tail, but also against the remainder-men or reversioners, and so the court should have instructed the jury.

As what we have said sustains the second and third assignments on Simon Hawk's writ of error, we reverse the judgment, and order a new *venire*. On the writ of A. E. Bassett, the judgment is affirmed.

### Appeal of MANGAN.

(*Supreme Court of Pennsylvania. October 3, 1887.*)

#### EXECUTORS AND ADMINISTRATORS—SALE OF LAND—HEIRS NECESSARY PARTIES.

A judgment was taken against an administratrix on a debt contracted by the deceased, in his life-time, without making the widow and other heirs parties. An execution issued, and land of the estate was levied on and sold. *Held* that under Act Pa. February 24, 1884, providing for the sale, etc., of real estate of a decedent, the heirs were necessary parties, and the sale did not pass title as against the heirs or other creditors of the estate.

Appeal from orphans' court, Luzerne county; D. L. RHONE, Judge.

Michael Mangan, deceased, in his life-time entered into articles of agreement with one Charles Pugh for the purchase of a certain lot of land in Pittston borough, and, having made certain payments thereon, died intestate. Letters of administration on his estate were afterwards duly granted to his widow, Mary Mangan. Pugh then brought suit in the court of common pleas of Luzerne county at the January term, 1881, against the administratrix, for the unpaid purchase money and interest on said articles of agreement, and obtained judgment there for the sum of \$5,055.26 on January 31, 1881, and, without having made the widow, as such, or the heirs of said decedent, parties to the record, issued execution on his judgment. On this execution the interest of decedent in said lot was sold to Pugh, who afterwards conveyed all his interest in the land to Mary Mangan, the appellant. G. W. Cunningham, a judgment creditor of decedent, was represented at said sheriff's sale by his counsel, who bid the property up to \$1,455. Afterwards, Cunningham having revived his judgment, and having issued execution thereon, and levied on the interest of decedent in said lot, the court of common pleas stayed the writ, and directed that the administratrix petition the orphans' court for an order of sale of decedent's interest in the real estate. This she did under objection to the court, and before the examiner, that the equitable interest in question, as well as the legal title, was by virtue of the sheriff's sale and conveyance from Pugh vested in her individually, as against all persons except the heirs of her deceased husband, who alone could question the validity of the sheriff's sale; and that Cunningham, at whose instance this proceeding was instituted, had no standing, after the sheriff's sale, to require the administratrix to proceed as stated. The examiner reported that the sheriff's sale was a nullity. Exceptions being filed by the appellant, the court below overruled them, sustained the examiner's report, and granted an order for the sale of said equitable interest, subject to the payment by the purchaser to the holder of the legal title of the said purchase money, as due at and before the sheriff's sale, with the interest then and since accrued. As Mrs. Mangan still protested against the sale, and desired to be relieved from conducting it, the court below appointed K. J. Ross as trustee for that purpose, who gave bond, advertised, and on November 20, 1886, sold, the equitable interest to John McGahren and G. M. Harding, who had acted as attorneys for Cunningham in this proceeding. On return of this sale by the trustee, it was confirmed by the court below on January 12, 1887; whereupon this appeal was taken.

*John T. Lenahan and George S. Ferris*, for appellant. *John McGahren and G. M. Harding*, for appellee, Cunningham.

GREEN, J. We are quite clear that this case was correctly decided by the learned court below. The plain words of the act of 1834 prohibit either the levy or the payment of the decedent's debts out of the real estate of the widow and heirs, unless they have been brought in by proper notice. In construing this act, we held, in *McCracken v. Roberts*, 19 Pa. St. 390, that the sheriff's sale of the real estate of a deceased person on a judgment obtained against the administrators of his estate, to which his children were not made parties, agreeably to the provisions of the thirty-fourth section of the act of twenty-fourth February, 1834, does not divest the title of the children. BLACK, C. J., said, on page 395: "It is admitted by the counsel for the plaintiff in error that the sheriff's deed to Murdock gave him no title whatever. The want of a *scire facias* against the devisees was fatal." The necessity of proceeding against the widow and heirs by *scire facias*, after judgment, against the administrator, was fully pointed out in the elaborate opinion of KENNEDY, J., in *Murphy's Appeal*, 8 Watts & S. 165, and confirmed in *Atherton v. Atherton*, 2 Pa. St. 112. In *Sample v. Barr*, 25 Pa. St. 457, we held that the thirty-fourth section of the act of 1834 is a rule of action, and not of lien; that the debt must be established against the widow and heirs or devisees before it is levied on the real estate of the decedent; and that a sale without a compliance with the act in this respect will confer no title on the purchaser. Against these decisions it is of no avail to cite cases in which heirs who have assented to, or participated in, or accepted the results of, a sale of their real estate, made upon a judgment against the administrator only, are held to be estopped from questioning the validity of the sale afterwards. All those cases depend upon their special circumstances of estoppel. There was nothing of that kind in this case. The assent of the widow to the sale under the judgment against herself as administratrix, by means of which she procured a conveyance of the title to herself, most certainly could not divest the estate of the heirs. *Riland v. Eckert*, 23 Pa. St. 215, is of no assistance to the appellant, because in that case the original judgment was obtained against the decedent in his life-time, and the act of 1834 did not apply. But WOODWARD, J., in delivering the opinion, fully recognized the cases above cited, and said, speaking of the act of 1834: "It has not been applied to judgments obtained in the life-time of the decedent, for they were not within the mischief; but, whenever a title derived through a judgment against the personal representatives has been set up to defeat the heirs or devisees of a decedent, it has been required to conform to the statutory rule. Such were *Keenan v. Gibson*, 9 Pa. St. 249, and *McCracken v. Roberts*, 19 Pa. St. 393, and other cases, which rule that a sheriff's sale on such a judgment, where the widow and heirs or devisees have not been made parties, does not divest their title."

It is argued that the appellee in this case, being only a creditor of the decedent, and not an heir, must be regarded as a stranger, and therefore not in a position to invoke the benefit of the act of 1834. We cannot assent to that view. Creditors of decedents are not strangers to their estates, but have by law a right to intervene, and require the estates to be sold, even where the widow and heirs or representative refuse to do so. Their claims to their debtors' estates are indeed superior to those of the widow and heirs. But, in point of fact, the party proceeding for the order of sale in this case is John Mangan, a son and heir of the decedent, and hence the contention has nothing to stand upon. Decree affirmed.

#### TRUBY v. MOSGROVE *et al.*

(Supreme Court of Pennsylvania. January 8, 1888.)

#### USURY—WHAT CONSTITUTES—PAYMENT UPON CONTINGENCY.

One person agreed to pay another interest above the legal rate when the market price of petroleum should reach \$1.15 a barrel. Held, that the payment depended upon a contingency, and that the contract was therefore not usurious.

Error to court of common pleas, Armstrong county; HENRY W. WILLIAMS, Judge.

*Assumpsit* by Simon Truby, Jr., assignee of D. A. Ralston, against James Mosgrove and William Pollock, administrators of James E. Brown, to recover alleged usurious interest collected by defendants from plaintiff's assignor. Brown and Ralston entered into three contracts, one of which is as follows:

"KITTANNING, March 18, 1880.

"James E. Brown agrees to loan D. A. Ralston twenty-five (25) thousand dollars under following conditions: D. A. Ralston to pay at rate of four (4) per cent. interest on above amount, or any part thereof, until he (Ralston) draws or uses the same. When Ralston draws the above amount, or any part thereof, he then to pay Mr. Brown at rate of seven (7) per cent. per annum as long as he retains it, not to be less than four (4) months; and Ralston to have the privilege to retain the money until United Pipe Line certificates are worth, in open market, at rate of one dollar and fifteen cents (\$1.15) per barrel. When Ralston draws above amount, or any part thereof, he to deliver to Mr. Brown, United Pipe Line certificates, as collateral security, at rate of one thousand barrels of oil for one thousand dollars received; Ralston to pay all storage, shrinkage, and fire assessments on said collateral oil.

"Witness our hands and seals this, the eighteenth day of March, 1880.

"J. E. BROWN. [Seal.]

"D. A. RALSTON. [Seal.]"

As Ralston obtained the money, Brown took negotiable notes at four months, and as they matured they were renewed. Under the contracts, Ralston obtained \$60,000 from Brown, and delivered to him certificates for 60,000 barrels of oil. Brown died before the certificates reached the specified price. Ralston afterwards made an assignment for the benefit of his creditors, and Truby became his assignee. Mosgrove and Pollock, acting as Brown's administrators, waited until the market price of the oil exceeded the specified price, and then sold the certificates delivered by Ralston for \$870.31 in excess of the debt, and 6 per cent. interest, after paying the charges specified in the contract. By the laws of Pennsylvania, (Brightly, *Purd. Dig. tit. "Interest,"* § 1,) "the lawful rate of interest for the loan or use of money, in all cases where no express contract shall have been made for a less rate, shall be six per cent. per annum." Plaintiff sued for this sum of \$870.31, claiming that it was usurious interest, and, being defeated below, brings error.

*McCain & Leason*, for plaintiff in error. *E. A. Golden, H. L. Golden*, and *James P. Colter*, for defendants in error.

PAXSON, J. The learned judge of the court below entered judgment in favor of the defendant upon the special verdict. In this there was no error. The contract between Brown and Ralston, while resembling, somewhat, a contract for the loan of money, was not so in substance. It was practically a venture or speculation in oil, with capital to be furnished by Brown. If unsuccessful, that is, if oil never reached \$1.15 per barrel, the loss fell on Brown; if successful, Brown was to get his money back, with 7 per cent. interest. In other words, he risked the capital with the chance of selling 1 per cent. above legal interest as profit. We do not see any taint of usury in this. It is settled law that when the promise to pay a sum above legal interest depends upon a contingency, and not upon the happening of a certain event, the loan is not usurious. This was decided in *Railroad Co. v. Stichter*, 11 Wkly. Notes Cas. 325. And see, also, *Spain v. Hamilton's Adm'r*, 1 Wall. 604; *Corcoran's Case*, Id. 604. In *Philip v. Kirkpatrick*, Add. 124, the principle is thus stated: "If money be lent payable on a contingency, which may never happen, as the arrival of a ship, more than legal interest may be reserved on the payment; and it is not usury, for the lender risks the loss of the whole." Judgment affirmed.

McINTIRE *et al.* v. WESTMORELAND COAL CO.

(Supreme Court of Pennsylvania. January 3, 1888.)

## 1. ACTION—BY LIFE-TENANT AND REMAINDER-MAN FOR INJURY TO ESTATE.

A life-tenant and remainder-man may join in an action for an injury to land which affects both the possession and the fee-simple.

## 2. SAME—FORM OF ACTION—CASE—PLEADING.

The life-tenant and remainder-man sued in case for an injury to land. An amended declaration containing counts in trespass was filed. *Held*, that case was the proper action, and the declaration must be sustained if it contains a single good count.

Error to court of common pleas, Westmoreland county.

*Wetty McCullogh and Wentling & Miller*, for plaintiffs in error. *Marchand & Gaither and Moorhead & Head*, for defendants in error.

PAXSON, J. This was a joint action on the case, brought in the court below by Samuel P. McIntire and Jane McIntire against the Westmoreland Coal Company. The plaintiffs were the owners of a piece of land of about half an acre in Westmoreland county, upon which was erected an hotel and other buildings. The surface of said land was underlaid with a valuable vein of coal. It is alleged that the defendant company owned all the land surrounding the lot of the plaintiff, and, in the course of its mining operations, had mined and taken away all the coal beneath the surface; that they had so negligently mined the same as to leave insufficient props, by means of which the surface had cracked in many places; and that, by reason thereof, a valuable well of water on the premises had been destroyed. It appeared that Jane McIntire, one of the plaintiffs, had a life-estate in said premises, and that Samuel P. McIntire, the other defendant, was the remainder-man. As before stated, the action was joint, and they counted for the entire damages done to the property by reason of the alleged unlawful acts of the defendant company. The narr as originally filed was in case. An amended narr was subsequently filed, containing several counts in trespass *vi et armis*. Subsequently a motion was made to quash the writ and narr. We do not know the precise ground upon which this motion was made, as we are not furnished with a copy of it. It was treated in the argument and the paper books, however, as in the nature of a special demurrer, and the ground of it a misjoinder of parties. The court below quashed both writ and narr, and turned the plaintiff out of court. There can be no doubt that the life-tenant might have brought her action of trespass for the disturbance of her possession, and the remainder-man might have brought an action on the case for the injury to the reversion. That is not the question, however. We are to consider whether they had the right to join, and in one action recover, the injuries to the possession and the remainder. We may observe here that we are unable to see how such joinder could possibly injure the defendant. A recovery in such suit would be a bar to any subsequent action by either for the same cause. Aside from that, the defendant will have to incur the risk of having to pay more money with two actions than with one, besides additional costs. The only inconvenience in the case which we can see would be the difficulty of apportioning the damages, in case of a recovery, between the life-tenant and the remainder-man. But this is a difficulty with which the defendant has no concern. It would be protected in any event. The law abhors circuity and multiplicity of action. In the somewhat analogous case of the assessment of damages for land taken by a railroad company by virtue of the right of eminent domain, the law permits all the damages to be assessed upon one petition, whether such damages be sustained by the tenant for years, tenant for life, or remainder-man. It is true, this is a statutory proceeding, and we are not embarrassed in such cases by the refined distinctions of the common law in regard to pleading and forms of actions.

If there is a single count in the narr that can be sustained, the writ should not have been quashed. It is not enough to show that some of the counts are in case, while the counts in the amended narr sound in trespass. If it be true, as assumed by the court below, that the mine was unopened when the life-estate commenced, and that the life-tenant had therefore no interest in it, the fact remains that she had an interest in the surface and the well of water, and to the extent these were injured she had a right of action. That action might have been trespass, in which she would be entitled to recover for the actual injury, and also damages for the force employed, according to the circumstances; or she might have waived the force, and sued in case, where her damages would be limited to the actual injury. A recovery in either form of action would be a bar to an action for the same cause in another form; as when the trespass is waived, and *assumpsit* or trover is brought, either would bar an action of trespass. So, trover or replevin may be concurrent remedies, and one action would bar the other. *Van Dresor v. King*, 34 Pa. St. 201, and cases there cited. The acts alleged in the narr were an injury both to the possession and the freehold. Moreover, the injury was joint,—a single act, which affected both the plaintiffs, though in different degree. Under the circumstances, S. P. McIntire being out of possession, and the injury affecting both, they were compelled, in bringing a joint action, to sue in case. This does the defendant no injury. It does not in any way interfere with the evidence they may have by way of defense; nor does it subject them to any risk of a second or other action for the same cause.

We are of opinion that it was error to quash the writ and declaration. The writ is entitled to stand, and the narr can be moulded to suit the exigencies of the case. Judgment reversed, and a *procedendo* awarded.

#### BRINSER v. ANDERSON *et al.*

(*Supreme Court of Pennsylvania. January 3, 1888.*)

##### 1. EJECTMENT—ADVERSE POSSESSION—ESTOPPEL TO ASSERT.

In ejectment, plaintiff, claiming title under a parol contract, had for 20 years maintained possession, though the purchase money had not been paid in full, when he entered into a contract of lease with the grantee of the party with whom the parol contract was made. *Held*, that as the evidence did not show an intent on the part of plaintiff to abandon his claim under the contract of purchase, and there was evidence tending to show that the lease was security for the purchase money advanced by such grantee, plaintiff was not estopped to assert his claim.

##### 2. SAME—POSSESSION AS NOTICE TO PURCHASER.

Where one is in possession of real estate, claiming under a parol contract of sale, and also under a lease, one who, without knowledge of the lease, purchases the land from the holder of the legal title is chargeable with notice of any equities the one in possession may have in the land.

##### 3. SAME—AUTHORITY OF HEIR TO CONVEY—BURDEN OF PROOF.

In ejectment, plaintiff, claiming under a parol contract, entered into with one of a number of heirs, must, to maintain his title, show the authority of the heir to act for the others.

Error to court of common pleas, Dauphin county; J. W. SIMONTON, President Judge.

A. J. Herr and J. C. McAlarney, for plaintiff in error. *Flemming & McCarrell*, for defendants in error.

CLARK, J. It is agreed that John Snyder owned, and died seized of, the premises in dispute. Both parties rely on this common source of title. The plaintiffs, on the one hand, are the heirs at law of John Anderson, deceased; who, they allege, in his life-time, in the year 1857, purchased the premises under a parol contract from the heirs of John Snyder, then deceased; and their claim is that this parol contract has been so far in part executed as to render

it unjust and inequitable to rescind the same. The defendant, on the other hand, claims under a regularly executed conveyance from the heirs of Snyder to J. Hoffman Hershey, dated twenty-second November, 1858, and under deed from Hershey to him, dated August 19, 1884; he denies that any such parol sale was made; and that if it had been, the defendant purchased without notice of it; and, further, that, if any such equitable right or title ever existed, it was subsequently abandoned and nullified by an agreement to take the premises under a lease at a certain yearly rent.

The first question arising in the case, therefore, is whether or not, if the evidence is believed, a parol contract has been established by sufficient proof, and enough shown to take the case out of the statute of frauds. This was a question of law for the court below, and is for our consideration here. *Ocer-meyer v. Koerner*, 81\* Pa. St. 517. To establish a parol contract for the sale of land, and take it out of the statute of frauds, the existence of the contract and its terms must be shown by full, complete, satisfactory, and indubitable proof; the evidence must define the boundaries and fix the consideration; exclusive and notorious possession must have been taken under it, and continuously maintained; and the contract must have been so far in part performed that compensation in damages would be inadequate, and rescission inequitable and unjust. *Hart v. Carroll*, 85 Pa. St. 508. In *Jamison v. Dimock*, 95 Pa. St. 52, it was held, however, that in the case of a parol sale for a money consideration, fully paid according to the contract, where the possession was taken and continuously held in pursuance thereof, it is not essential that the improvements should be such as could not be compensated in damages; that the equities of the vendee might rest upon other equally available grounds.

In the case at bar, the parol agreement is alleged to have been made by Washington R. Snyder, one of the heirs, in his own behalf, and "representing" the remaining heirs of John Snyder, deceased. Who the remaining heirs were, does not distinctly appear in the proofs. The defendants read in evidence the deed to J. Howard Hershey, purporting to be from the heirs and legal representatives of John Snyder, deceased; and, from the note made of it in the evidence, it would seem that he left at least four children and heirs, viz., Washington R. Snyder, Maria, intermarried with Christian Fisher, Sarah, intermarried with John Winnagle, and Catherine, intermarried with one Snively. Whether or not there were any others does not appear.

It is undoubtedly true that there was a contract for the sale of this lot by Washington R. Snyder to John Anderson, made in the year 1857. The receipt, dated twenty-second October, 1857, taken with the other evidence in the case, is full and complete on this point. The terms of the contract are, we think, sufficiently shown. The lot is described as "No. 258 in the Borough of Middletown;" which may be regarded, perhaps, as a proper designation of the boundaries. The consideration was \$300, a considerable part of which, if not all, was shown to have been paid. Possession was taken immediately after, and in pursuance of the purchase, and a dwelling-house was erected upon it. The possession was open and notorious, and was continuously maintained for many years, and until legal proceedings were instituted to test the title. But how, and by what authority, did Washington R. Snyder represent his sisters in the sale? Was he their attorney in fact, regularly constituted, or was he their agent by parol merely? He might, perhaps, enter into a parol contract in respect to his own interest; but could he without authority bind his sisters? They were not present; they do not appear to have participated in the sale or to have approved it after it was made. It does not appear that they received any portion of the purchase money, or, indeed, that they ever knew any such contract was made, at least until after their conveyance to Hershey. We are not to presume that Washington R. Snyder had power to sell his sisters' shares simply because he assumed to have it; and, if he had not the power, his contract to that effect was of no validity whatever.

as to them; it was just as if it had never been made, and there is not the slightest proof that any such power existed.

The transaction in question occurred nearly 30 years ago, during nearly all of which time the plaintiffs had been in possession under claim of title. It cannot be expected, perhaps, after this great lapse of time, that the proof should be as precise as if it related to a recent occurrence; but a person purchasing real property knows, or ought to know, that the law requires the evidence of his title to be in writing. The burden of proof is therefore upon him. The delay, as in this case, is frequently his own fault; and this stringent but salutary rule of evidence will not generally be relaxed in his favor. It was incumbent, therefore, upon the plaintiffs not only to establish the existence of a contract made by Washington R. Snyder, and the terms of that contract, but also his authority for making the same. But, assuming that on the retrial of this case proof may be made of the authority of Washington R. Snyder to represent his sisters in the sale, we come next to consider the question as to the effect of the written agreement made between Hershey and Anderson on the thirtieth of December, 1875.<sup>1</sup>

It is contended on the part of the defendant that this writing was an abandonment of any equity Anderson may have acquired under the parol purchase alleged; and that he and his heirs are thereby estopped from claiming any title to the lot. The lease was, undoubtedly, evidence of abandonment; and was, with all the other evidence in the case, for the consideration of the jury; but it cannot be set up as an estoppel. Hershey was the holder of the legal title. Anderson had for 18 years made default in the payment of the purchase money; and it was Hershey's clear right, by an equitable ejectment at any time, to rescind the contract and recover the possession. But he might contract, in the form of a lease or otherwise, with the defaulting vendee, for the continuance of his possession for fixed periods of time, on terms agreed upon, the rent to be applied to the interest or principal of the purchase money. Abandonment includes both the intention to abandon and the external act by which that intention is carried into effect. Intent is the essence of the act; and therefore the facts are in each particular case for the jury. *Clemmen's Lessee v. Gotshall*, 4 Yeates, 330; *Atchison v. McCulloch*, 5 Wall. 13; *Heath v. Bidle*, 9 Pa. St. 273; *Kunkel v. Wolfensberger*, 6 Watts, 126. Very similar to this is the case last cited. There the owner of the equity of redemption executed a lease of the mortgaged premises to the mortgagee, covenanting to pay to him an annual rent of \$24, together with the taxes and repairs. It was argued in that case, as it is in this, on the one hand, that the acceptance of the lease was a relinquishment of the equity; on the other hand, it was contended that the

<sup>1</sup>This agreement, made the thirtieth day of December, A. D. 1875, between J. Hoffman Hershey, of West Hempfield township, Lancaster county, and state of Pennsylvania, of the one part, and John Anderson, of Middletown, Dauphin county, of the other part, witnesseth, that the said J. Hoffman Hershey doth lease and let unto the said John Anderson all that certain house, out-buildings, and lot of ground numbered 258, being a corner lot and fronting on Market street, and now in the occupancy of said John Anderson, situate in the borough of Middletown, in the county of Dauphin, to have and to hold the said premises, monthly, if the said John Anderson shall prove himself satisfactory to the said J. Hoffman Hershey, and if not the said J. Hoffman Hershey hereby reserves the right to remove the said John Anderson and family, with his goods, from the house and premises, as a tenant at will, at any time during said term. The said John Anderson hereby promising and agreeing to pay as rent, for each month, in advance, the sum of \$3, commencing on April 1, A. D. 1876, upon the conditions aforesaid, and also pay all taxes assessed on said property during the occupancy of the same. The said John Anderson agrees also to do such labor or work (at the customary wages) as the said J. Hoffman Hershey shall direct him to do. He shall suffer no damages to be done whilst occupying said premises, nor do any himself, but agreeing peaceably, at any time, as hereinbefore reserved, to yield up the premises to the said J. Hoffman Hershey, or his agent, etc.

In witness whereof we have hereunto set our hands and seals the day and year aforesaid.

J. HOFFMAN HERSEY. [L. S.]  
JOHN ANDERSON. [L. S.]

lease was only a mode adapted for securing the possession for a definite time, and providing for the interest in the form of rent, and that whether it was or was not was for the jury. Chief Justice GIBSON, delivering the opinion of the court, said: "The only original thing in the cause, and it is not of difficult solution, is the effect of the lease from one of the defendants to the grantor, under whose title the plaintiff claims, which is said to be a decisive circumstance, either to rebut the alleged mortgage originally, or to dissolve the relation created by it, if it ever existed; and that is a matter of law for the court. But why should the relation of landlord and tenant be thought inconsistent with that of mortgagor and mortgagee? Without it, a mortgagor is an occupant liable to be turned out at a moment's warning; and it is hard to imagine why a stipulation for a certain term, at a rent equivalent to the interest, may not be reconciled to the intention of the principal contract."

If a lease under such circumstances was not inconsistent with the relation between mortgagor and mortgagee, we cannot see how it could be supposed to be inconsistent, under like circumstances, with the relation of vendor and vendee. We think the court was right, therefore, in submitting to the jury "whether Hershey took the deed from Snyder in the interest of Anderson, and to enable Anderson, by paying the \$150, on the footing of the lease, to obtain title to the lot." "If Anderson in making this lease," says the learned court, "and Hershey in taking the lease, did not intend that Anderson was acknowledging that he had no title to the property, but it was for the purpose of carrying out that arrangement, and of securing the payment of the \$150, the giving of the lease would not, as a pure matter of law, prevent Anderson or his heirs from setting up a claim of title; and we leave to you to determine what his intention was, from all the facts in the case, in the giving of the lease." There was evidence in the cause from which the jury might well find that Anderson did not intend, by the execution of the lease, to abandon his title. He seems to have regarded the deed to Hershey as collateral security for the \$150, which Hershey advanced in discharge of the purchase money; and Hershey himself, if the testimony of George Anderson and Amanda Harley is believed, regarded the \$150 as a loan to Anderson for the purpose stated. Upon the evidence of these witnesses, although there was certainly much countervailing proof, the court could not do otherwise than submit the question to the jury.

But it is said that Brinser was a *bona fide* purchaser, without notice of any equity in Anderson; and therefore his title is not affected by it. This would seem to be true, unless, by the possession of Anderson, Brinser was put upon inquiry as to the title under which the possession was maintained. Anderson was, at the time, in possession under the terms of the paper which has been denominated a "lease;" and if Brinser had actual knowledge of the lease, and had no knowledge of the facts relating to its execution, it is probable under the ruling of this court in *Leach v. Ansbacher*, 55 Pa. St. 85, he might be regarded as an innocent purchaser. "Nothing in the transaction," says Mr. Justice THOMPSON, in the case last cited, "gave the least sign to put the purchaser upon inquiry. The possession will, it is admitted; but when the party is in possession under a lease, that knowledge of the lease dispenses with the inquiry of how the possession is held. That knowledge the agent had, and of the very terms of the lease. That was enough for him. He was not bound to inquire of the tenant in possession if the lease was fair or fraudulent, or whether there was a trust notwithstanding." Sedg. Vend. 339; *Hood v. Fahnestock*, 1 Pa. St. 474. But there is not the slightest evidence in this case that Brinser knew of the lease; and we are not to assume a fact that has not been proved. If he had no knowledge of the lease, then plainly the possession put him upon inquiry as to the ground of that possession; and he is chargeable, constructively, with the knowledge of every fact which due and proper inquiry would have brought to light. *Leonard's Appeal*, 94 Pa.

St. 168. The possession of Anderson was notice of the title under which that possession was maintained.

Judgment reversed, and a *venire facias de novo* awarded.

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MATSON'S FORD BRIDGE CO. v. COMMONWEALTH.

(*Supreme Court of Pennsylvania.* January 3, 1888.)

CORPORATIONS—PROFITS—PROCEEDS OF PROPERTY TAKEN FOR PUBLIC USE—TAXATION.

A bridge owned by an incorporated company was declared a county bridge by appropriate proceedings, and the company's damage was assessed at a much greater sum than the amount of its capital stock, and, when paid, the surplus was divided among the stockholders. *Held*, that the surplus was of the nature of profits, and was a proper measure of the tax to be levied upon the capital stock.

Error to court of common pleas, Dauphin county; J. W. SIMONTON, President Judge.

This was an appeal by the Matson's Ford Bridge Company to the court of common pleas from the auditor general's settlement for taxes upon the capital stock of the company. The court of common pleas sustained the auditor's settlement, and the company brings error.

*Weiss & Gilbert and James Boyd*, for plaintiff in error. *Kirkpatrick & Sanderson*, for defendant in error.

CLARK, J. The defendants, in pursuance of an act of assembly of seventh May, 1832, (P. L. 1831-32, p. 528,) and the several supplements thereto, erected, and for many years have maintained, a bridge across the Schuylkill river at Matson's Ford, Conshohocken, in Montgomery county. The capital stock of the company was \$45,000, all of which was paid in. Under the act of eighth May, 1876, (P. L. p. 131,) and its supplements, proceedings were had to declare the bridge a county bridge. Viewers were appointed, who reported in favor of the applicants; and that, by means of the taking of the bridge for public purposes, the president, managers, and company of the Schuylkill bridge at Matson's Ford would sustain damage to the amount of \$75,000. The report was subsequently approved by the grand jury, with the concurrence of the court; and on the twelfth of June, 1886, the county commissioners took possession of the bridge, and caused the collection of tolls to cease, having first paid to the bridge company the \$75,000 damages. On the fifteenth of September, 1886, the auditor general, with the approval of the state treasurer, under the provisions of the act of seventh June, 1879, made a settlement for taxes upon the capital stock of the bridge company, embracing a tax of \$1,500, being at the rate of 33 $\frac{1}{3}$  mills, on the ground that the company had divided among the stockholders \$30,000 out of the sum realized from the sale of the company's property in excess of the amount paid in in capital stock, which was alleged to be a dividend of 66 $\frac{2}{3}$  per cent. on their capital stock. An appeal was taken to the common pleas of Dauphin county, and the settlement was by that court sustained. The error assigned is the decree of the court sustaining this item in the settlement.

It is clear that \$75,000 was awarded to the company as the value of its property. The award was of damages, but the damages were necessarily computed upon the value of the private property which had been taken and applied to the public use. The transaction between the state and the company, under the act of eighth May, 1876, cannot, perhaps, be characterized as a sale; but the title to the bridge property passed from the company to the commonwealth under it, as it would under a contract of sale. The commonwealth had a right to take the property for public use by paying the price which might be placed upon it by viewers appointed for that purpose pursuant to law. The franchise of the company was rendered wholly valueless by the erection of a free bridge, and the company was obliged to, and did

at once, discontinue the corporate business. The value of the bridge, and also of the franchise, which was thus destroyed, is represented in the award of \$75,000. *Montgomery Co. v. Schuylkill Bridge*, 16 Wkly. Notes Cas. 267. This action of the company would not ordinarily effect a technical dissolution; but it was the undoubted right of a merely business corporation, when its property was appropriated to public uses, to wind up its affairs, and, after payment of its debts, to distribute its property among the holders of the stock. The distribution is in all respects the same as if made on an actual legal dissolution. The stockholders were entitled—*First*, to receive the amount of their capital stock; and, *second*, their proportion of the surplus according to the number of shares held by them respectively. This surplus while the bridge was in operation was in some sense, perhaps, part of the capital; but when the time came for a distribution it was clearly a surplus of profits arising out of the business, either from an accumulation of undivided gains, or from the general appreciation of the property. The design of the act of 1879 is accurately stated by the learned judge of the court below: "The theory of the act is that the profits realized by the corporation, whether directly arising from its operations from year to year, or from the increase in the value of its property from whatever cause, will sooner or later reach the pockets of its stockholders; and that, when they do, they furnish a fair measure of the value of the capital stock, and therefore of the amount of tax which it ought to pay." The tax is on the capital stock, not on the dividends. *Iron Co. v. Com.*, 59 Pa. St. 104. The case just cited was determined upon the acts of twenty-ninth May, 1844, and twelfth April, 1859; the provisions of which, however, were in this respect similar to the act of 1879. The whole sum distributed represents the actual value of the shares, but their value for taxation is to be fixed by the aggregate of the dividends of the profits made or declared during the fiscal year. It is not required, in order to determine the value of the capital stock, that the dividend shall be formally declared. A profit made or passed to the stockholders becomes the measure of the state tax. The formal declaration of a dividend is conclusive. The company is estopped by it, whether the dividend be earned or not; but it is not conclusive, in respect of the commonwealth, that all the earnings and profits of the year have been embraced in it. "The precise measure of the value of the stock in each and every year," says the learned judge of the court below, "may not be furnished by the dividend of that year. Thus, a corporation may make a profit in a given year of sixteen per cent., and divide but ten. In that event its tax for that year would only be at the rate of five mills on the par value of its capital stock, instead of eight mills, as it would have been if the sixteen per cent. had been divided. But the amount undivided will remain in the treasury of the company, to be divided the next or some subsequent year; or, if invested by the corporation, will increase the value of its property, and thus enable it to make larger dividends in the future, and consequently increase its rate of taxation, or to make a stock dividend with a like result, or to divide a larger surplus among the stockholders when it ceases business. In one form or other, the profits will reach the stockholders, and in doing so will furnish a measure for the taxation of the capital stock."

Upon a full examination of the whole case, we are of opinion that the conclusions of the court below are in accordance with the spirit and purpose of the act of 1879, and that the fund of \$30,000 is a profit which the company made in its business; and as that profit has been divided among the stockholders, because they are such, and in proportion to the number of shares held by each, such a transfer must be treated as the making of a dividend, the amount of which declares the measure of the tax to which the capital stock is subject. The judgment is affirmed.

## HAYMAN v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. January 16, 1888.)

## CARRIERS—INJURY TO PASSENGER WHILE APPROACHING FERRY-BOAT.

Plaintiff, a passenger, was injured in passing from defendants' waiting-room to their ferry-boat, by contact with a swinging door, of ordinary construction and use, at the end of the passage-way, which was permitted to come violently against him by a person moving in advance. Held that, as the door was in plain view, and of a kind not peculiar to defendants' business as carriers, and not part of their machinery of transportation, plaintiff must prove his allegations of defects, unfitness, or negligence, or suffer a nonsuit; and there is no *prima facie* presumption throwing the burden of disproving negligence upon the defendants.<sup>1</sup>

Error to court of common pleas, Philadelphia county.

Trespass on the case by Joseph Hayman against the Pennsylvania Railroad Company, for damages for personal injuries. Plaintiff was nonsuited, and brings error.

*Jacob Singer and Emanuel Firth*, for plaintiff in error.

The contractual relation existing between carriers and passengers for hire exacts of the former the exercise of the highest degree of care and skill, and that all means have been taken beforehand to guard against all dangers that may beset the passengers, as far as human care and foresight will go. *Laing v. Colder*, 8 Pa. St. 479; *Sullivan v. Railroad*, 30 Pa. St. 234; *Railroad v. Zebe*, 33 Pa. St. 326; *Meter v. Railroad*, 64 Pa. St. 226; *Railroad Co. v. Nappelys*, 90 Pa. St. 140; *Railroad Co. v. Anderson*, 94 Pa. St. 358; *Steam-Ship Co. v. Landreth*, 102 Pa. St. 134.

The general rule thus stated is supported by a multitude of authorities in this and other states. The duty arises out of the contract to carry between the carrier and the passenger, and is superadded by law to the contract; and when, in the performance of this contract, a passenger is injured without fault of his own, the law raises *prima facie* a presumption of negligence and throws on the carrier the *onus* of showing it did not exist. See opinion of Mr. Justice BELL in *Laing v. Colder*, *supra*. This language was fully indorsed and affirmed in subsequent cases, and fully concurred in by Mr. Justice GORDON in the more recent case of *Railroad v. Anderson*, already cited. This doctrine also prevails in many other states, and in England. *Railroad Co. v. Mowery* 36 Ohio St. 418; *Railroad Co. v. Walrath*, 38 Ohio St. 462; *Murphy v. Railroad Co.*, 36 Hun, 199; *Kansas Pacific Co. v. Miller*, 2 Colo. 444; *Scott v. Dock Co.*, 3 Hurl. & C. 598.

Especially was this a case for the jury in view of the evidence presented, that, immediately after the injury to the plaintiff, the defendant caused the glass in the swinging doors to be covered with thickly woven wire. For it has been repeatedly held that where, after an accident, the defendant removes the alleged cause, it is, to an extent, an admission that he was in default. *Railroad Co. v. Taylor*, 15 Wkly. Notes Cas. 40.

*David W. Sellers*, for defendant in error.

There was no evidence to sustain the averment in the declaration which stated the cause of action to be as to the door "being improperly and negligently constructed, and being also improperly and negligently constructed in part of glass." To the contrary, the evidence was a passage-way for a single file of passengers passing through a door hung, as usual, with ordinary glass. As there was no negligence proven against the defendant the plaintiff failed in his action. Section 255, Railway Accident Law, 1886.

<sup>1</sup> A carrier of passengers, is held to the exercise of the highest care which human vigilance can give only in respect to things appertaining to the actual transportation of the passengers, and in regard to the results naturally to be apprehended from a failure so to do. *Morris v. Railroad Co.*, (N. Y.) 18 N. E. Rep. 455.

WILLIAMS, J. The complaint of the plaintiff in error in this case is that the court below directed the entry of a compulsory nonsuit on the conclusion of his evidence. The sole question for consideration, therefore, is whether the evidence was sufficient to sustain a verdict in favor of the plaintiff. The facts disclosed by it are that the plaintiff had purchased a ticket from the defendant company entitling him to carriage from Philadelphia to Burlington, New Jersey, and was proceeding from the ticket office to the boat on which a part of the journey was to be made. His route was through a long, narrow passage intended to accommodate persons passing in single file. At the end, near the landing, was a door, the upper half of which was provided with glass, and which swung either way, to permit the passage of persons to and from the boat. The person in front of plaintiff passed out at the door, leaving it to swing back behind him: The plaintiff put out his hand to arrest his motion, and push it open again, and, instead of directing his hand towards the frame or wooden portions of the door, pushed it against the glass, which broke under the force of the impact, and let his hand through, cutting it, and inflicting the injury sued for. This was the whole case, and upon it the plaintiff contends that he should have been allowed to go to the jury upon the ground that the mere happening of the injury raises *prima facie* a presumption of negligence, and throws the burden of disproving negligence on the carrier. In support of this position, he cites *Laing v. Colder*, 8 Pa. St. 474, and several cases following it. The authority of these cases is beyond question, but the applicability of the rule established by them to this case is not. The rule requires that a carrier of passengers shall exercise "the utmost degree of care and diligence" to secure the safety of its passengers. To this end, it must provide a safe road-bed, well-constructed cars, engines, and skillful, trustworthy servants to take charge of the movement and management of trains. All these things are under the exclusive control of the officers of the company. The public have no right, and no opportunity, to interfere in regard to them. When, therefore, a passenger is injured by a collision, or other accident, while on his journey, the law presumes the accident to be due to want of proper care on the part of the company conducting the transportation, and puts the burden of showing the actual condition of the track, the car, or other appliances involved in the accident, upon the only party in a condition to bear it, viz., the carrier, which has the exclusive possession and care of it. The legal presumption takes the place of the proof which the injured person is unable to make, and puts the carrier at once upon the defense. *Laing v. Colder, supra; Meier v. Railroad Co.*, 64 Pa. St. 226; *Railroad Co. v. Anderson*, 94 Pa. St. 358. But the reason ceasing, the rule ceases. If an intoxicated person, after having purchased his ticket at a railroad station, should, on his way out of the ticket-office, stumble upon a heated stove, and suffer serious injury, there would be no reason for excusing the injured man from making out his case because he had a railroad ticket in his pocket, or because the stove on which he fell belonged to a railroad company, or was standing in a railroad station. It was no part of the machinery of transportation, and was in no sense peculiar to the business of the railroad company.

The same thing is true of the case in hand. The plaintiff was injured in the waiting-room or passage-way leading to the wharf, by putting his hand through the glass in the swinging door. The door was no part of the machinery employed for the carriage of passengers. It was not built upon a pattern peculiar to the defendant company. So far as the pleadings or the plaintiff's evidence enables us to judge, it was constructed like the swinging doors to be met with in places of business in every part of the country. It was certainly visible to all comers and goers passing between the waiting-room and the boat, for it was so located that all passengers were obliged to push it open in passing to and from the landing. If there was anything in the construction of the door that made it unfit for the purpose for which it was used, or

the place at which it was located, it was easy for the plaintiff to show it by a multitude of witnesses. There was no reason, therefore, for resorting to the legal presumption of negligence in aid of the plaintiff's case. The cause of the accident and the erection and construction of the door were as clearly known to the plaintiff as to the defendant and its employers; and it was the duty of the plaintiff to make out his cause of action in this case as he would be bound to do if the swinging door had been in a hotel or store. Not having done this, the court was clearly right in ordering the nonsuit. Judgment affirmed.

DOD *et al.* v. PAUL *et al.*

(Court of Chancery of New Jersey. January 3, 1888.)

**EQUITY—MISTAKE IN DEED—REFORMATION.**

P. held a tract of land in trust, equally for himself and S. and D. It was laid off in lots, which were numbered. Lots 30, 31, 32, and 35 were sold to Mrs. S. Each of the three owners then selected for himself four lots. D. selected 26, 27, 28, and 29. S. selected 34, 35, 36, and 37. After the lots had been largely improved, deeds were made conveying to Mrs. S. 31, 32, 33, and 34; to D., 27, 28, 29, and 30; and to S., 35, 36, 37, and 38. Afterwards a division was made of the remaining lots, and 28 lots were conveyed to D.; and 28 to S., including lot 38, which had been previously conveyed to him,—which gave, in all, to S., 31 lots; to D., 32; and to P., 34. The lots were held as first selected for 17 years, and some reconveyed, and largely improved; P. superintending most of the improvements, and never asserting title to lot 26. Held that these facts show a mistake in inserting the wrong lot numbers in the deeds, and the parties have a right to have the deeds revised and corrected.<sup>1</sup>

On bill to revise and correct certain deeds. The facts fully appear in the opinion.

*John C. Besson*, for complainants. *John S. Applegate*, for defendant Paul.

McGILL, Ch. In June, 1869, the defendant Miffin Paul purchased from Arthur V. Conover a tract of about 71 acres of land lying between the Shrewsbury river and the ocean at Seabright, in Monmouth county. Before he took his deed and paid the consideration money, he interested William W. Shippen and Samuel B. Dod in his venture, and obtained from each of them one-third of the consideration he was to pay for the land. The deed from Conover was to Paul alone, and he, to secure Messrs. Shippen and Dod, made a declaration in writing that he held the land in trust for his and their benefit. The purpose of the parties was to divide the land into seaside lots, and sell the lots. To accomplish this purpose, they caused the land to be surveyed, and then mapped into lots, procured the Long Branch & Sea-Shore Railroad Company to locate a depot at about the center of their land, and agreed that they would each take four of the lots, and grade and build upon them for their individual use, and thus start a settlement on their lands. At an appointed time, the three gentlemen and the complainant Mrs. Martha B. Stevens, who is a sister of Mr. Dod, met upon the land, and selected four lots each, for the purpose of improving them. As Mrs. Stevens was to purchase the lots she selected, she was allowed to make the first choice. After her selection, Mr. Shippen took the four adjoining lots immediately north, and Mr. Dod took the four lots adjoining immediately south, of those which Mrs. Stevens had selected. At the same time Mr. Paul chose four adjoining lots several hundred feet south of Mr. Dod's location. Shortly after the selections were made, the 12 lots chosen by Mrs. Stevens and Messrs. Dod and Shippen were graded and built upon, at considerable expense, under the personal supervision of Mr. Paul. The lots

<sup>1</sup> As to the mistakes against which equity will relieve, and the proof necessary to obtain a reformation of a written instrument, see *Benson v. Markoe*, (Minn.) 83 N. W. Rep. 88; *Gulimartin v. Urquhart*, (Ala.) 1 South. Rep. 897, and note; *Griffith v. County of Sebastian*, (Ark.) 3 S. W. Rep. 886, and note; *Bailey v. Insurance Co.*, 18 Fed. Rep. 250, 256; *Hutchinson v. Ainsworth*, (Cal.) 15 Pac. Rep. 82; *Ahlborn v. Wolff*, (Pa.) ante, 799.

thus improved and built upon for Mr. Dod were numbered 26, 27, 28, and 29, and the lots improved and built upon for Mrs. Stevens were numbered 30, 31, 32, and 33, and the lots improved and built upon for Mr. Shippen were numbered 34, 35, 36, and 37. Upon lot numbered 26 Mr. Dod caused an ice-house to be erected, and had Mr. Paul personally superintend that work for him. In October of the same year, when the improvements were well advanced, it was proposed that deeds for the improved lots should be given by Mr. Paul to the persons to whom they respectively belonged; and accordingly three deeds were prepared, under the supervision of Mr. Dod, which described the improved property by reference to the map of the land. Mr. Dod did not know the map numbers of the improved lots, and for that reason left a blank space in the descriptions for the insertion of the proper numbers, and sent the deeds to Mr. Paul with the request that he should properly fill the blanks and then execute the deeds. With his own hand Mr. Paul filled the blank in the deed to Mr. Dod with the lot numbers 27, 28, 29, and 30, and in the blank in the deed to Mrs. Stevens with the lot numbers 31, 32, 33, and 34, and the blank in the deed to Mr. Shippen with the lot numbers 35, 36, 37, and 38. He thus included in the deeds lot numbered 38, which had not been graded and improved, and left out lot numbered 26, which had been graded, and upon which Mr. Dod's ice-house had been erected. About this time, Mr. Dod told Mr. Paul that he (Dod) wished two more lots, immediately south of the lots he had improved, to build upon for his mother; and thereupon, with the consent of Messrs. Paul and Shippen, he graded and built a house upon lots numbered 24 and 25. In January, 1882, after several lots had been sold, the associates agreed to divide their holdings, and thereupon Mr. Paul conveyed to Mr. Dod 28 lots, including the lots numbered 24 and 25, which Mr. Dod had built upon for his mother. At the same time he conveyed 28 lots to Mr. Shippen, including, as one of the 28 lot numbered 38, which he had already, in 1869, conveyed to Mr. Shippen. According to the deeds, Mr. Shippen got, in all, 31 lots, Mr. Dod got 32 lots, and Mr. Paul got 34 lots. Lot numbered 38 was twice deeded to Mr. Shippen, first in 1869, and again at the division in 1872. By agreement with his associates, Mr. Paul kept an account of the dealings with reference to this land in a book provided for the purpose. In this book, under date of January 30, 1872, he enumerated in his own handwriting the lots apportioned to each of the associates. Among those there enumerated as belonging to Mr. Dod is lot numbered 26, and among those there enumerated as belonging to Mr. Shippen is lot numbered 34. At the division of the lots in 1872, the declaration of trust was surrendered to Mr. Paul, and was by him afterwards destroyed. In June, 1876, Mr. Shippen conveyed to Mrs. Mary P. Lewis the lot numbered 34, and afterwards Mrs. Lewis erected an expensive cottage upon it. In November, 1881, Mr. Dod conveyed a portion of lot numbered 26 to the Seabright Improvement Company, and in 1886 that company had its title to the lands so conveyed to it examined, and then discovered that the lot 26 had never been deeded to Mr. Dod. Shortly after this discovery, the defendant Paul notified Mr. Dod that a portion of the porch of Dod's cottage encroached upon his (Paul's) property, the lot numbered 26. This notice led to an examination of the conveyances, and revealed the situation above stated. The complainants and Mr. Shippen have remained in undisturbed and unquestioned possession of the properties which were improved by them, respectively, since the improvements were made. Mr. Dod, for 17 years, has openly claimed to be the owner of lot numbered 26; and during that time, although Mr. Paul has constantly witnessed Mr. Dod's acts of ownership over that lot, he has failed to assert any claim to it.

I think that the evidence establishes, in the clearest and most satisfactory manner, that it was the intention of the parties to the deeds of 1869 that lots numbered 26, 27, 28, and 29 were to be conveyed to Mr. Dod, and that lots numbered 30, 31, 32, and 33 were to be conveyed to Mrs. Stevens, and that

lots numbered 34, 35, 36, and 37 were to be conveyed to Mr. Shippen; the improvement of these lots, under the supervision of Mr. Paul, and the apportionment of them; the entry of the total division of the Paul in the account-book, wherein he designated lot 26 as belonging to Mr. Shippen; and lot 34 as belonging to Mr. Shippen; the double conveyance to Mr. Shippen; the fact that but 31 lots were conveyed to Mr. Shippen; 32 were conveyed to Mr. Dod, and 34 remained to Mr. Paul; and the peaceable possession of lot 26 by Mr. Dod for 17 years,—are circumstances which bring my mind strongly to the conclusion that, by an inadvertence, wrong lot numbers were inserted in the deeds of 1869. The interpretation that this concatenation of circumstances would be which would charge Mr. Paul with fraud and concealment; but which is untenable, under the evidence in the case. If it had been intended to fraudulently keep lot 26 out of the division, so that it would ultimately be his property, free from the trust he had declared, he would hardly have permitted Mr. Dod to remain in peaceable possession of it for 14 years, and a declaration of trust had been destroyed. The complainants are entitled to the relief they ask. I will decree the reformation they seek; and, following precedent established in *Loss v. Obry*, 22 N. J. Eq. 52, I will correct the defendant Paul in costs, because, when the mistake was brought to his notice, he refused to correct it, and pertinaciously defended this suit, notwithstanding the mistake was clear, and good faith demanded its correction.

### M'COLGAN v. KENNY.

(Court of Appeals of Maryland. January 5, 1888.)

EXECUTORS AND ADMINISTRATORS—PETITION TO REMOVE BY PARTY ENTITLED TO FILING.

Defendant qualified as administrator of a decedent in February, 1886. In 1887, the party entitled to administer filed her petition asking the removal of the defendant. *Held*, that the petition was filed too late, and should be dismissed. *Following Edwards v. Bruce*, 6 Md. 392.

Appeal from orphans' court of Baltimore city.

Petition filed by Bridget Kenny to vacate an order appointing James McColgan administrator of Catharine G. Ford, deceased. The petition was granted, and the defendant appeals.

*James McColgan*, for appellant. *R. M. McSherry* and *Charles V. Ler*, for appellee.

BRYAN, J. Catharine Ford died intestate, leaving her husband, James Ford, surviving her, but leaving no children or descendants. On the twenty-sixth day of February, 1886, the husband renounced his right to administer, and the orphans' court, on his recommendation, appointed James McColgan administrator, who duly qualified, and undertook the administration of the estate of the deceased. The deceased left a brother, Thomas G. Ford, and a sister, Bridget Kenny, the appellee in this case. Upon the renunciation of the surviving husband, the brother and sister were the next persons entitled to administration; the brother being entitled to preference. According to the act of 1882, c. 477, they had no interest whatever in the personal estate of the deceased; but the act does not take from them the right to administer. The thirty-eighth section of article 93 of the Code, upon the renunciation of any person entitled to administer, the orphans' court must proceed as if no person were not entitled. The appointment of Mr. McColgan was therefore improvident, and he must be removed on this application, unless the petitioner has in some way lost her right. The petition was filed by Mrs. Kenny on the seventh of March, 1887; she and her husband both testifying that the administration was granted, Ford in their presence, and in the presence

her brother, asked Mr. McColgan to administer. Mr. McColgan testifies as follows: "Mr. Gallagher and Mr. Ford had both repeatedly stated that they wanted me to administer. It was talked over fully in Mrs. Kenny's presence, and she entirely approved of it at that time. Then they were apparently agreeing. I did not administer at that time, that is, say February 19th; and it was then understood and agreed that I was to administer on the estate, because Mr. Ford himself had doubts about his capacity, and Gallagher had, and I believe Mrs. Kenny had also." It also appears from Mrs. Kenny's testimony that "shortly after the summer, or in September," she called to see McColgan, and asked him to pay some debts of the deceased. McColgan testifies that she asked him if he had not sold two stalls belonging to the estate; he probably refers to the same interview mentioned by Mrs. Kenny. He also testifies that the last time she was in his office she knew he was administrator, and was talking to him as administrator. It is probable she had no very exact ideas on the subject of the duties of an administrator. It is, however, satisfactorily shown that she knew McColgan was requested to act as administrator; and that at least as early as September, 1886, she asked him to pay debts of the deceased, and to sell a portion of her personal estate,—acts which could be done by no one except an administrator. This petition to remove him from the administration was not filed until the seventh of March, 1887. If there was no misapprehension on the part of Mrs. Kenny and her brother about the request to McColgan that he should administer, their right was waived under the rule laid down in *Pollard v. Mohler*, 55 Md. 287. But at all events, according to *Edwards v. Bruce*, 8 Md. 392, the petition was filed too late; it ought to have been dismissed. Order reversed, with costs, and cause remanded.

#### ANNAPOLIS & B. S. L. R. Co. v. Ross et al.

(Court of Appeals of Maryland. January 6, 1888.)

##### 1. CONTRACTS—CONSTRUCTION—PROVISIONS FOR ALTERATIONS.

Plaintiff agreed to build for defendant some bridges according to certain plans. The rate of compensation for the work was fixed by the agreement. Defendant reserved the right to make additions to the work at the same rate as the whole amount would bear to that shown in the plans, provided that no such alteration should be made entailing on plaintiff expense beyond the proportion of the balance of the work. *Held*, that the agreement did not require of plaintiff, in making additions, a class of work more costly than that contemplated by the agreement.

##### 2. SAME.

Plaintiff agreed to build two bridges for defendant on piles of a specified length at an agreed rate of pay; defendant reserving the right to make additions to the work at the same rate, provided that they should not be of a more costly class of work than contemplated by the contract. Piles of the specified length proved insufficient, and, by defendant's direction, those for one bridge were spliced, and additional piles furnished, while those for the other were capped, and upon them a trestle was built, whereon the bridge was laid; these additions costing more than the agreed rate would bring plaintiff, and he sued for, extra pay for the additions. *Held*, that instructions asked by defendant, assuming, as matter of law, that the additions were of the class contemplated by the contract, were properly refused.

Appeal from Baltimore court of common pleas.

Action by P. Sanford Ross, Joseph B. Sandford, and Walter B. Brooks, Jr., trading as Ross & Sandford, against the Annapolis & Baltimore Short Line Railroad Company, to recover the value of extra work done in building two bridges. There was a verdict and judgment for plaintiffs, and defendant appeals.

*John E. Semmes*, for appellant. *T. W. Blackistone* and *George Blackistone*, for appellees.

ROBINSON, J. The plaintiffs agreed to build for the defendant company bridges over the Patapsco and Severn rivers. They were to be built on piles

according to specifications, which formed part of the contract. The length and price per line foot to be paid for the piles, and the cost for driving them; and the price per thousand feet for framing the timber, which included the cost of the materials, and putting them in place,—are all set forth in the specifications. Plans, also, for the bridges, and the estimated number of piles for each bridge, were furnished to the plaintiffs before the contract was signed. The whole work was to be done under the direction of the defendant's engineer, and he was to be the sole judge of the quantity and quality of the work, and his decision was to be final and conclusive between the parties. The defendant company reserved the right to make additions to, and to deduct portions from, the work specified as shown in the plans, at the same proportional amount of increase or decrease in pay as the whole amount bears to the original plan: provided, however, that no alteration shall be made from said plan which shall entail upon the plaintiffs an expense in constructing beyond the balance of the work. It was further agreed that in the event of a difference between the parties in regard to any part of the work done under the contract, the decision of the engineer was to be final and conclusive. After the plaintiffs had begun the construction of the Patapsco bridge, it was found that, owing to the soft bottom of the river, the piles furnished for that bridge, according to the specifications, were not long enough to bring the bridge to the level required for the defendant's road. This they reported to the defendant's engineer, and they were directed by him to cap the piles near the water's edge, and to build thereon a trestle-work high enough to bring the bridge to the level required. The piles furnished for the Severn bridge were also found too short, and these the engineer directed to be spliced. As these alterations would necessarily increase the cost of construction, the plaintiffs required of the engineer some authority in writing before proceeding to make the same, and thereupon he addressed to them the following letter:

*"Messrs. Ross & Sandford—GENTLEMEN:* You will please order the piles and extra timber used in Patapsco bridge and piles in Severn bridge as required, and keep strict account of extra expenses incurred.

[Signed]

*"W. D. JANNEY."*

Upon the receipt of this letter the plaintiffs resumed work, and in the construction of the Patapsco bridge the piles were capped near the water's edge, and thereon a trestle 14 feet high was built, and upon this trestle the bridge was laid. In the construction of the Severn bridge, the piles were spliced as directed, and additional piles furnished. These alterations largely increased the cost of construction; the spliced piles (of which about 800 were required) alone costing more than three times the price set forth in the specifications. Besides, the plaintiffs suffered loss from delays incident to the furnishing of extra piles. When the bridges were finished, the itemized account of the plaintiffs for the Patapsco bridge amounted to \$15,674.81, and the account for the construction of the Severn bridge amounted to \$30,553.02. These accounts the defendant submitted to its chief engineer, Latrobe, who, after an examination of both bridges, awarded the plaintiffs, \$12,491.95 for the Patapsco bridge, and a sum for the Severn bridge much less than claimed by the plaintiffs. The difference between the sums thus awarded by the engineer and the amount claimed by the plaintiffs is the subject-matter now in dispute.

That alterations were made, and that the cost of constructing the bridges was thereby largely increased, is not denied; and the real question is whether the alterations were such as the defendant had the right, under the contract, to make. If they were, then, in the absence of bad faith or fraud on the part of the engineer, (and this is not imputed,) his award is final and conclusive. On the other hand, if the alterations are not fairly within the scope of the contract, his award is not binding, because his arbitrament was to be final only in regard to the work done under the contract. The right of the defend-

ant to make alterations in the construction of the bridges, although the cost for labor and materials was thereby increased, cannot be questioned; provided, however, such alterations did not subject the plaintiffs to an "expense in constructing beyond the proportion of the balance of the work," or, in other words, as we construe the contract, did not require of them a class of work more costly than originally contemplated. The construction of the contract is for the court; but whether the work as finally done was within its scope is a question for the jury. And in regard to this question the evidence is conflicting. On the part of the plaintiffs it shows that they were not only required to furnish extra piles at a greater cost than set forth in the specifications, but also to splice them at a much greater cost; that the construction of the trestle-work was a different kind of work than required under the contract; and that the alterations not only increased the cost, but so changed the character of the construction that they were unable to render an account based upon the compensation as agreed upon. Opposed to this is the evidence on the part of the defendant, to the effect that, although the cost of construction was increased, the alterations did not subject the plaintiffs to a class of work more costly than required under the contract. The engineer, in his testimony, says: "The Patapsco bridge, in the nature and character of its work, was the same; that the form was somewhat modified, but under the item of framing timber there was no difficulty in following and carrying out the rates of compensation as agreed upon. And, as to the Severn bridge, that, although spliced piles were not spoken of in the contract, the class of work was the same," etc. Upon this evidence it was for the jury to say whether the alterations were or were not within the scope of the contract; or, in other words, whether they were such as the defendant had the right to make under the contract. If they were not, if they required of the plaintiffs a class of work more costly than that required in the contract, then the estimate of the engineer was not binding, because it was only in regard to the work done under the contract that his decision was to be final and conclusive. And this question was, as we understand the instruction of the court, submitted to the jury. At the same time, speaking for myself, I desire to say that the question was not in my opinion submitted in terms as plain and explicit as it ought to have been. If the alterations were not within the scope of the contract, then the plaintiffs were entitled to recover a fair compensation for the increased cost of construction by reason of the alterations thus made, and in estimating which the jury were to be guided by the prices named in the original contract, so far as they were applicable to the labor and materials furnished on account of such alterations. And so the court instructed the jury.

The defendant's prayers were properly refused, because they assume, as matter of law, that the alterations were such as the defendant had the right to make under the contract, and that the award of the engineer was therefore conclusive. This, as we have said before, was a question for the jury. Judgment affirmed.

#### PHILADELPHIA, W. & B. R. CO. v. DAVIS.

(*Court of Appeals of Maryland. January 6, 1888.*)

#### 1. RAILROAD COMPANIES—CONSTRUCTION OF ROAD—EMBANKMENTS—DAMAGE FROM EXCESSIVE RAIN-FALLS.

If for any purpose it becomes necessary to erect a railroad embankment, a proper outlet, of ample capacity to carry off all the water likely to be in it, must be provided, to prevent damage to contiguous property; but this rule does not contemplate excessive rain-falls of infrequent occurrence and beyond ordinary foresight.

#### 2. SAME—CLOSING OUTLET FOR SURFACE WATER—LIABILITY FOR DAMAGES.

If a railroad company closes a usual outlet for surface water, raising the bed of a street, and constructs another outlet of insufficient capacity to carry the water likely to be in it, it is liable in damages to the owner of contiguous property injured thereby.

**3. SAME—INSTRUCTIONS.**

In an action for damages caused to plaintiff's house by defendant having obstructed or altered the outlet for surface water, an instruction that, "if the jury find the construction or alterations of plaintiff's house were sufficient to cause the injury, plaintiff is not entitled to recover." assumes that such construction or alterations actually did cause the injury, and was properly modified by adding, in effect, "unless the jury find that the injuries were caused by acts of the defendant."

Appeal from circuit court, Harford county.

Action on the case by Thomas D. Davis against the Philadelphia, Wilmington & Baltimore Railroad Company for damages caused by overflow, etc. Verdict and judgment for plaintiff, and defendant appealed.

*J. J. Donaldson* and *Bernard Carter*, for appellant. *S. A. Williams* and *John T. Ensor*, for appellee.

**YELLOTT, J.** An action on the case was instituted by the appellee against the appellant to obtain compensation, by the recovery of damages, for alleged injuries to the plaintiff's property, caused by an overflow of surface water, resulting from an alteration by the defendant of an existing drainage. The appellee is the owner of a house and lot in Canton, at the north-east corner of Clinton and Boston streets. The appellant has a line of railroad laid on the bed of Boston street, which street terminates at its junction with Clinton street; but the track of the road crosses Clinton street, and, extending eastwardly, passes the south side of appellee's lot in such close proximity that only a space of a few feet intervenes between the curb of the sidewalk on the south of said lot and a lateral track leading from the main track of the road into a large open lot north of Boston street. In 1880, and for more than 20 years anterior to that period, there was a large open gutter or water-channel in which the surface water flowed from the higher ground north and east of the railroad. This gutter extended along the track, passing the south side of appellee's house and across Clinton street and then down Boston street westwardly until it discharged the current of water into an open ditch, through which it was carried into the Patapsco river. There is evidence tending to show that this open gutter was of ample capacity to carry off the surface water, and that the appellee sustained no injury from an overflow prior to 1880, when the appellant closed this open gutter along Boston street, across Clinton street, and eastwardly to a paved alley in the rear of appellee's house; substituting for said open gutter an iron pipe with an interior diameter of about 18 or 20 inches. It is also shown by the evidence that the bed of Clinton street, at the crossing, was raised; that a box drain was put across the tracks on the east side of and parallel with Clinton street; and that across Clinton street was put a smaller drain covered with iron plates. Into the box drain, and at right angles thereto, was introduced another box drain immediately south of appellee's pavement. It is alleged, and evidence has been adduced tending to show, that these alterations in the drainage lessened the capacity of the outlet for the surface water, so that whenever there was a copious rain-fall the water accumulated and flowed into the appellee's cellar. The result of this flooding has been a serious injury to the walls of the building, which has been so badly cracked and weakened that desirable tenants have abandoned the property. To recover damages for the injury thus sustained this action was instituted.

It is observable that this record does not disclose a case where there has been an artificial obstruction interposed, so as to produce an interruption or diversion of the current of a permanent stream of water flowing in its ordinary channel. The injury complained of proceeds from an obstruction to the flowage of surface water, which, prior to the alleged wrongful act of the defendant, had found an ample outlet through which it was carried off without any damaging consequences to the property of coterminous proprietors. In considering questions thus arising, we encounter some diversity and conflict

in the reported decisions. In Massachusetts and some other states it has been held that the owner of land may lawfully prevent surface water from coming upon it, although, in so doing, the water may be made to flow upon adjoining land, and cause loss and injury to coterminous proprietors. *Gannon v. Hargadon*, 10 Allen, 106; *Dickinson v. City of Worcester*, 7 Allen, 19; *Buffum v. Harris*, 5 R. I. 243. But in most of the states this doctrine does not seem to have been sanctioned by adjudication. In a case very recently decided by the vice-chancellor of New Jersey it was emphatically said that "the broad doctrine declared by some courts, that no right of any kind can be claimed in the flow of surface water, and that neither its retention, division, repulsion, or altered transmission will constitute an actionable injury, has never been adopted, in all its length and breadth, in this state." *Field v. Town of West Orange*, 2 Atl. Rep. 237. The prevailing doctrine in this country seems to be that the owner of the upper land has a right to the uninterrupted flowage of the water caused by falling rain and melting snow, and that the proprietor of the lower land, to which the water naturally descends, has no right to make embankments whereby the current may be arrested and accumulated on the property of his neighbor. This is the rule of the civil law apparently founded on the principles of justice, and said to be "received with constantly increasing favor in the United States." *Crawford v. Rambo*, 7 N. E. Rep. 429; *Martin v. Riddle*, 26 Pa. St. 415; *Porter v. Durham*, 74 N. C. 767; *Butler v. Peck*, 16 Ohio St. 336; *Ogburn v. Connor*, 46 Cal. 346. The principle established by these authorities seems to sanction the doctrine that if the water is allowed to flow without artificial obstruction, and the current encounters a natural obstruction caused by the elevation of the earth's surface at the boundary line, the proprietor of the upper land has no right to demand an outlet of his neighbor, nor is the latter liable for any injury caused by the accumulation of the water; for it would be absurd to say that a man can be sued for damages caused by the operation of natural laws not put in motion by his own instrumentality. But every man is responsible for injuries resulting to others from his own acts not sanctioned by legal principles. So, if for the purpose of constructing a railroad, or for any other purpose, it becomes necessary to erect an embankment, a proper outlet or culvert must be provided of ample capacity to carry off the flow of water, so that it may not be obstructed and thus accumulated on the upper and adjacent lands of other persons; for, as regards coterminous estates, no one can legally assume the right to alter the condition of things so as to injuriously affect the pre-existing rights of his neighbor. The outlet must, therefore, be carefully and skillfully constructed so that no damage may result to contiguous property.

In *Harrison v. Railway Co.*, 3 Hurl. & C. 231, POLLOCK, C. B., said: "They are bound to maintain a sufficient cut or depth. The sufficiency of a cut depends on its depth, width, fall, and outlet, as compared with the water likely to be in it. Now in this case the cut was not sufficient to hold the water likely to be in it owing to the condition of the outlet." The rule is that the outlet must be of ample capacity to carry off all the water likely to be in it. But the rule is not applicable to an extraordinary and excessive rainfall, which is held to be *vis major*. Such unfrequent and extraordinary occurrences cannot be foreseen and provided against, and for damages caused by them no one is responsible. Recognizing and adopting this principle, the supreme court of Texas, in an action to recover for injuries caused by the construction of insufficient culverts in the defendant's railroad embankment, held that, "if the overflow was of such an extraordinary character that railroad engineers of ordinary care and prudence, in the construction of the embankment and culverts, could not reasonably be expected to have anticipated and provided against, the railroad was not liable." *Railway Co. v. Pomeroy*, 3 S. W. Rep. 722. With this exception in relation to extraordinary floods, the rule is as already stated. And it is held that where, in some particular local-

ity, a municipal corporation is under no obligation to construct drains or culverts so as to protect the property of individuals or to provide means for carrying off surface water, yet if it does construct them, and the work is performed in a negligent or unskillful manner, or if it is negligent in the management of them, it is liable in damages. *Stefert v. City of Brooklyn*, 4 N. E. Rep. 321; *Gilluly v. City of Madison*, 24 N. W. Rep. 137; *Henderson v. Minneapolis*, 20 N. W. Rep. 322; *Allen v. City of Chippewa Falls*, 9 N. W. Rep. 284. In *Johnston v. District of Columbia*, 6 Sup. Ct. Rep. 924, GRAY, J., said that "the construction and repair of sewers according to the plan adopted are simply ministerial duties, and for any negligence in so constructing a sewer, or keeping it in repair, the municipality who has constructed and owns the sewer may be sued by a person whose property is thereby injured."

In the case now under consideration the appellant undertook to alter the established outlet through which the surface water was carried away. It was incumbent on the corporation to have this work done in a careful and skillful manner. If done carelessly and negligently, so that, as a consequence, injury to the plaintiff ensued, an action for damages is maintainable. The facts in evidence, relating to the manner in which the work was done, were considered and passed upon by the jury, guided and enlightened, in relation to the legal principles applicable to the evidence believed by them to be true, by the instructions emanating from the court. The rulings of the court, on the instructions asked for, present the question now to be determined.

The plaintiff offered but one prayer, which was granted; and to this ruling the defendant excepted. In this instruction the jury are told that if they believe from the evidence that the defendant closed the open trench or gutter and raised the bed of Clinton street, and that the closing of the gutter and raising the bed of the street caused such water as usually flowed through said gutter to dam and overflow the plaintiff's premises, and that such damage and overflow would not have occurred but for the closing of said gutter and raising the bed of said street, and that the plaintiff's house was injured by such overflow, then they must find their verdict in favor of the plaintiff. In other words, the jury were told that if they believed from the facts offered in evidence that the property of the plaintiff was injured, and that the injury was caused by the act of the defendant in closing the usual outlet for the surface water, raising the bed of the street, and constructing another outlet of insufficient capacity to carry the water likely to be in it, the defendant was liable. This instruction was tantamount to saying that the defendant was liable for injuries resulting from its own unskillfulness or negligence; and there was no error in granting it.

The defendant offered ten prayers, two of which were rejected and another granted, with modifications made by the court. To the rejection of these two prayers, and to the granting of the other as modified, exceptions have been taken. The fourth and fifth prayers of the defendant were properly rejected. The fourth prayer presents the proposition "that there is no legally sufficient evidence in this case that the defendant changed the natural direction of the drainage at or near the plaintiff's premises." This is repeated in the fifth prayer, with the addition that there is no legally sufficient evidence that the defendant ever diminished or decreased the carrying capacity of any of the drains, except the drain across Clinton street. An analysis of the evidence in relation to alterations in the drainage would lead to useless prolixity, and it is sufficient to say that there is proof in abundance, offered on the part of the plaintiff, tending to show that there have been changes in the mode and direction of the drainage, and that the present plan of drainage adopted by the defendant is insufficient to carry off the currents of water. The court could not have granted these two prayers relating to the legal insufficiency of the evidence, because, each being in the nature of a demurrer to evidence, the truth of the evidence must have been assumed. The ninth prayer of the defend-

ant reads thus: "That if the jury shall believe from the evidence that the original construction of plaintiff's house, or alterations made in it by plaintiff, or the changes naturally incident to a house such as that of the plaintiff, or any of them, was sufficient to cause the injuries to the house, such as have been testified to, then, under the pleadings in this case, the plaintiff is not entitled to recover." This prayer was modified by the addition of the following words: "Unless the jury, after taking into consideration all the facts and circumstances of the case, as testified to by the witnesses, (including such defective construction and changes, if the jury shall so find,) shall determine from a preponderance of testimony that the injuries complained of were occasioned by the acts of the defendant as set forth in the plaintiff's first prayer." It will be observed that the prayer as offered did not put it to the jury to find that the original construction or the alterations in the house did actually cause the injury which forms the foundation for this action. The prayer as presented tended to mislead the jury. Moreover, in this case there was another independent and efficient cause which might have been productive of the injury, and the court very properly modified the instruction so as to bring that cause under consideration by the jury. *Railroad Co. v. Reaney*, 42 Md. 136.

Finding no error in any of the rulings of the learned judge in the court below, the judgment should be affirmed.

### HITCHINS *et al.* v. MAYOR, ETC., OF FROSTBURG.

(Court of Appeals of Maryland. December 15, 1887.)

#### 1. MUNICIPAL CORPORATIONS—CONSTRUCTION OF SEWERS—LIABILITY FOR NEGLIGENCE.

A municipal corporation invested by its charter with authority to open, grade, and pave streets, and construct such gutters and sewers as in its judgment the public convenience requires, although not compellable to exercise its powers, must, if it undertakes to make improvements, adopt reasonable plans, and is liable for any negligence or unskillfulness in the execution or construction of the work whereby the property of private persons is injured.<sup>1</sup>

#### 2. SAME—INSTRUCTIONS.

In a suit against a municipal corporation for damages for the overflow of water into plaintiffs' cellar from a sewer or culvert insufficient to carry off the water flowing to it from gutters constructed by defendant along streets of a steep grade, defendant tendered evidence to show that the overflow was due to the deepening of plaintiffs' cellar, and the court instructed the jury that plaintiffs could not recover, notwithstanding that the grade of the streets, and the insufficient size of the sewer or culvert, caused the overflow. *Held* error, in the face of evidence that the overflow would not have occurred but for those causes.

#### 3. SAME.

An instruction requested by plaintiffs upon the law applicable to the case, abstractly correct so far as it went, but omitting any reference to evidence tendered by plaintiffs that defendant had for years had notice of the defective condition of the sewer, or to defendant's evidence as to the deepening of the cellar, *held*, properly refused.

#### 4. SAME.

The court instructed the jury that plaintiffs could not recover, notwithstanding the negligent or defective construction of the sewer or culvert, "provided the construction of the culvert did not place or leave the property in a worse condition than if no culvert had been made at all." *Held* error.

#### 5. TRIAL—READING PLEADINGS TO JURY.

After the rulings of the court upon the prayers for instructions, counsel proposed to read the declaration to the jury, for the purpose of calling their attention to the testimony in the case, and of arguing that it supported the allegations in the declaration, and that plaintiffs were therefore entitled to recover, defendants not having demurred. *Held* that, as such a step would constitute an appeal from the court to the jury, the court properly refused to permit it.

<sup>1</sup> Concerning the liability of municipal corporations for negligence in the construction of sewers, see *Rice v. City of Evansville*, (Ind.) 9 N. E. Rep. 189, and note; *City of Denver v. Rhodes*, (Colo.) 13 Pac. Rep. 729; *Loughran v. City of Des Moines*, (Iowa), 34 N. W. Rep. 172; *Defer v. City of Detroit*, (Mich.) 34 N. W. Rep. 660; *City of Terre Haute v. Hudnut*, (Ind.) 13 N. E. Rep. 636.

6. SAME—DISCRETION OF COURT—REFUSAL TO PERMIT JURY TO TAKE PLEADINGS.

Whether the jury should take with them into the jury-room the pleadings in a cause is a matter entirely within the discretion of the trial court, and a refusal to permit them to do so is not the subject of review on appeal.

Appeal from circuit court, Alleghany county.

Action by Hitchins Bros. against the mayor and city council of Frostburg to recover damages caused by the backing and overflow of water, mud, and *debris* upon plaintiffs' property from a badly constructed and insufficient underground sewer or culvert in the town of Frostburg. Verdict for defendant. Plaintiffs appeal.

*Wm. Brace*, for appellants. *Wm. Detecmon* and *Ferd. Williams*, for appellee.

ALVEY, J. This action was brought to recover damages alleged to have been suffered by reason of the backing and overflow of water, mud, etc., upon the property of the plaintiffs, caused, as it is alleged, by a badly constructed and insufficient underground sewer, in the town of Frostburg. It is alleged that, in the grading of two of the streets of the town, the surface water was diverted from its natural course and flow, and collected into artificial drains or gutters in large volumes, and thereby caused to flow to a point in Bowery street opposite and near to the property of the plaintiffs, on the north side of that street, where the defendant caused to be constructed a sewer or culvert under and across Bowery street, by which such water was designed to be carried off, and emptied on the south side of said street; but, by reason of the negligent, unskillful, and defective construction and maintenance of such culvert, the same was insufficient, and failed to carry off the water conducted to the mouth thereof, and consequently the water and *debris* so collected and conducted was backed up, and made to overflow upon the property of the plaintiffs, thereby causing great injury. The case was tried upon the general issue plea of not guilty. By the charter of the town, full authority is conferred upon the mayor and councilmen to open, grade, and pave streets, and to construct such gutters and sewers as in their judgment the public convenience may require, and to repair the same whenever needed. They are also empowered to remove all nuisances and obstructions from the streets, and they are clothed with power to pass all such ordinances as may be deemed beneficial to the town, and necessary for the safety and protection of the persons and property of the inhabitants thereof. Acts 1870, c. 77; 1878, c. 255. The evidence shows that the town of Frostburg is built on the slope of a mountain, and the grades of its streets are in many places, and in different directions, quite steep. Charles street has a heavy down grade to the point where it joins or intersects Bowery street, and the latter has a considerable ascent in both directions, east and west, from the point where such streets join at right angles. Artificial gutters have been made on the north side of Bowery street, and on the east side of Charles street, whereby the surface water, which flows on both streets in large quantities during heavy rain-falls, is collected, and made to flow in the artificial gutters to the mouth of the sewer constructed diagonally across Bowery street, at the junction of Bowery and Charles streets. It is shown by the proof on the part of the plaintiffs, and, indeed, not controverted by the defendant, that this sewer or culvert was not of sufficient capacity, even if it had been otherwise well constructed, to carry off the water frequently flowing to it; but that, according to the proof offered by the plaintiffs, it was so unskillfully, negligently, and defectively constructed that the flow of water was obstructed, and consequently dammed up, and made to overflow the adjoining premises of the plaintiffs, sometimes to the depth of two feet or more, carrying dirt and *debris* upon the same, thereby doing serious damage to the property. Proof was also adduced to show that the defendant was for several years before suit brought well aware of the defective

and insufficient condition of the sewer, and of the injury suffered therefrom by the plaintiffs, but that it had failed to take any steps to remedy the defect. On the part of the defendant, proof was given to controvert, in several important particulars, the evidence on the part of the plaintiffs. The defendant also offered proof to show that the prior owner of the plaintiffs' property cut down and lowered the floor of the cellar of the house, and removed the earth between the house and the street, so that, when the water was raised a few inches in the gutter on the street, it ran into the cellar or basement of the house. This, however, was controverted by testimony for the plaintiffs. Upon the whole evidence, both parties applied to the court for instructions to the jury; but, of the prayers offered, the one single prayer by the plaintiffs, and all those by the defendant, except the first and fourth, were rejected. It was, therefore, upon the first and fourth prayers of the defendant, given as instructions, that the case was placed before the jury. The plaintiffs objected to the refusal to grant their one prayer, and to the granting of the two prayers on the part of the defendant. And this court is now called upon to determine whether there was error, in this ruling upon the prayers, committed by the court below.

Before proceeding to notice particularly the prayers under review, we deem it proper to state the general doctrine of the law upon the subject, as we find it laid down by the most approved authorities. How far the common law, independently of the special provisions of the statute incorporating the defendant, would furnish a remedy against a municipality for an injury such as that complained of here, is a question not necessarily involved in this case; for as we have seen, the statute, with a view to the improvement and benefit of the town, confers large powers upon the mayor and councilmen with respect to streets, drains, sewers, etc., and also power to remove and prevent nuisances. It is out of these powers, and the manner of their exercise, and the duty resulting therefrom, that the liability here insisted upon arises to the plaintiffs, if it can be maintained at all, in respect to the facts of the case, as we have stated them. In *Cooley*, Const. Lim. 248, it is laid down as the result of the decisions upon the subject that the grant by the state to the municipality of a portion of its sovereign powers, and their acceptance for these beneficial purposes, is regarded as raising an implied promise, on the part of the corporation, to perform the corporate duties; and this implied contract, made with the sovereign power, inures to the benefit of every individual interested in its performance. In this respect these corporations are looked upon as occupying the same position as private corporations, which, having accepted a valuable franchise, on condition of the performance of certain public duties, are held to contract by the acceptance for the performance of these duties. In the case of public corporations, however, the liability is contingent on the law, affording the means of performing the duty, which in some cases, by reason of restrictions upon the power of taxation, they might not possess. But, assuming the corporation to be clothed with sufficient power by the charter to that end, the liability of a city or village, vested with control of its streets, for any neglect to keep them in repair, or for any improper construction, has been determined in many cases. And a similar liability would exist in other cases where the same reasons would be applicable. In support of this text, the learned author refers to a number of cases; and the principle stated by him is in accord with the decisions of this court in the case of *Baltimore City v. Marriott*, 9 Md. 160, and the recent case of *Taylor v. Cumberland*, 64 Md. 68. And on the next succeeding page of the author just cited he says: "In regard to all those powers which are conferred upon the corporation, not for the benefit of the general public, but of the corporations, as to construct works to supply a city with water, or gas-works, or sewers, and the like, the corporation is held to a still more strict liability, and is made to respond in damages to the parties injured by the negligent manner

in which the work is constructed or guarded," etc. But, notwithstanding this duty and liability of the municipality in respect to powers delegated, there is a class of powers, defined as discretionary or *quasi* judicial, which the corporate authorities cannot be compelled to execute; as, for instance, the opening, widening, or extension of streets, the adoption of a particular grade, or the adoption of any particular plan for improvement, and the like, unless the terms of the statute are imperative. But any particular plan that may be adopted must be a reasonable one, and the manner of its execution thence becomes, with respect to the rights of the citizen, a mere ministerial duty; and for any negligence or unskillfulness in the execution or construction of the work, whereby injury is inflicted upon private right, the municipality will be held responsible. This is the principle maintained by the great preponderance of authority; and there is nothing in the case of *City of Cumberland v. Willison*, 50 Md. 188, at all opposed to this principle, as would seem to be supposed by counsel for the defendant. In that case, the authority delegated to the corporation to grade and improve its streets was held to have been properly exercised, with no want of reasonable care and skill. It was not attempted to be shown that the injury complained of had been produced by the want of care and skill in the grading and draining of the street; and there was no question of negligence or want of skill raised in the case. But in the recent case of *Kranz v. Baltimore City*, 64 Md. 491, 2 Atl. Rep. 908, where the action was brought for injury sustained by a property holder, caused by obstructions in a sewer, and the overflow therefrom, upon the premises of the plaintiff, of water, mud, filth, etc., the result of the bad condition and want of repair of the sewer, this court held that the city was liable, as well for the consequences of the negligent failure to keep the sewer in repair, as for negligence and unskillfulness in actually making the repairs. And the general proposition was maintained that where a municipal corporation undertakes, in the discharge of its duties, to construct or repair such a work as a sewer or culvert, it is responsible for damage caused by the negligent, careless, or unskillful manner of performing the work; and 2 Dill. Mun. Corp. § 1049, is cited with approval. And in that same work, in section 1051, where the author sums up and states the results of the authorities upon the subject of municipal liability for injuries caused by surface water, the following among other propositions is formulated: "There is a municipal liability where the property of private persons is flooded, either directly or by water being set back, when this is the result of the negligent execution of the plan adopted for the construction of gutters, drains, culverts, or sewers, or of the negligent failure to keep the same in repair and free from obstruction; and this, whether the lots are below the grade of the streets or not." The cases, says Judge DILLON, support this proposition with great unanimity. Of the many cases cited by the author, we need only refer to those of *White Lead Co. v. Rochester*, 3 N. Y. 463; *Barton v. City of Syracuse*, 36 N. Y. 54; *Rowe v. Portsmouth*, 56 N. H. 291; and *Noonan v. City of Albany*, 79 N. Y. 470.

Now, with these general principles in view, we will turn to the prayers, which form the subject of the first exception by the plaintiffs. And, with respect to the one prayer offered by the plaintiffs, we think the court below was right in rejecting it. By that prayer the court was asked to instruct the jury that if they should find that the defendant built the culvert described by the witnesses, and that the same was intended to receive and carry off the surface water flowing through the gutters along Bowery and Charles streets in times of rain; and further find that such sewer or culvert was constructed in such careless, unskillful, and improper manner as, instead of carrying off such water, to cause the same to accumulate in large quantities at the upper end thereof, and from thence to flow back upon the property of the plaintiffs, and injure and damage the same,—then the plaintiffs were entitled to recover. This prayer would seem, as a general proposition, to be quite correct, as far

as it goes; but in view of the evidence in the case, and to avoid misleading the jury, it ought to have gone further, and made reference to the evidence on the part of the defendant, whereby it was sought to show that, by cutting down the cellar floor of the plaintiffs' house, the water was in fact let in from the gutter on Bowery street, which did the injury complained of, and that such injury, therefore, was not caused by any fault of the defendant in the construction or repair of the sewer; for if it be true that the injury suffered was in fact produced by water thus let in from the gutter, or in any other way than the backing and overflow of the water and *debris* from the mouth of the sewer, caused by the obstruction to its natural flow through such sewer, there would be no ground for recovery, either upon the allegations of the declaration, or the proof produced on the trial. But the prayer is defective in another particular: It wholly omits to submit to the jury to find whether the defendant had notice, either direct, or inferential by lapse of time, of the defective and insufficient condition of the sewer and the injury resulting therefrom. *Kranz v. Baltimore City*, 64 Md. 491, 2 Atl. Rep. 908. It is clear, therefore, that there was no error in rejecting the prayer offered by the plaintiffs.

But we think there was error in granting the prayers of the defendant. The first of these prayers, as construed by the court, in the course of the argument of counsel to the jury, is based upon the theory that the plaintiffs could not recover, notwithstanding the jury might find from the evidence that the surface water was diverted from its natural flow by the elevation and improvement of the streets, and by the artificial gutters and drains, whereby such surface water was collected in volume, and conducted to the mouth of the sewer opposite the adjoining property of the plaintiffs, whence it could not escape, except by flowing over the premises of the plaintiffs, "if the jury should find that the cause of the back-flow of the water was the elevation of the street, and that said culvert was insufficient in size to carry off all of such water in times of heavy rain: provided, the construction of the culvert did not place or leave the said property in a worse condition than if no culvert had been made at all." To this proposition we cannot assent. Reason as well as authority would seem clearly to oppose it. We fully agree with Judge DILLON in the principle stated by him in section 1042, vol. 2, of his work on Municipal Corporations. In that section, after referring to the general doctrine that the municipality is not bound to protect from surface water those who may be so unfortunate as to own property below the level of the street, he says: "It is possible there may be no middle ground, but we are unable to assent to the doctrine that by reason of their control over streets, and the power to grade and improve them, the corporate authorities have the absolute and unconditional legal right intentionally to divert the water therefrom as a mode of protecting the streets, and to discharge it, by artificial means, in increased quantities, and with collected force and destructiveness, upon the property, perhaps improved and occupied, of the adjoining owner." Here, Bowery street runs east and west from the mouth of the sewer; and the declivity of the hill, along the side of which that street is made, is to the south. The natural flow of the surface water, therefore, as shown by the proof and the plat exhibited, is to the south. But this natural flow has been interrupted by the elevation of Bowery street, on the south side thereof, and the water has been concentrated in a gutter, and made to flow to the mouth of the sewer, opposite the property of the plaintiffs, on the north side of that street. If, then, it be true, as it clearly is, upon unquestionable authority, (*Lynch v. The Mayor*, 76 N. Y. 60; *Byrnes v. Cohoes*, 67 N. Y. 204; *O'Brien v. City of St. Paul*, 25 Minn. 333; *Inhabitants of West Orange v. Field*, 37 N. J. Eq. 600; *Ashley v. Port Huron*, 35 Mich. 296,) that the corporation cannot thus divert the flow of surface water, concentrate it in volume and force, and empty it upon private property, without becoming liable, it next follows that

there is a duty incumbent upon the corporation to provide, by adequate means, for passing off the water there concentrated in volume, so as to avoid doing damage to private property. The street may be properly graded, and the drains properly made, but the sewer made for the purpose of receiving and carrying off the water cannot be said to be skillfully and carefully constructed, or kept in repair, if, from any structural cause, it be insufficient to pass off the water flowing to it through the artificial channels provided. If it be true, as alleged and shown by the plaintiffs, that the surface water was gathered into artificial channels or gutters, and made to flow to the mouth of the sewer, where it was allowed to accumulate in large quantities, and thence flow back upon the property of the plaintiffs, this constituted a nuisance, and, as such, it was certainly the duty of the defendant to remove it, and for the neglect of such duty the defendant is liable. For, as was said by the court of appeals of New York in the case of *Noonan v. City of Albany*, 79 N. Y. 470, "a municipal corporation has no greater right than an individual to collect the surface water from its lands or streets into an artificial channel, and discharge it upon the land of another; nor has it any immunity from legal responsibility for creating or maintaining a nuisance." The second prayer granted on the part of the defendant is obnoxious to the same objection that applies to the first. The plaintiffs, and those under whom they claim, had clearly the right to the use and enjoyment of their property in any reasonable way, and for any reasonable purpose, and to make any alteration or new adaptation therein that they deemed proper, without thereby subjecting themselves to the loss of protection to their property from wrongful invasion by inundation or otherwise. Hence it was error to instruct the jury, upon certain enumerated facts, in respect to the lowering of the cellar floor, (as was done by granting this prayer,) "that the plaintiffs could not recover for any injury to said house caused by said inflow of surface water to such basement or cellar, notwithstanding the jury might find that the grade of said street, and the insufficient size of said culvert, caused the inflow of said surface water to said basement in time of heavy rain." If the injury complained of was sustained by reason of the backing of the water from the mouth of the culvert, where it had been brought in large quantities by artificial drains, and that such backing and overflow was caused by the defective and insufficient sewer or culvert, and would not have occurred but for that cause, then the fact that the floor of the plaintiffs' cellar had been lowered afforded no justification to the defendant for the defective and insufficient sewer. The cause of the injury was the fault of the defendant, and not of the plaintiffs.

In thus disposing of the two prayers granted for the defendant, we also dispose of the court's construction of the first prayer, as stated in the first exception. And, as to the question raised and stated in the fourth exception, we think the court was quite right in ruling as it did. There was no question before the jury as to the want of care or skill in the construction of the gutter or passage-way for the water along Charles street. Defects and unskillfulness in the construction of that gutter, or negligent failure to keep it in repair, are not alleged as substantive and independent causes of injury; nor was there any proof to show that injury was suffered from that cause.

The second and fifth exceptions present questions of practice. It appears by the second exception that after the court had ruled upon the prayers for instruction, and granted such as were approved, the counsel for the plaintiffs, in argument to the jury, proceeded to read the declaration. To this the counsel on the other side objected, and, upon inquiry by the court as to the purpose of reading the declaration to the jury, the counsel for the plaintiffs stated "that his purpose was to call the attention of the jury to the testimony in the case, and to apply such testimony to the allegations of the declaration, and to argue that said allegations, and each of them, were sustained by the evidence in the case, and therefore plaintiffs were entitled to recover, because defend-

ant had not demurred." The court would not permit the declaration to be read, and the plaintiffs excepted. This court is clearly of opinion that the action of the court below was entirely correct; otherwise, it would be simply an appeal from the court to the jury. If the jury could be induced to conclude that the allegations of the declaration were sustained by the proof, however inconsequential or immaterial, in a legal point of view, they might be, and notwithstanding the court may have instructed to the contrary of the plaintiffs' contention, upon the theory contended for here, the plaintiffs could recover. Such theory has no foundation in reason, principle, or practice. The instruction given for the guidance of the jury made no reference to the pleadings in the case, and therefore the jury were not required to look at the pleadings, to ascertain how they were to find.

In the fifth exception it is stated that at the conclusion of the argument, and when the jury were about to retire to consider of their verdict, the counsel for the plaintiffs asked that the jury be allowed to take with them to their room the declaration in the case. This request, upon objection by the defendant, was refused by the court, and the plaintiffs excepted. This refusal by the court, we think, forms no ground of exception by the plaintiffs. It is true, it is said by the late Mr. Evans, in his work on Maryland Practice, (page 400,) that, when the jury withdraw from the bar, "they have the right to take with them the pleadings in the cause, and the written directions of the court;" and this passage of the work was referred to in the opinion of this court with apparent approval, though not at all necessary to the decision, in the case of *Ingalls v. Crouch*, 35 Md. 296. In the case just mentioned it was not said or intimated that the practice was so established as to forbid the exercise of the discretion of the court below over the subject, and that the refusal to allow the pleadings to be taken by the jury was a subject of exception and review. On the contrary, there are many reasons for holding that the matter rests exclusively in the discretion of the court below. In any case where the court may suppose that the jury might be misled by the statements and allegations of the pleadings, it would certainly be proper that the pleadings be withheld from them. They are not supposed to be the best judges of the technical language of pleading, and able to determine when the allegations are or are not supported, in the contemplation of law. It is in this that the aid of the court is required, and the instructions of the court form the exclusive guide to the jury. If the instructions given, as in this case, make no reference to the pleading, even this court, on review, will not assume that the court below inspected the pleadings, and adjudged them sufficient to sustain the instructions. *Stockton v. Frey*, 4 Gill, 406; *Owings v. Jones*, 9 Md. 116. The issues to be tried are supposed to be fully explained to the jury at the bar, in the course of the trial, and therefore the jury are not left to grope through the technical verbiage of pleading to ascertain for themselves what issues they are required to determine. Whether they should take with them to their room the pleadings in any case is matter of discretion of the court below, and not the subject of review on appeal.

It follows, from what we have said in regard to the two prayers granted on the part of the defendant, that the judgment must be reversed, and a new trial awarded.

## BROUMEL v. RAYNER.

(Court of Appeals of Maryland. December 9, 1887.)

## 1 CONTRACTS—WAIVER OF STIPULATIONS—ENFORCEMENT OF OTHERS.

Plaintiff and defendant having purchased and partitioned between them a plat of land, entered into a contract to grade and pave certain streets upon it. The particular streets and the time within which the work was to be done upon each, were specified in distinct clauses of the contract. All the clauses except the last were tacitly waived, neither party having demanded their performance of the other. The street named in the last clause became a public nuisance, and plaintiff, having ineffectually called upon defendant to perform his part of the contract, graded and paved such portion of the street as passed through his own land, and sued defendant for breach of the contract. *Held*, that he was entitled to recover, notwithstanding the waiver of the prior stipulations, there being nothing in the contract making such stipulations conditions precedent.

## 2. SAME—MEASURE OF DAMAGES FOR BREACH.

In an action for breach of a contract between plaintiff and defendant, jointly to grade and pave a street, where plaintiff had requested defendant to perform his part of the contract, and, upon default, had done the work himself, the court allowed plaintiff, as damages, half the cost of grading and paving the street. *Held*, a proper measure of damages.

Appeal from superior court of Baltimore city.

Action by William S. Rayner against James Broumel, for damages for breach of contract to grade and pave a street. Verdict for plaintiff. Defendant appeals.

*Henry F. Garey*, for appellant. *B. Howard Haman*, for appellee.

**YELLOTT, J.** The parties to this suit had bought a tract of land in Baltimore county, near the limits of Baltimore city, and had executed a deed of partition dividing this land between them. Wishing to improve the property thus divided, they entered into a contract, dated November 9, 1874, in which they covenanted and agreed that they would grade and pave certain streets named, and particularly designated on a plat prepared for the purpose. These streets were to be graded and paved within specified and limited periods; or, in other words, one was to be graded and paved within a year, another within two years, and others within longer spaces of time named in distinct and separate clauses of said contract. The clause sued on, contains a stipulation that the parties shall, within six years, grade and pave Lanvale street, from Florence street to John street. It seems that there was a tacit waiver of the stipulations in regard to the other streets named in the contract, as none of these streets were graded and paved, and there is no proof that, as respects them, either party ever demanded of the other a performance of the covenants contained in the contract. But, when the time limited for the grading and paving of Lanvale street was about to expire, the appellee, who was plaintiff below, announced his readiness to comply with the obligations imposed upon him by the clause in the contract relating to this street, and required of the appellant performance of his part of said contract. The appellant refused to comply, and the appellee then proceeded to grade and pave one half of said street, the condition of which, as shown by the proof in this record, required such improvements to be made as speedily as possible. Having done this much of the work, the appellee instituted this action for the recovery of damages resulting from an alleged breach of the contract.

The plaintiff sued in *assumpsit*, and the declaration, besides the money counts, contained two other counts specially setting forth the contract and alleging the breaches. These two counts were demurred to, and the demurrer was overruled. The case was submitted to the court for determination, without the intervention of a jury. After the introduction of evidence of both

parties, the court was asked to pass upon certain legal propositions presented in the shape of prayers for instructions. The court rejected all the prayers offered, and filed its own opinion as a proper presentation of the legal principles applicable to the questions in controversy. The verdict and judgment being for the plaintiff, the defendant appealed.

If the opinion of the court is correct, the instructions asked for by the defendant were properly rejected, and there was no error committed in overruling the demurrer. It is apparent that the court was right in holding that the mutual waiver of antecedent stipulations did not impair the obligation of subsequent stipulations not waived, as there is nothing on the face of this contract which makes one stipulation a condition precedent to another. Whether a contract must be sued on as an entirety, or is divisible, and can become the foundation of separate suits, for the infraction of independent stipulations, depends on its terms; and, in order to arrive at a correct construction, due regard must be had to the intention of the contracting parties, as revealed by the language which they have employed and the subject-matter to which it has reference. *Brewster v. Frazier*, 32 Md. 302; *Ensworth v. Insurance Co.*, 1 Flip. 92. And undoubtedly the law is well settled in regard to the failure to perform distinct and independent stipulations. In such cases, there are as many causes of action as there are breaches. *Dugan v. Anderson*, 36 Md. 567; *Williams v. Hallett*, 2 Sawy. 263; *Faw v. Marsteller*, 2 Cranch, 24. And in *Perkins v. Hart*, 11 Wheat. 250, WASHINGTON, J., said: "Where the agreement embraces a number of distinct subjects, which admit of being separately executed and closed, it must be taken distributively, each subject being considered as forming the matter of a separate agreement, after it is so closed." In *Taylor v. Laird*, 1 Hurl. & N. 274, POLLOCK, C. B., determined that when there is a contract for an entire service, but the parties stipulate that payments for such service shall be made periodically, in fixed sums, a failure to make any one of these payments may become the foundation for a suit. Thus it is manifest that many suits may grow out of one contract. This principle has been recognized in all of the states. *Cunningham v. Morrell*, 10 Johns. 203; *Tompkins v. Elliot*, 5 Wend. 496; *Bean v. Atwater*, 4 Conn. 4; *Weiler v. Henarie*, 13 Pac. Rep. 614.

When the contract executed by the parties to this appeal is examined, it at once becomes apparent that it is divisible, and that its stipulations are independent of each other, and must be taken distributively. The work on each street was to be performed at a different period. One street was to be graded and paved within two years, another within three, another within four; and Lanvale street was to be graded and paved within six years from the date of the agreement. The stipulation in the contract, in regard to the grading and paving of Lanvale street, being independent of other stipulations relating to the improvement of other streets, it is clear that the plaintiff could have instituted and maintained an action founded on the refusal of the defendant to comply with the obligation imposed by this stipulation. But the plaintiff was compelled to grade and pave a portion of said street extending through his own property because the condition of this part of the street was such that it had become a public nuisance, and he was liable to an indictment. He expended a sum sufficient to put this part of the street in good condition by paving and grading, and the court, sitting as a jury, allowed him, in damages, one-half of the amount of money so expended. The rule for the measurement of damages, thus adopted by the court, was a sound one, and sanctioned by adjudication. In *Wicker v. Hoppock*, 6 Wall. 94, the supreme court said: "The general rule is that when a wrong has been done, and the law gives a remedy, the compensation should be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the same situation he would have occupied if the wrong had not been committed." And in *Abbott v. Gatch*, 13 Md. 332.

there is a recognition by this court of the same standard for the measurement of damages.

From what has been said, it follows that there was no error in any of the rulings of the court below, and its judgment should therefore be affirmed.

SWIFT v. WILLIAMS *et al.*

WILLIAMS *et al.* v. MANUFACTURERS' NAT. BANK *et al.*

(Court of Appeals of Maryland. January 5, 1888.)

1. TRUSTS—MISAPPROPRIATION OF FUNDS—NOTICE OF, BY BANK.

A trustee, authorized to receive trust money in his co-trustee's absence, indorsed a check payable to both, as if he were sole trustee, and it was credited to him as such, in bank. He then gave S. a check on this fund, to pay a debt which he owed in another capacity. The trustee check was refused, when presented to the drawee for payment, because indorsed by but one trustee. The trustee, by agreement with his bank, then added his co-trustee's name to the indorsement of the trustee check, and to the signature of the check to S., and opened the account in the joint trustees' names. *Held*, that the trustee's bank had notice of the misappropriation of the trust funds, and that, by paying the check to S., it became a party to the wrong, and liable therefor.

2. SAME—PAYMENT OF DEBT WITH TRUST FUNDS—LIABILITY OF CREDITOR.

A trustee paid with trust money a debt which he owed in another capacity. *Held*, that the creditor receiving such payment is liable to the trust-estate for the amount thereof, and it is immaterial whether or not he had notice that the trustee was thus misappropriating the trust funds.

Appeal from circuit court of Baltimore city.

Bill in chancery, filed by E. Calvin Williams and Joseph T. Moore, trustees, against I. Parker Veazey, the Manufacturers' National Bank, and William H. Swift, to recover certain trust funds, alleged to have been misapplied by I. Parker Veazey, a former trustee, in whose place Joseph T. Moore had been substituted. A decree was entered, declaring Veazey and Swift liable, and dismissing the bill as to the bank. Swift appeals from the decree against him, and the trustees appeal from the decree, so far as it dismisses the bill against the bank.

*I. Nevitt Steele, Sebastian Brown, and Wm. H. Brune, Jr., for appellants. John P. Poe, George R. Gott, and Duncan Veazey, for appellee.*

IRVING, J. This is a suit in equity, brought by E. Calvin Williams and Joseph T. Moore, trustees, under decrees of the circuit court of Baltimore city, in the case of *Robert M. Bull and others* against *George W. Bull and others*, to recover certain funds of their trust alleged to have been misapplied by I. Parker Veazey, a former trustee, who has been removed, and in whose place Joseph T. Moore has been appointed, by order of court, as co-trustee with Mr. Williams. About the main facts in the case there is no dispute. By the first decree in the case, Messrs. Williams and Veazey were appointed trustees for the sale of the real estate mentioned in the proceedings, a sale was effected, and reported to the court. Exceptions to that sale were pending, when Mr. Williams, being out of health, and desirous of sailing for Europe, so represented to the court; and for the purpose of "avoiding any delay in consummating said sale, and the distribution of the proceeds thereof, under a proper account to be stated by the auditor, so far as the same may not be objected to, petitioned the court to allow I. Parker Veazey, his co-trustee, to receive the purchase money from the purchaser, and, in all respects, to act as fully during the absence of the petitioner as if both were present and acting." Upon that petition, the circuit court passed this order: "Ordered by the circuit court for Baltimore city, this fourteenth of July, 1886, upon the foregoing petition, that I. Parker Veazey, one of the trustees appointed by the decree heretofore passed in this cause, be and he is hereby authorized to receive from John C. C. Justis, the purchaser at the sale hereto-

fore reported to this court, the full amount of the purchase money, notwithstanding the absence of his co-trustee; and in all respects to act as fully, in all matters pertaining to said trust, as if both were present and acting. This petition stated that both trustees had qualified, by each giving a separate bond." After the passage of that order, the exceptions were disposed of, and the sale was ratified. The purchaser, John C. C. Justis, immediately proceeded to pay for the property he had bought. To do so, Messrs. Justis & Armiger drew a check on the National Mechanics' Bank for \$28,121.55, the amount of the purchase money, which was made payable to the order of John C. C. Justis. This check Justis indorsed "To the order of E. Calvin Williams and I. Parker Veazey, Trustees," adding, in this indorsement, that it was "in full settlement upon property 192 and 194, W. Baltimore street;" and Veazey conveyed the property to the purchaser. Although this check was indorsed so as to make it payable to the order of both trustees, Veazey solely indorsed it, "I. Parker Veazey, Trustee, for deposit," to the Manufacturers' National Bank. Thereupon the Manufacturers' National Bank opened an account with Veazey, as if sole trustee, and passed the amount of that check to his credit as such trustee. On the same day, viz., fifteenth July, 1886, Veazey, who was sole trustee of the Gazette Publishing Company, gave his check, signed "I. Parker Veazey, Trustee," on the Manufacturers' National Bank, to E. O. Hinkley for \$14,144.82, in payment of a preferred debt due William H. Swift, from Veazey, as trustee of the Gazette Publishing Company, under an order of the court so awarding. Having received this check, E. O. Hinkley, who was the attorney of Swift, for the collection of that claim, handed Veazey a release of Swift's claim against the trust estate of the Gazette Publishing Company. This last-mentioned check was deposited by Hinkley in the Union Bank, to the credit of Hinkley and Morris, and the same was entered to their credit on the books of the bank, and the bank-book of Hinkley and Morris. Both the Justis check and the Hinkley check went through the clearing-house at the same time, on the sixteenth of July, 1886, and the balance due the banks from each other was accordingly ascertained; but when the Justis check on the Mechanics' Bank actually came to that bank it was rejected, and payment was refused by its president, because it was indorsed to the Manufacturers' Bank by the order of Veazey, trustee, alone; whereas the indorsement of Justis was specifically made "To the order of E. Calvin Williams and I. Parker Veazey, Trustees." The Manufacturers' Bank being so notified, it notified the Union Bank that Veazey's check to Hinkley was not good, but added it would probably be made right during the day. The Union Bank, in turn, notified Hinkley, who at once gave his check to cancel the credit he had received for it, and the check of Veazey was surrendered to him, and he took it, and went to look for Veazey, to get an explanation of the matter from him. Having found Veazey, he was assured it was all right, and they together went down the street with the purpose of going to the Manufacturers' National Bank, to see about the matter. On their way, Mr. Veazey saw Mr. Hines, the cashier of that bank, on the street, and said, "That is the man I want to see," and left Hinkley, and went to him. Some conversation was held with Hines, when he and Veazey came up to Hinkley, who had not heard them talk. Upon reaching Hinkley, Veazey said to him, in the presence of Hines: "It is all right," to which Hines assented; and Hinkley was directed, with Hines' knowledge and assent, to redeposit the check in the Union Bank, which he immediately did. When he did so, his check, for the correction of the supposed erroneous credit to Hinkley and Morris' account, was returned to him, and no change was made in the bank's books or his; but both were left as when the check was first deposited, as the entries had not as yet been disturbed. The arrangement effected between Hines and Veazey, in that interview, which Hinkley did not hear, was that Veazey would alter the signature to the check by appending Mr. Williams' name; and that

the deposit should be so changed as to stand in the name of both trustees, so that the check could be properly charged to that fund. Hines said he supposed that he was bound by the court's order to recognize Veazey alone, in the indorsement of the check on the Mechanics' Bank; and he produced the copy of that order which Veazey left when he deposited the check, to the president of the Mechanics' Bank; but Mr. Baldwin, its president, did not take the same view, and refused to honor the check in that shape. Hines then gave the Mechanics' Bank a cashier's check on his bank, to cancel the allowance of the Justis check against the Mechanics' Bank at the clearing-house; and Mr. Justis took a cashier's check from the Mechanics' Bank for the same amount as the rejected check, which he deposited in the Manufacturers' Bank, to the joint credit of Williams and Veazey, trustees, and took up the other check.

There was already an account opened in that bank to the joint credit of Williams and Veazey, trustees, by the deposit of \$500 on the fourth of June, 1886, and, strangely enough, the cashier, Hines, says he cannot explain why this account was simply entered on the books as Veazey's; and the deposit of the fourth of June of \$500 was added to the new account opened in the joint names of Williams and Veazey, trustees, by the Justis deposit. Veazey closed, also, the account in his name as sole trustee by his check to the bank. The Union Bank was notified the check was all right, and it notified Mr. Hinkley, who sent his client his money. When the Manufacturers' Bank sent word to the Union Bank that Mr. Veazey's check was all right and good, the Hinkley check from Veazey was returned by the messenger to the Manufacturers' Bank, where, as he had promised Hines he would do, Veazey added the name "E. Calvin Williams, Trustee, per I. Parker Veazey," as a drawee of the check to Mr. Hinkley; so that it could be carried as a formally correct credit to the bank as a disbursement from the Bull trust fund. In this way, on the sixteenth day of July, 1886, the misapplication of more than \$14,000 of the Bull estate trust funds was accomplished, and the same was appropriated to the payment of a claim against the Gazette Publishing Company, which had no connection whatever with the Bull estate.

In September, 1886, when Mr. Williams returned from his trip abroad, the breach of trust by his co-trustee was discovered. He reported the same to the court, and Mr. Veazey was removed, and the appellant Moore was appointed in his place. The trustees were then authorized, by order of court, to institute such proceedings as they might be advised were necessary and proper for the recovery of the fund which had been improperly paid away and misapplied. This bill, which was filed against Veazey, the Manufacturers' National Bank, and William H. Swift, alleged the entire insolvency of Veazey, and his inability to make good the funds which he had misappropriated, and charged that both the Manufacturers' National Bank and William H. Swift were answerable to the trustees for the amount of the Bull estate which the former had paid out on the check of Veazey, and the latter had received. The decree of the circuit court held Veazey and Swift liable, and declared Veazey's primary liability; but it dismissed the bill as against the Manufacturers' National Bank. Swift appealed from the decree against him, and the trustees appealed from the decree so far as it dismissed the bill as against the bank.

The appeals were heard together, and the views of the respective counsel were presented with great clearness and force. Having examined all the authorities cited by counsel, and very many which were not cited by them, we have reached the conclusion that the learned judge who decided the case below erred in dismissing the bill as against the Manufacturers' National Bank, but properly held the other defendants bound. So far as the Bull estate is concerned, and its trustees, we think the Manufacturers' National Bank is equally bound to see the fund of that estate, improperly appropriated through its aid, made good. The question in this case is not one of primary or secondary lia-

bility, but whether all who have participated in any degree or way in bringing about the wrong should not be compelled to see it right. Therefore, for the purposes of this decision, it is not necessary to decide, and we do not determine, as between the Manufacturers' Bank and Mr. Swift, who was most in fault, or on whom the loss must ultimately fall; the rule being, as laid down by the master of the rolls, in *Wilson v. Moore*, 1 Mylne & K. 146, that "all parties to a breach of trust are equally liable, and there is no primary liability." It is the well-settled law that whenever a party has obtained money which does not equitably belong to him, and which he cannot in good conscience retain as against the person who is equitably entitled to it, he will be held as holding it for such person who is rightfully entitled to it. If it be trust property, equity impresses the trust upon it in the hands of the transferee, and "renders him liable to all the remedies which may be proper for enforcing the rights of the beneficiary. This rule forms the protection and safeguard of the rights of the beneficiaries in all kinds of trust, and enables trust property to be followed into the hands of all subsequent holders who are not in the position of *bona fide* purchasers for value without notice." 1 Perry, Trusts, § 217 *et seq.*; 2 Pom. Eq. Jur. 620, 621; *George's Creek Case*, 59 Md. 255.

Swift cannot be regarded as a "*bona fide* purchaser without notice." He was the creditor of the Gazette Publishing Company, and of its funds in the hands of Veazey, its trustee. As such creditor, he received payment from funds belonging to the Bull estate and from none belonging to the publishing company. The general rule is that an antecedent debt does not form a valuable consideration, in a case of this kind, so as to make the creditor who is paid from wrong funds a purchaser without notice. 2 Pom. Eq. Jur. 622, and authorities cited. When the property is not "ear-marked," as where the payment is made in money proper, it has been held that the taker without notice gets it discharged of the trust. *Stephens v. Board of Education*, 79 N. Y. 183; 2 Pom. Eq. Jur. 622. But if that be the law, which we do not decide, this case is free from the difficulty of identification on which it must rest. The payment was made by check on a fund not liable for the debt it paid. That check is traced back, with absolute certainty, into the trust account of the Bull trustees, where the bank credits itself with its payment. That trust money may be followed into any hands where it has gone erroneously was not questioned, as we understood Swift's counsel; but it was contended that inasmuch as this check was given by Veazey, as sole trustee, as he was of the Gazette Company, and was so received by Hinkley for Swift, and deposited in the Union Bank, and in that form was paid to the Union Bank by the Manufacturers' Bank on which it was drawn, and inasmuch as Hinkley did not know it was not the money of Swift's debtor in Veazey's hands, that the Manufacturers' National Bank must be held as having admitted Veazey had such money in their hands, though in fact he did not have; and that, in paying the check as drawn, the bank must be held to have paid it with its own money, as if it was really Veazey's debtor through proper deposit; and, as a consequence, that Swift cannot be made to return the money so received. As respects this suit, that argument is more ingenious than cogent. If the bank had promptly recognized its mistake in undesignedly, yet culpably, aiding in the breach of trust, and had restored the money to the Bull trust, and this was its suit against Swift for reimbursement; or, if Swift had repaid the money, and was suing the bank, that argument might be regarded as more applicable and more forcible; and then the question also would arise whether Hinkley, as the attorney of Swift, had enough information to put him on inquiry and charge Swift with notice. But as this is a suit for money which has been paid to Swift from an estate against which he had no claim, and from which he was not entitled to be paid, and which he has really received in mistake, so far as he is concerned, it seems to us to be wholly immaterial whether he or his counsel had

actual or constructive notice of the fact that the money paid was not such money as he was entitled to have paid to him. We need not, therefore, now consider the effect of the statement of Mr. Hines as to what he said to Hinkley at the Union Bank, on the sixteenth of July, which Hinkley does not remember, and in fact denies, touching the change of the conditions of the deposit in the Manufacturers' Bank. Whatever question there might be upon that testimony, whether Swift should be visited with the consequences of statements his counsel did not understand, if made, and did not remember, and be charged with knowledge, or that which is equivalent to it, negligence after being put on inquiry, in our view we are relieved from considering it; for we do not think, as we have already said, that, as between Swift and the representatives of the Bull trust, it is material whether he had knowledge or not. If, as between him and the Manufacturers' Bank, the latter would be estopped, as his counsel contends, from saying it was not a fund he was entitled to retain, still, as against the representatives of the Bull trust, he cannot be allowed to retain that which was paid to him, in reality, from a fund on which he had no claim, and which was charged against that fund and no other, and was not intended by the drawee of the check to be charged against any other fund. Swift will be in no worse position than if it had not been paid him; for although he may have given a release to Veazey, as trustee of the Gazette Publishing Company, if the consideration for that release fails he is remitted to his position before executing it, with all the remedies open to him on Veazey's bond as trustee of the Gazette Publishing Company. Whatever the law may be as between him and the bank, in this suit he must be treated as if the bank was as insolvent as the defaulting trustee is. The Bull trust must not suffer for his benefit.

The bank, by its counsel, contends that Swift has received money that does not belong to him, which he should return; and that the bank is in no way answerable for it, and has been properly exonerated by the decree under review. By dwelling upon the equitable aspect of the case, as against Swift, and the law in such case as against him, the real participation of the bank, in accomplishing the wrong to the Bull estate, has been passed out of view. Reliance also has been placed upon the difference which the supreme court says, in *Bank v. Insurance Co.*, 104 U. S. 63, exists between a trust fund, ordinarily held as such, and a trust fund kept in bank by the trustee depositor to be checked against. The court then says: "The contract between the bank and the depositor, is that the bank will pay according to the checks of the latter, and, when drawn in proper form, the bank is bound to presume that the trustee is in the course of lawfully performing his duty, and to honor them accordingly." This is, and ought to be, the law; but the facts of this case do not bring the bank within its protection, and it is not entitled to claim exemption from liability under its operation. The very check with which this account was opened was indorsed to the bank by one only of two trustees, to whom, by special indorsement, it was made payable. An account was opened in the name of Veazey, as if sole trustee, with this check, when, at that very time, an account was already standing on the bank's books in favor of both trustees jointly, by a deposit of \$500 on the fourth of June preceding. The bank was thus notified, in the inception of the transaction, that the funds deposited were trust funds of which two trustees were the custodians and managers. It is true that, at the time of the deposit, Mr. Veazey presented to the bank a copy of the court's order, already recited, and the bank, no doubt, as its cashier testifies he did, relied on that order as binding on the bank. That order, however, gave Veazey no authority to pay away the funds; and it and the check notified the bank that the money paid by the check was purchase money for a trust-estate, which, in the nature of things, could not be immediately paid away. And when the National Mechanics' Bank refused to honor the check, as indorsed, notwithstanding the

court's order, which was also exhibited to its president, the Manufacturers' National Bank seemed to see its error, and caused the deposit to be changed on its books. The account which was opened in the name of Veazey as trustee was closed, as already stated, by his check for the full amount of the Justis check; and this was done, notwithstanding there then was, to the knowledge of both Veazey and the bank, an outstanding check in favor of Mr. Hinkley for more than half of that account as it then stood charged, and which could properly only be charged up against the unchanged account. Still, the Union Bank was notified that this outstanding check in favor of Mr. Hinkley, and which it held, would be paid. It in turn, as stated heretofore, notified Mr. Hinkley to the same effect, and he paid his client.

The Manufacturers' National Bank knew that this Hinkley check, drawn by Veazey alone, could not properly be paid from the joint deposit, or the Bull fund, and so understanding paid it, and then had it altered by the addition of Mr. Williams' name to the check "per Veazey, Trustee," for the express purpose of enabling the same to be charged to the joint-trustee account. Being altered, it was then charged up against the Bull fund, in the hands of both trustees, as the new account opened stood on the bank's books. Upon what principle the bank is to be exculpated from participation in this transaction, and exonerated from liability because of it, we do not see. The learned judge has filed no opinion, and we do not know by what reasoning he reached his decision, in which we cannot concur. We do not suppose that the officers of the bank willfully participated in doing this wrong, and we did not understand counsel so to insist; but that they were guilty of such negligence in failing to make inquiry, and in not following up the matter and learning the true state of facts, as it would have done had they heeded the notice which was given them that there was something irregular being done, as to charge them with the knowledge of that which would have been obtained by proper diligence, cannot be doubted.

The conclusions we have reached, after the most thorough examination into the authorities, seem to be fully sustained by them. That the check having the signature of but one trustee, where the fund deposited belonged to several, is not good as against the fund, is very clear. In Grant on Banking and Bankers (page 65) it is laid down that in such case each trustee must sign, or the check may be refused payment; and the banker will not be discharged if he does pay it, unless subsequent to the deposit the drawer becomes solely entitled. Morse on Banking (page 290) says: "If the deposit is placed to the credit of divers persons as trustees, the signature of all is indispensable to the validity of the check." In *Innes v. Stephenson*, 1 Moody & R. 145, Lord TENNENT says: "To hold otherwise would defeat the very object of paying the money in jointly." *Husband v. Davis*, 10 C. B. 645, and *Stone v. Marsh*, Ryan & M. 364, may be cited for the same principle. In this case, not only was the absence of one trustee's name notice to the bank that something might be wrong, but, without heeding it, the bank actually aided in perfecting the wrong, by having the additional name added after the check, in its original form, was paid. Authorities are abundant to show that the addition of a new name as maker, without assent, changes its character, and discharges that one not assenting. *Lunt v. Silver*, 5 Mo. App. 186; *Diets v. Harder*, 72 Ind. 208; *Wood v. Stelle*, 6 Wall. 80. Without explaining to the Union Bank what the difficulty was, it informed that bank that the check, as passed to it with none but Veazey's name signed to it, was good, and that bank and its depositor acted on that information; and then the Manufacturers' Bank caused its form and signature to be changed, thus making the check an entirely different thing from what it was when given to Mr. Hinkley, and deposited by him in his bank to his credit. Had it been in the shape it bore when the bank charged the account of Veazey and Williams with it, it cannot be doubted it would have been refused by Hinkley, and the misapplication

would not have been effected. In the face of all that the bank had before the eyes of its officers, its culpable negligence cannot be doubted.

In *Bank v. Bank*, 30 Md. 27, this court decided that the law imposed on the bank the obligation of certainly knowing the signature of its depositors appended to checks drawn on the bank, and if it paid a check the signature to which was forged, as was done in that case, the bank must bear the loss, unless it was misled into the error by the conduct of another, amounting to *mala fides*, by which the loss might possibly be shifted onto the misleading person. If the bank is bound to know the signature is genuine, it must also be bound to know, when the word "trustee" is added, that the drawer is such trustee as is authorized to draw that check. This would seem to be a necessary corollary of the other rule. In *Bank v. Lange*, 51 Md. 144, this court decided that the addition of the word "trustee" after a name gave notice of a trust, and approved the law laid down in *Shaw v. Spencer*, 100 Mass. 382, when it was decided that the addition of the word "trustee," in certain stock certificates, gave notice that they were held in trust, and put a party taking the same upon notice, and imposed on him the duty of inquiry, from which, if he abstained, he neglected at his peril. If it be so in such case, there is no possible reason why the same rule should not apply to the addition of "trustee" after the signature to a check, and should not put upon the party honoring the same the imperative duty of being certain that the check has been properly drawn against the fund from which he pays it. We do not mean by this to say that if Mr. Veazey had sole-trustee funds on deposit, against which that check appeared to be drawn, the bank would be bound to know that Mr. Hinkley properly represented a claim against that estate; for, in that case, the check would be in proper form, and would fall under the distinction noted by Justice MATTHEWS in 104 U. S., already cited, here was a check signed by one trustee only, when the bank knew he had no sole-trustee funds then, and that the account in the bank which had been opened on that theory was opened in error; and that caused a proper account in favor of both trustees to be opened; and yet the bank failed to inquire whether this check, given by the drawer as sole trustee, was properly chargeable to that fund as correctly opened, but assuming that it was, paid it as drawn, and then caused it to be changed, by the addition of another signature, so as to become a proper charge in form against that fund, as it was not in the form in which it was given and really paid. Being notified that trust funds were being paid away through that check, and that the check was not in form to be a proper charge against the fund, (they knew it was to be paid from according to the intention of Veazey,) they cannot escape the consequences of their neglect to inquire into the matter, which resulted in the misappropriation, which, it cannot be doubted, would never have been accomplished if the bank had done its whole duty.

Reference has already been made to the order of court, on which the cashier said the bank was relying as obligatory on it. It was brought to it by the person making the deposit, and, naturally enough, perhaps, did mislead the officers of the bank. But it was not an order affecting the bank in any way. It did not, as before stated, direct the disbursement of any of the money it authorized Veazey to receive. It is an unbending rule in equity, of very ancient authority in this state, that a trustee cannot dispose of trust funds in his hands without the previous and express sanction of the court. *Tilly v. Tilly*, 2 Bland, 425. This the bank was bound to know, and must be presumed to know. *Shaw v. Spencer*, 100 Mass. 382; *Lang's Case*, 51 Md. 144. The petition upon which that order was passed, and of which the order gave notice, asked that the disposal be made according to an audit to be made, and which should not be objected to. The bank certainly failed to follow up the inquiry to which it was most suggestively put. For additional authorities in support of and controlling this decision we refer to *Magruder v. Peter*, 11

Gill & J. 217; *Baynard v. Norris*, 5 Gill, 483; *Winchester v. Railroad Co.*, 4 Md. 239; *Stewart v. Insurance Co.*, 53 Md. 579; *Abell v. Brown*, 55 Md. 217; *Ellis v. Horrmann*, 90 N. Y. 478; *Oliver v. Piatt*, 8 How. 401; *Kelsey v. Hobby*, 16 Pet. 271; *In re Hallett*, 13 Ch. Div. 699.

The decree in respect to Veazey and Swift was entirely right. The only error we find to be corrected is that the Manufacturers' National Bank should have been made conjointly liable for the restoration of the money to the Bull trust fund. So far, therefore, as the decree appealed from dismissed the bill as to it, the same must be reversed, and the cause will be remanded, to the end that the decree may be so modified as to make the Manufacturers' National Bank also liable. Upon the appeal of Swift the decree must be affirmed. Upon the appeal of the trustees Williams and Moore the decree must be reversed. Reversed and remanded.

**CRISE v. LANAHAN et al., (three cases.)**

**COALE v. SAME.**

(Court of Appeals of Maryland. December 16, 1887.)

**1. APPEAL—DELAY IN TRANSMITTING RECORD—DISMISSAL.**

An appeal from an order in which the record is not sent to this court for more than a year after the order was passed, in the absence of fault or neglect in the clerk, and where it also appears to have been due to the action of appellant, will be dismissed.

**2. SAME—PERFECTING—AGREEMENT—BURDEN OF PROOF.**

On a question of fact as to what agreements were made between the parties, relative to the perfecting of an appeal, the affirmative of the issue is upon the appellants; and where two witnesses of equal credibility, having the same means of knowledge, arrive at different conclusions, the affirmative cannot be said to have been proven.

**3. CONTRACTS—EXCUSE FOR NON-PERFORMANCE—INTERFERENCE BY INJUNCTION.**

A member of a firm executed a mortgage, which was upon the property of his wife, which mortgage, in the course of business, fell into the hands of a third party, who held as collateral security a note of the firm, upon which a dividend had been awarded him by the receiver, and that award ratified by the court. It was agreed between said third party and the attorney of the firm that before taking the dividend he should first exhaust the mortgaged property, which he was prevented from doing by injunction. Held, that he was relieved from his agreement, and at liberty to take his dividend.

**4. ASSIGNMENT—OF FUNDS IN COURT—POWER OF COURT OVER.**

When it has been proven to the satisfaction of a court that there has been an assignment of funds, while the same are in court, by claimants under its jurisdiction, such court has ample power to carry out such assignment by proper order.

Appeal from circuit court of Baltimore city.

The firm of Rich & Co. failed, and receivers were appointed to take charge of their assets and settle up the firm's business. John L. Crise was a member of said firm. Thomas M. Lanahan was a creditor of the firm, upon a note of \$3,000, which was filed with the auditor, who made an allowance thereon of a thirteen-dollar dividend, which allowance was ratified by the court. Subsequently, said Thomas M. Lanahan filed another claim, which was also allowed by the auditor, and the allowance ratified by the court. In June, 1887, another dividend was allowed on the Thomas M. Lanahan note, and confirmed by the court. From these three orders, John L. Crise appealed, and from the court's order of May 31st, Edwin B. Coale, one of the receivers, appealed.

*Sebastian Brown* and *William Reynolds*, for appellants. *Frank Gosnell*, for appellees.

STONE, J. There are four appeals in the one record in this case, and motions have been made to dismiss three of them, and we will consider these motions in the order in which the cases stand on the docket.

The appeal in the case standing first on the docket must be dismissed. It

is an appeal taken from an order passed on second of June, 1886. The appeal was entered within three days after the passage of the order, but the record was not sent up until July, 1887, more than a year after the appeal was taken, and there is no evidence that this delay arose from the default or neglect of the clerk, but, on the contrary, it clearly appears that it arose from the action of the appellant. The appellant insists that the record was not sent up, because he made an agreement with the appellee in reference to the case, which agreement the appellee violated, and that he should be now estopped from moving to dismiss the appeal, and that the court, of their own motion, should never dismiss an appeal. It is not necessary for us to say anything on the point made that the court will not dismiss the appeal in any case, *sua sponte* and without a motion made to that effect, because in this case such a motion has been made. As to the point raised, that because one of the parties violated an agreement, by virtue of which the case was not sent up within the time fixed by law, and that therefore it should now be heard, it is enough to say that even if in any case the time for the transmission of a record as now fixed by law could be extended by agreement of parties, (which we do not now mean to decide,) there is no such agreement sufficiently shown in this case, and the appeal must be dismissed.

The appeal that stands next on the docket has been dismissed by order of the appellants.

The other two appeals were taken in time, and are before the court for determination. The record in the case is very voluminous, but, in the view that we take of the case, a great deal of it is immaterial to the decision of the questions before us. The facts necessary for an explanation of our views are these: Rich & Co. failed, and receivers were appointed to take charge of their assets and settle the business of the firm. Crise, the appellant, was a member of the firm of Rich & Co. He supposed that he was only a special partner, but it turned out that he was a general partner, and consequently liable for the debts. Crise was the only solvent member of the firm. Lanahan, the appellee, was a creditor of Rich & Co. upon a note for \$3,000, which was duly filed in court, and, after a long controversy, the claim was audited and allowed to the appellee, and the auditor's report finally ratified it in June, 1886. An appeal was taken from this order, which appeal we have dismissed for the reasons stated in a former part of this opinion. This order of June, 1886, standing unreversed, establishes beyond controversy the fact that Lanahan, the appellee, was a creditor of Rich & Co., and that he was entitled to the dividend, about \$1,300, allowed him in the auditor's report so finally ratified, and he is still so entitled, unless he has by some act of his since its award to him by the court forfeited his claim to it. We do not understand that this is denied by the appellant, but he (the appellant) insists that, by an agreement based upon a valuable consideration, the appellee waived his right to this dividend of \$1,300, and agreed to look to a certain mortgage for his claim against Rich & Co. The appellee denies that he ever agreed to waive or abandon his claim against Rich & Co.; but admits that he agreed, for the accommodation of the appellant, to sell the mortgaged property first, but that an injunction prevented his selling the mortgaged property, and therefore he was relieved from his obligation to do so. The question at issue is, therefore, one of fact, and not of law. We may fully concede the law as claimed by the appellant, that while the fund is in court, and both the claimants under the jurisdiction, if it was proven to the satisfaction of the court that the fund had been assigned, the court has ample power to carry out the assignment or agreement by ordering the fund to be paid over to the party entitled. The whole difficulty arises from an agreement between Mr. Brown, the counsel for the appellant, and Mr. Lanahan, the appellee. The agreement was almost wholly a verbal one, and we are satisfied was honestly construed differently by the parties who made it. It was the subject of several interviews of more or less

length, and they are the only witnesses to it. We may here say that the mortgage of Kerner and wife, which is referred to in the testimony, was executed by one of the firm of Rich & Co., (Kerner,) and was upon the property of the wife. This mortgage had fallen into the hands of Lanahan, the appellee, some time before, and he had demanded and received from Rich & Co. the \$3,000 note as collateral security for the mortgage, and it was upon this note that the dividend of \$1,900 had been awarded to Lanahan.

In order that we may understand the points both of agreement and difference between Mr. Brown and Mr. Lanahan, we will quote from the record what we deem the material part of the testimony of each relating to this agreement. Mr. Brown says: "Several propositions were made by Mr. Lanahan and myself, perhaps, leading to a settlement of this whole matter, and finally it was agreed that we should dismiss our exceptions to the smaller claim allowed to Mr. Lanahan, so that he could get his dividend on that, which was in the nature of a fee, and that Mr. Lanahan should sell this property of Mrs. Kerner, and make the three thousand dollar debt out of that property. In order that there should be no misunderstanding between Mr. Lanahan and myself, that he should sell that property and make his money out of it, I had him in his office to make the statement in writing, which I will now read, and then file as an exhibit:

"JULY 16, 1886.

"*Sebastian Brown, Esq.*—DEAR SIR: It is a part of the agreement entered into between you and me, to-day, in reference to the matters of John L. Crise, that I shall, within two or three weeks from this time, advertise and sell the property of Kerner, and make out of it the most I can for my claim.

Respectfully, [Signed] T. M. LANAHAN."

—"[Same marked 'Defendants' Exhibit J. L. C., No. 1.]" It was discussed at some length, between Mr. Lanahan and myself, as to the most appropriate method of ridding the Kerner matter of any difficulties, in connection with the fact that the court had awarded to Mr. Lanahan, as above stated, this sum of thirteen hundred and odd dollars, and it was agreed between us that the appeal in relation to that matter should stand, but that the cause, of course, should not be taken to the court of appeals. The appeal, therefore, did stand upon the record, but the matter having been settled, of course the appeal was not sent up. This agreement with Mr. Lanahan in July was made on the eve of his going to Saratoga, and it was expressly understood that as the money (thirteen hundred and odd dollars) was not being used, it should, for the present, be loaned to John L. Crise, which was done; and that after he had sold the Kerner property, Crise should be, of course, the absolute owner of that thirteen hundred and odd dollars. Mr. Lanahan went to Saratoga, and on his return, agreeable to his promise to me personally and in writing, he advertised the Kerner property for sale. Some steps were taken—the nature of which I do not know, because I have not examined the record—by Mrs. Kerner to stop the sale of the property, and as a consequence the sale did not take place. After its being of course understood, and so talked over between us, that if the property did not realize enough to pay the whole of your claim the balance should come out of the estate of William Rich & Co., or its assets, or (which would be the same thing) out of Mr. Crise; and it was distinctly discussed by us that Mr. Crise should be present at this sale, in order that the property should not go below its value." Mr. Lanahan says: "After considerable talk and negotiation, lasting probably more than one day, he agreed to settle all the claims I represented, in the mode I suggested, with this modification: that he would continue his appeal, as far as claim No. 17 was concerned, but would not allow the record to be sent up, and I should, for the accommodation of Crise, advertise the mortgaged property, and Mr. Crise would be present at the sale and buy it, and would there pay me my mortgage claim in full, or give notes for it, as we might agree.

He said he would prefer not giving Crise's notes for the balance due on the mortgage claim, or the mortgage claim, until the sale, as he wanted the whole matter to appear in my name as against Kerner. I told him I had no objection to advertising the property and trying to sell it for his accommodation, and I now say it was understood and agreed that that sale was to be made by me simply to accommodate Mr. Brown or Mr. Crise, or both, as they did not want, personally, to seem to be pressing Mr. Kerner for the claim under the mortgage, being as they had made use of him as a witness in the effort to exempt Crise from liability as a general partner. I accordingly advertised the property, and Kerner got out an injunction,—as will appear by the papers which are admitted as evidence in this case,—in which he sets up certain equities as between Mr. Rich and himself, or some members of the firm of William Rich & Co. After this injunction, I went to Mr. Brown and told him he must now settle my claim and take charge of the mortgage claim, and have it entered to the use of the firm of William Rich & Co., or Mr. Crise, as he saw fit. I made out notes for it agreeably to our understanding, and gave them to him to have Mr. Crise sign. After some days he brought them back, probably the same day or the next day—I won't say about that,—and said he had a letter or note of mine under which I was to look to the mortgage for my debt, in consideration that he would dismiss his appeal on my dividend of \$107, allowed me under the auditor's account. I told him then (which was absolutely the fact) that no such agreement had ever been entered into, and that I agreed, simply as a matter of favor and accommodation to him, to advertise this property and sell it for Crise's benefit."

It will be seen from this testimony that both gentlemen agree upon this: that Mr. Lanahan was to sell the Kerner property without delay, and if it did not bring enough to pay him, then Mr. Crise was to pay the balance. There can, we think, be no doubt that so far these gentlemen perfectly understood one another, but beyond this their understanding of the agreement seems to be diametrically opposite; the appellant insisting that Lanahan waived his claim to the dividend, and agreed to look to the mortgage property for his claim, and only to resort to Crise in the event that the property did not bring it. This Lanahan flatly denies, and insists that he only agreed for the accommodation of Crise to sell the property, and that he did not waive any claim as to his dividend, and only left it in court until he could make the sale, which was to be made at once; that when the sale was stopped by injunction he was absolved from his agreement.

The affirmative of the issue is certainly upon the appellant; and where there are only two witnesses to the agreement, both of equal credibility, and with the same means of knowledge, and these witnesses arrive at different conclusions, we cannot say that the affirmative has been proven. The written part of the agreement—the letter—is certainly entirely consistent with the theory of the defendant, and the circumstances surrounding the case do not tend to discredit it. After the defendant's claim against Rich & Co. had been established by a decree of the court, we cannot well see why he should waive it, and bind himself to resort to the mortgage and exhaust that for fear of an appeal, and in consideration of a small claim of a little upward of \$100, when at any time, either before or after the decree, he could have himself foreclosed the mortgage. He did advertise the property, but the sale was stayed by injunction. This was a contingency that neither party had foreseen or contemplated. Lanahan could not perform his part of the agreement, and hence this suit. There is, we think, no doubt that mutual concessions were made by both parties, in order to end this protracted litigation. Nor is there any doubt of the sufficiency of the consideration to support the agreement, and we concede the law as claimed by the appellant. But the difficulty is in the proof of what the agreement was,—whether there is sufficient proof that Lanahan bound himself to exhaust his remedy against the land first, even

through what might be an unsuccessful, as it probably would be a long, lawsuit, and then look to Crise for the difference between what he got from the land and his claim, or whether the appellee was only bound, for the accommodation of the appellant, to endeavor to sell the land before he took his dividend. From what we have already said we consider, in view of the testimony of the appellee, the first-mentioned agreement not proven. A court of equity would not, and should not, deprive a party of the possession of a fund, to which it had already decided he had a title, without clear, definite, and satisfactory proof that the purposes of justice required it. It was evidently supposed by both parties that all Lanahan had to do was to advertise and sell the property. This of itself involved some professional labor. But there is no evidence that a protracted lawsuit over the mortgage was to be carried on by the appellee without any compensation whatever. But the appellee was prevented from selling the property according to agreement by an act of the court over which he had no control. There can be no doubt that a man, by an absolute contract, may bind himself to do a thing which subsequently became impossible, or to pay damages for his non-performance. But where the event is of such a character that it cannot reasonably be supposed to have been within the contemplation of the contracting parties when the contract was made, this will not apply. Thus, where the performance of a contract is prevented by an act of the legislature, or the action of a court of competent jurisdiction, the non-performance is excused. *Baily v. De Crespigny*, L. R. 4 Q. B. 180; *People v. Insurance Co.*, 91 N. Y. 174; *Whitfield v. Zellnor*, 24 Miss. 663.

Under the circumstances of this case, the action of the court, we think, relieved the appellee from the further performance of his agreement, and left him at liberty to take his dividend. And the appeal from the order of thirty-first May must be affirmed. The appeal from the order of June 11, 1887, must also be affirmed. This appeal is from an order ratifying an auditor's report merely of an additional dividend upon a claim that had been already passed upon by a final order passed more than a year before. It is *res adjudicata*. The order of eleventh of June, 1887, is in no sense a final order in this case. The final order, and from which the appeal properly should have been taken, was from the order of second June, 1886, which decided that the claim of the appellee was a valid claim against Rich & Co., and as such entitled to its due proportion of the assets of Rich & Co. The right of the appellee to his proper proportion of the assets of Rich & Co. was finally decided by that order, and is not open for review under this order. The first appeal upon the docket must be dismissed, and the orders from which the two last appeals were taken must therefore be affirmed, with costs.

### HIGGINS *et al.* v. LODGE *et al.*

(Court of Appeals of Maryland. January 5, 1888.)

#### 1. SALE—FRAUD IN PURCHASE—EVIDENCE—DISPOSING OF GOODS AT AUCTION.

On the trial of a cause, the issue being whether the vendee had purchased certain goods fraudulently, the evidence showed that he began a jobbing business in a basement room about June 15, 1885, and on August 21st bought the goods in question, worth \$6,000, to be paid for October 10th; that, before July, he began sending goods to an auctioneer for sale, and so continued till September 5th, when he had left a stock worth \$400 or \$500, though he had the week before a stock worth \$15,000; that the auction sales realized over \$6,400; that on September 7th he withdrew nearly all of his bank deposit; and that, after September, the business was conducted in his wife's name. *Held*, that the evidence tended to show that the purchase was fraudulent.

#### 2. AUCTIONEERS—PURCHASE OF GOODS WITHOUT NOTICE OF FRAUD—TITLE.

In a suit to recover goods from an auctioneer who had received them from a third person, and advanced money on them, plaintiff charged that the consignor had purchased them fraudulently from him; and the jury were instructed that an auctioneer who receives for sale goods fraudulently purchased by another, but has no

notice of the fraud, and in good faith advances money on them, acquires a title against the vendor. The evidence sustained the charge of fraud. *Held*, that the instruction was proper.

Appeal from superior court of Baltimore city.

Replevin by Lodge, Wilkins & Co. against Higgins, Cobb & Co. There was a verdict and judgment for plaintiffs, and defendants appealed.

*W. Field, Jr.*, for appellants. *William Reynolds*, for appellees.

BRYAN, J. Lodge and others replevied certain goods from Higgins. The evidence tended to show that one Hirsch Levy had made a fraudulent purchase of these goods from the plaintiffs, and that he had sent them for public sale to the defendant, who was an auctioneer. The defendant had made advances of money on them.

On the supposition that the purchase of the goods from the plaintiffs had been accomplished by the fraud of Levy, it is not questioned that it was void at the election of the sellers, and that they could have reclaimed their property from him. But if he sold them to a *bona fide* purchaser, without notice of the fraud, a good title would be passed, which could not be impeached by the original vendor. Ordinarily, a purchaser cannot acquire a title from a vendor who has none. But the authorities show without dissent that there is an exception under the circumstances which we have just supposed. In *Powell v. Bradlee*, 9 Gill & J. 278, it is said: "In such a case, good faith and a valuable consideration would be essential constituents of a good title." If these features do not appear in the transaction, we take it that the title fails. An interest in the goods acquired by making advances on them, when placed in the hands of an auctioneer for sale, would be protected under the same circumstances which would make a purchase valid. The court instructed the jury that, if Levy's purchase was fraudulent, the defendant's title would be defeated, unless they found he had in good faith advanced money to Levy upon the security of the goods, or incurred expenses in relation to them. On the prayer of the defendant, the court ruled that the plaintiffs could not recover if the jury found that the advances were made by the defendant without notice or knowledge of the circumstances under which Levy purchased the goods. On the prayer of the plaintiffs, it was ruled that they were not precluded from recovering by these advances, if the jury found that, at the time the goods were delivered to the defendant, he had knowledge of circumstances calculated to put a man of ordinary prudence on inquiry as to whether Levy was perpetrating a fraud in selling the goods by auction, and that he failed to make inquiry into the character of the transaction. Taking these instructions together, it seems to us that they laid the case properly before the jury. Higgins could not deduce title to the goods through a fraudulent vendee unless he showed that his advances were made in good faith. If he knew that Levy was selling these goods for the purpose of carrying into effect a fraud, his advances could not be considered as made in good faith; and if the circumstances were such as reasonably to call for inquiry, and if inquiry would have given him this knowledge, he is responsible in the same way as if he had obtained it. It has been held that if, in any purchase, "there be circumstances which, in the exercise of common reason and prudence, ought to put a man upon particular inquiry, he will be presumed to have made that inquiry, and will be charged with notice of every fact which that inquiry would give him." *Baynard v. Norris*, 5 Gill. 483. To the same effect are *Green v. Early*, 39 Md. 229; *Abrams v. Sheehan*, 40 Md. 446.

The evidence showed that Levy rented a basement room about the fifteenth of June, 1885, and commenced business as a jobber; that between that time and September 7th he purchased a large quantity of goods, \$6,000 worth being purchased from these plaintiffs; that in the latter part of June, 1885, he commenced sending goods to the defendant to be sold by auction, the defend-

ant making advances on them; that he continued to send goods for this purpose, and to receive advances from the defendant until September 5th; that the amount of these auction sales was more than \$6,400; that, on September 5th, Levy had in his store only four or five hundred dollars' worth of goods; that, the week before, he had \$15,000 worth; that he had opened a bank-account on the eleventh of July, and on the seventh of September he drew out the balance to his credit, with the exception of a small sum; that after that day he was regarded as utterly insolvent; that he purchased the goods in question from the plaintiffs on the twenty-first of August on credit, the time fixed for payment being October 10th; that the small balance to his credit in the bank was attached by creditors; and that after September his business was conducted in his wife's name. The evidence certainly warranted the jury in finding that when Levy purchased these goods he did not intend to pay for them, and that he was engaged in a deliberate scheme of fraud, which he was effecting by purchasing large quantities of goods on credit, selling them by auction, and putting the proceeds beyond the reach of his creditors. Notwithstanding fraud on the part of Levy in making the purchase in question in this case, the title of Higgins would be good if the matters within his knowledge did not reasonably suggest to him the propriety of inquiring into the transactions in which Levy was engaged, and if this inquiry would not have discovered his fraudulent courses. It was the province of the jury to determine this question on the evidence in the cause. Judgment affirmed.

### LINCOLN v. QUINN *et al.*

(Court of Appeals of Maryland. January 6, 1888.)

#### 1. SALES—ON CONDITION—BONA FIDE PURCHASERS—MORTGAGES.

A contract for the sale of certain goods stipulated the title should not pass until payment, in installments, was made in full. The vendee mortgaged the goods for value to various persons, only one of whom had notice of the contract. The property passed into the hands of receivers, and a petition was filed by the vendors, asserting title, and asking the delivery or value of the goods. *Held*, the vendor could not recover, except as to the mortgagee having notice of the contract; and not as against *him* in this case, as the prayer of the petition was for the whole property, and directed against all the mortgagees.

#### 2. SAME—PROVISION FOR FORFEITURE OF INSTALLMENTS—ENFORCEMENT IN EQUITY.

Where it was stipulated in a contract for the sale of goods, payable in installments, that, if default was made in any of the credit payments, the vendor might reclaim and take them, and that all payments made at that time should be forfeited, *held*, such forfeiture would not be enforced by a court of equity.

Appeal from circuit court, Frederick county.

The complainant, William R. Lincoln, filed his petition against the respondents, John T. Quinn, John D. Addison, David C. Winebrener, and others, asserting title to certain goods previously sold and delivered by him to one Hoover, and which were now in the hand of receivers, with all the other property of Hoover. The respondents claimed the goods by virtue of certain mortgages executed to them by Hoover for value, and without any notice of the manner in which he acquired possession. The trial court found for the respondents, and William R. Lincoln appeals.

*D. S. Briscoe and Ch. W. Ross*, for appellants. *Wm. P. Maulsby, Jr., C. O. Keedy*, and *I. C. Motter*, for appellees.

BRYAN, J. The question in this case involves the validity of a title to goods and chattels derived from the vendee in a conditional sale. In *Hall v. Hinks*, 21 Md. 406, it was decided that a *bona fide* purchaser, without notice of the condition upon which his vendor has acquired the possession, will be protected against the claim of the original vendor, in the same manner where the sale and delivery are conditional as where the possession has been obtained by fraud. Twenty years have passed since this decision was made, and in the

course of that time it has been repeatedly approved by this court. It is of great importance that the administration of justice should be conducted according to fixed and certain rules. Vacillation and uncertainty in the judgments of the courts produce a feeling of insecurity as to rights and property, and surely tend to encourage disorder, discord, and confusion in social and domestic life. The law on the subject has been otherwise settled in many of the states of the Union. In *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. Rep. 51, a very learned and elaborate examination of the question was made by the supreme court of the United States, and the positions taken in the opinion were maintained with great force and clearness. The laws of the several states have probably had their origin in the necessities and interests of the people concerned, and doubtless have been adapted to their condition and circumstances under the guidance of a wise public policy. We read with pleasure and profit the able disquisitions delivered by other courts, but we are not unmindful that it is our duty to declare our own law as it belongs to our own people. Having found this question settled by all the authority which can be bestowed by repeated decisions and long acquiescence, we are unwilling to disturb it.

The contract of sale in this case contained an express stipulation that the title to the goods should not vest in the vendee until the price should be paid in full, and installments were to be paid monthly. They were sold in the city of Baltimore by Lincoln, the appellant, to Hoover, and were carried by him to Frederick, and used in an hotel which he was keeping in that place. More than a year afterwards, the purchaser mortgaged these goods to Quinn, Addison, and Winebrenner, to secure the payment of two notes of even date with the mortgage, payable by the purchaser to a bank. On one of these notes all of these mortgagees were securities, and, on the other, Winebrenner alone was security. A few days after this mortgage, a second one was made by the purchaser to Ritler and other persons, to secure a promissory note of same date payable by him to them. All the above mortgagees are appellees in this case. A short time after the date of these mortgages, all of the property of Hoover was placed in the hands of receivers, by an order of the circuit court for Frederick county sitting in equity. A large portion of the purchase money remaining unpaid, Lincoln filed a petition in which he asserted title to these goods, and prayed that they should be delivered to him by the receivers; or, if the court should think that he was entitled only to the balance of the purchase money which was unpaid then, that the receivers should be directed to pay him said balance, or, if they had no funds applicable to that payment, that the goods should be sold, and the balance paid out of the proceeds of sale. It is shown by the evidence that none of the mortgagees except Winebrenner had any notice of the terms of the conditional sale, or of any claim on the part of Lincoln to the goods. With respect to Winebrenner, he had information of matters which fairly put him on inquiry, and according to the established rule, he must be charged with notice of every fact which that inquiry would have ascertained. *Higgins v. Lodge*, ante, 846, (decided at the present term.) The result is that Winebrenner's title is not good, but that of the other mortgagees must be sustained.

The prayer of the petition was for certain specific relief, which was properly refused. It asserted a claim to the whole property, or, alternatively, to the amount of the purchase money remaining unpaid, and it was directed against all of the mortgagees. It could not be granted in that form, and there was no prayer for general relief. The petitioner, however, is not without remedy against Winebrenner. He may still file a petition against him, and he will be entitled to receive such portion of the proceeds of the sale of the goods as may be applicable to the debt on which he is the only surety, subject to an abatement which will be presently mentioned. It would not be just to deprive these persons, who are co-sureties with him, of their rights under the

mortgage. They are in no sense partners with him, and ought not to be affected by notice which is entirely personal to him. It is true that the payment of the debt will inure to Winebrener's benefit. But it is their right to have the proceeds of the goods applied to its payment, whatever may be the incidental advantage to others.

It was stipulated in the contract of sale that, if Hoover made default in any of the credit payments, Lincoln might reclaim and take possession of the goods, and that all payments which had been made up to that time should be forfeited. A court of equity will not lend its aid to enforce a forfeiture of this kind. Against persons liable to his claim on the property, he could in equity recover an interest in the goods equal to the amount of the unpaid purchase money. That portion of this interest which would be applicable to the payment of the note secured by Winebrener alone is still the property of Lincoln, and he must be paid, out of the proceeds of sale of the goods, a sum duly representing this portion.

The order of the circuit court will be affirmed, but leave will be given to the appellant to file a new petition stating his claim according to his rights as above declared. Order affirmed, and cause remanded.

### LILLIBRIDGE v. BARBER.

(*Supreme Court of Errors of Connecticut. July 15, 1887.*)

#### 1. ASSAULT AND BATTERY—EVIDENCE—INSTRUCTIONS.

In an action for an assault, the issue was as to whose land it was upon which the trespass was committed. The court charged that if the jury found that plaintiff's testimony, as corroborated by two witnesses, outweighed defendant's, uncorroborated, and if they found the witnesses all equally credible, the preponderance was with plaintiff, that he had proven the assault as claimed on his own ground. *Held* not error. PARK, C. J., and CARPENTER, J., dissenting.

#### 2. SAME—PLACE IMMATERIAL.

In an action for an assault, the court charged that the place where the assault was committed was immaterial, provided it was, as in this case conceded, within the jurisdiction of the court. *Held* not error; there being nothing to show in any manner that, because of the place, the act was justifiable.

#### 3. TRIAL—INSTRUCTIONS—COMMENT ON EVIDENCE.

It is not error for the court, when instructing a jury, to speak of the testimony of one party to the action as uncorroborated.

Appeal from superior court, New London county; PHELPS, Judge.

This action was brought by Daniel Lillibridge, plaintiff, against Thurston B. Barber, defendant, for an assault. Verdict and judgment for plaintiff, and defendant appeals.

*S. Lucas and A. A. Browning, (S. A. Crandall, of counsel,)* for appellant. *F. T. Brown and W. A. Biscoe,* for appellee.

PARDEE, J. The assault charged, alleged in the complaint, is as follows: "On April 19, 1886, the defendant assaulted the plaintiff at said Norwich, upon land of the plaintiff, known as the 'Morse Farm,' and violently seized the plaintiff around the body, and threw him down upon the ground and stones with great force, and fell upon him, and struck him upon the face and body." Upon the trial the plaintiff offered evidence to prove one act of trespass only, and that it was committed upon his own land, near to the line separating that from the land of the defendant. The defendant offered evidence tending to prove that he committed no act of trespass; that the plaintiff trespassed upon his land, and there threatened to assault him; that he ordered him to depart; that the plaintiff refused; that he gently removed him; that in so doing, without intention to injure him, he accidentally fell with the plaintiff; that whatever injury the latter received was by such accidental fall; and that, if he assaulted the plaintiff at all, it was on his (the defendant's) land. In argument, the defendant claimed that the allegation of place in the

complaint is material, and must be proven as made. The court charged as follows: "The place where the assault and battery were committed is immaterial, and that allegation is immaterial; especially where, as in this case, there seems to have been a dispute between the parties with respect to the title or boundary of the land, or the right of the plaintiff to be on it. But, aside from these considerations, the general principle is that the place where an assault and battery is committed is immaterial, provided it is within the jurisdiction of the court; and that, in this case, is conceded." To this the defendant objects, insisting that the plaintiff had located the assault upon his own land, that this allegation of place is material, that the proof must correspond, and that a trespass by the defendant upon his own land is entirely different from one upon the land of the plaintiff.

The objection is not well taken. An action for trespass to the person goes with the person injured, and may be brought wherever he can obtain jurisdiction over the defendant or his property. Place is not of the essence of such an action; indeed, it is quite immaterial. When one act only is complained of, and a location is given to it, the plaintiff may himself safely prove that it was committed at another; this, unless the defendant pleads and offers evidence tending to prove that his act is justifiable, because of the place where committed. Such evidence the plaintiff must overcome, either as to place or justification. The office of this complaint was to forewarn the defendant as to the charge, in order that he might prepare his defense. If in the matter of locality it were to such a degree misleading as that the proof was a surprise to him, he could have found protection in a postponement of trial by the court, and opportunity to prepare anew. The plaintiff charged, and claimed to have proved, that the defendant assaulted him at a particular place. Without plea of justification, upon a simple denial of the truth of the charge, the latter introduced evidence tending to prove that, if he committed any assault, it was at another place. If the jury believed that in doing this he proved an unjustifiable assault at the latter place, this proof inures to the benefit of the plaintiff as effectively as if he had himself so charged and proven. The law regards the resulting truth; it does not concern itself as to the party introducing the evidence. There were only two eye-witnesses to what occurred between the parties; these confirmed the truth of the allegations of the complaint. The defendant claimed that the testimony of others, not eye-witnesses, and proven circumstances, corroborated him.

The court charged the jury upon this point as follows: "The plaintiff and Mr. and Mrs. Wheeler testify to one state of facts, and the defendant to another, entirely different. If these persons are all equally credible, the plaintiff has shown, by a fair preponderance of proof, that he was assaulted as claimed by him in the complaint. That is the question for you to weigh and determine,—the credit to be given to each of the witnesses. If you find the plaintiff's testimony, with the corroboration of Mr. and Mrs. Wheeler, outweighs the substantially uncorroborated testimony of the defendant, your verdict should be for the plaintiff." In this the defendant insists there is error, for the reason that the attention of the jury was thereby diverted from the question of fact, and directed simply to that of the credibility of the witnesses. It should, he claims, have been "left to the jury, under all the circumstances of the case, to find what the fact was." Precisely this is the effect of the quoted portion of the charge. The instruction is that if four witnesses had equal opportunity for seeing, equal accuracy in observation and memory, equal capacity and desire to tell the truth, the testimony of three must outweigh that of one. Of course, it is best, as a rule, that judicial comment to the jury upon the testimony should concern quality rather than quantity. But in the case supposed it is permissible, in the exercise of judicial discretion, to call the attention of jurors to quantity. If, upon seeing, hearing, and weighing the witnesses, it should so happen that the jurors believe

that in all of the named qualities each witness is equal to each of the others, they must accept the agreeing testimony of three, rather than the contrary testimony of one. This rule controls the decisions of men in determining questions of fact for their own purposes; no contrary rule can be laid down for the guidance of a jury. Before it can operate upon the mind of a juror, he must of necessity, under the instruction of the court, try each witness as in a crucible, and determine precisely what portion of his testimony is truth, to what degree he is credible, and must compare each with every other. This done, the juror has discharged his whole duty. Neither was it error on the part of the court to speak of the testimony of the defendant as being substantially uncorroborated; it was judicial comment upon the legal effect of it.

No one of the assigned errors furnishes a reason for a new trial, and it is therefore denied.

(In this opinion the other judges concurred, except PARK, C. J., and CARPENTER, J., who were of opinion that the court below erred in its instructions to the jury with regard to the preponderance of the testimony of the three witnesses for the plaintiff over the single witness for the defendant; regarding this as wholly a matter for the judgment of the jury.)

### CONNELL v. RICHMOND.

(*Supreme Court of Errors of Connecticut. July 2, 1887.*)

#### TENANCY IN COMMON—RENTING FARM ON SHARES.

Defendant let a farm on shares to plaintiff, who agreed not to sell any part of the crops, and to manage the same to the best interests of both parties, and at a given date and at stated times thereafter to pay defendant one-half the profits realized to such date. *Held*, they were tenants in common, and plaintiff could not recover the proceeds of an undivided moiety of the crop, taken and sold by defendant without consent.<sup>1</sup>

Appeal from court of common pleas, New London county; CRUMP, Judge.

The plaintiff, Dwight M. Connell, brought suit against George J. Richmond, in justice court, to recover the value of a quantity of oats alleged to have been illegally taken and appropriated by defendant, Richmond, to his own use. Judgment was entered for defendant, and on appeal by plaintiff was affirmed by the circuit court. Plaintiff appeals.

*R. M. Douglass*, for appellant. *S. S. Thresher* and *L. Brown*, for appellee.

PARK, C. J. This case depends upon the construction to be given to the contract between the parties as to the occupancy by the plaintiff of a farm of the defendant. The important portion of the contract is as follows: "This agreement, made this third day of April, 1886, between George J. Richmond of the first part and Dwight M. Connell of the second part, witnesseth that the said Richmond, in consideration, etc., doth covenant and agree, to and with the said Connell, to let to him on shares that part of the farm," (describing it.) "The said Connell agrees not to sell any hay, corn, or fodder of any kind from the farm, to manage it for the best interests of both parties concerned, and to pay to said Richmond on the first day of June, 1886, and every two months thereafter, up to the expiration of the year, one-half of the amount of all sales from the farm. And for security to the said Richmond for the fulfillment of this agreement, and the payment to him in full of one-

<sup>1</sup> A tenant in common may maintain trover against his co-tenant for his share of the common property consumed by the latter, *Lewis v. Clark*, (Vt.) 8 Atl. Rep. 158; or trespass against a co-tenant, where there has been a wrongful conversion of property, *McClure v. Thorpe*, (Mich.) 35 N. W. Rep. 829; or *indebitatus assumpsit*, where his co-tenant has received in money more than his share of the rents and profits of the common estate, *Hudson v. Coe*, (Me.) 8 Atl. Rep. 249.

half of all profits from the farm, crops, stock, hogs, and poultry, I, the said Connell, hereby pledge my stock, consisting of one horse, six cows, three calves and two hogs." The plaintiff went into possession of the farm under this agreement, and among other crops raised a quantity of oats, a portion of which, not exceeding one-half, the defendant took and appropriated to his own use without the plaintiff's consent. It is for this act of the defendant that the plaintiff brings this suit, claiming it to be illegal. The court below ruled that the agreement constituted the parties tenants in common of the crops, and that consequently the plaintiff could not recover. The correctness of this ruling is the question we have to consider.

The agreement commences with the statement that the defendant agrees with the plaintiff to let to him a certain part of a farm "on shares." Letting land on shares is a phrase well understood among farmers. It means that both parties shall share equally in the products of the land, to compensate the one for his labor and the other for the use of his land. In such cases, after the crops are harvested and before a division is made, each party is the owner of an undivided moiety of the same, and is a tenant in common with the other, unless the contract contains some special provision taking the case out of the general rule. There is no such provision in the present case. It is true that by the terms of the contract the plaintiff was "to pay to the defendant on the first day of June, and every two months thereafter up to the expiration of the year, one-half the amount of all sales from the farm." But this provision imposes no obligation on the plaintiff to make such sales, except so far as he was obliged to act "for the best interest of both parties," and that interest might not in his judgment require or allow such sales. A large quantity of the products might therefore remain unsold at the expiration of the year, and clearly the parties would be tenants in common of these products. The view we have taken of the contract virtually disposes of the other questions made in the case, and renders it unnecessary to consider them.

There is no error in the judgment appealed from.

(The other judges concurred.)

#### RICHMOND v. CONNELL.

(*Supreme Court of Errors of Connecticut. July 2, 1887.*)

##### 1. TENANCY IN COMMON—RENTING FARM ON SHARES—DIVISION OF PROFITS.

By the terms of a lease the lessor was to furnish the ground, and the lessee the labor, and pay the lessor "half of all profits from the farm." *Held*, to mean one-half of the products, and not half the net profits.

##### 2. SAME—ASSUMPSIT AGAINST CO-TENANT FOR PROFITS.

By the terms of a lease the lessee was to pay the lessor "one-half the amount of all sales from the farm." *Held*, that the tenancy in common would not prevent the lessor from recovering money for crops sold; and an ordinary suit for the recovery of money was the proper remedy, and not an action of account.

Appeal from court of common pleas, New London county; CRUMP, Judge.

Action by George J. Richmond against Dwight M. Connell, to recover certain moneys which defendant, as tenant, received for crops sold from the farm in which plaintiff had a half interest. The case was taken on appeal from a justice of the peace to the court of common pleas, and on a trial to the court there was judgment for plaintiff, and defendant appeals.

*R. M. Douglass*, for appellant. *S. S. Thresher* and *L. Brown*, for appellee.

PARK, C. J. This case grows out of the contract which we have considered in the last preceding case of *Connell v. Richmond*, ante, 852. We there held that the contract constituted the parties tenants in common of the crops raised on the farm leased by the present plaintiff on shares to the present defendant. By that contract Connell agreed to pay Richmond, on the

first day of June of that year, and every two months thereafter to the end of the year, "one-half the amount of all sales from the farm." And by a later clause of the contract he bound himself to pay to Richmond "one-half of all profits from the farm, crops, stock, hogs, and poultry." The suit is based upon these provisions of the contract. The defendant claims that the expression, "one-half of all profits from the farm," means net profits,—profits after deducting all expenses of production. The court below held otherwise, and the defendant claims that the court erred in this ruling. Such a claim seems to be entirely against reason where land is leased upon shares; that is, where one party furnishes the labor and the other the land. The labor, which is the cost of production, is the very thing which the tenant was to furnish. The manifest meaning of the contract is that the defendant was to account to the plaintiff for one-half of all the products of the farm. By the terms of the contract the defendant agreed to account to the plaintiff at stated times during the year for one-half of all moneys received from the sale of products. The fact that they were tenants in common of the crops until sold could not affect the right of the plaintiff to sue for and recover money received by the defendant for such portions of the crops as were sold. And there is nothing in the claim that an action of account only would lie. When any portion of the crops was sold the defendant at once held to the use of the plaintiff one-half of all the money received from such sale, which could have been recovered in an action of *assumpsit* at common law and under our practice act in an ordinary suit for the recovery of money.

There is no error in the judgment appealed from.  
(The other judges concurred.)

#### SCUTT v. TOWN OF SOUTHBURY.

(*Supreme Court of Errors of Connecticut. July 15, 1887.*)

##### 1. HIGHWAYS—DISCONTINUANCE—APPEAL—REPORT OF COMMITTEE—FINDINGS.

Where a committee, appointed on an application for the reversal of the action of a town in discontinuing a road, reported that the road was not of common convenience and necessity, and also reported that the road was convenient and necessary for plaintiff, his family, and a few of his neighbors, *held*, that the latter finding was not decisive of the question of common convenience and necessity, and was not inconsistent with their general finding, where the law confined their report to the one question of common convenience and necessity.

##### 2. SAME—OBJECTIONS TO REPORT—NEW MATTER.

Where a committee, appointed upon an application for the reversal of the action of a town in discontinuing a highway, reported that the way was not of common convenience and necessity, *held*, that new matter, offered upon objections to the reception of the report, tending to contradict the report, could not be introduced where the opportunity was given to present it before the committee.

Appeal from superior court, New Haven county; ANDREWS, Judge.

This was an application to the superior court by Levi Scutt for the reversal of the action of the town of Southbury in discontinuing two highways which he alleged were of common convenience and necessity. A committee was appointed which reported that the roads were not of common convenience and necessity. Plaintiff's remonstrance to the acceptance of the report was overruled, and judgment rendered for defendant on the report, and plaintiff appeals.

W. Cothren, for appellant. A. N. Wheeler, for appellee.

BEARDSLEY, J. This is an application to the superior court, pursuant to the provisions of the statute, (Gen. St. pp. 286, 287, §§ 29, 35,) asking for a reversal of an order made by the selectmen of the town of Southbury, and approved by the town, discontinuing two highways. The plaintiff alleges that the highways are of common convenience and necessity, and of the greatest convenience and necessity to him as a means of access to his land and to mar-

ket, and upon these grounds only asks for relief. The application was referred to a committee, pursuant to the statute, who reported that common convenience and necessity did not require that "either of the roads should be reopened or maintained as a highway," and concluded their report as follows: "Both said highways \* \* \* should be and remain discontinued and closed." The plaintiff remonstrated against the acceptance of the report, upon the following grounds: (1) The land crossed by said highways belongs to the original proprietors of the town of Woodbury, and was never laid out by the town of Southbury, or its selectmen, to be used as highways. (2) Said highways were not highways of the town of Southbury, and could not be by it or its selectmen discontinued. (3) Said highways were laid out by the original proprietors of the town of Woodbury for public convenience, and the special convenience of access to their interior lands, and were, at the time the town and its selectmen attempted to discontinue them, in use for the particular purposes for which said proprietors had dedicated them. (4) The committee having come to the conclusion that said Muddy Brook road was of common convenience and necessity only to the plaintiff, his family, and a few neighbors, decided, by mistake of law on their own premises, that it was not of common convenience and necessity to anybody. (5) Said highways were not legally shut, so that the order of the committee that they be not reopened is null and void. (6) That the committee exceeded its authority, and attempted to assume the authority and power of the court, in deciding and ordering "that both said highways, the Dark Entry road and the Muddy Brook road, should be and remain discontinued and closed," and both its report and its action are illegal and should be set aside.

The defendant demurred to the several grounds of remonstrance, and the court decided that they were insufficient. The plaintiff assigns such decision as error. The decision of the court was manifestly correct. If the committee did (as is assumed by the plaintiff in his fourth ground of remonstrance, and admitted by the demurrer, but nowhere else appears) come to the conclusion that one of the roads was convenient and necessary for the plaintiff and a few of his neighbors, such finding was not necessarily decisive of the question of common convenience and necessity, and is not inconsistent with the general finding that the road was not required by common convenience and necessity. And there is no foundation for the claim made in the sixth ground of remonstrance. The only comment to be made upon the language of the committee referred to in it is, that it was unnecessary, the report being complete without it. The other alleged errors have no foundation.

Upon the plaintiff's application, the only question at issue between the parties was whether these highways, or either of them, were of common convenience and necessity. Indeed, this was the only question which, by the statute under which the application was made, the committee could determine. If the matters which he now sets up bore upon that question, he had an opportunity to offer his evidence in support of them on the trial, and cannot now be heard upon them. If they did not, they are outside of the case as it stood before the committee. Upon the return of the report of the committee, in the absence of any "irregular or improper conduct" on their part, the duty of the court, as defined by the statute, was to dismiss the application with costs.

There is no error in the judgment appealed from.  
(The other judges concurred.)

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BLAKESLEE v. TYLER.

(*Supreme Court of Errors of Connecticut. July 15, 1887.*)

1. HUSBAND AND WIFE—ACTION AGAINST WIFE FOR TORT—CORRECTION.

As defendant and her husband advanced to place bars across a highway, the latter said, "Put them up," which defendant did with his assistance, but without fur-

ther request or command. *Held*, that under Gen. St. Conn. tit. 19, c. 5, § 9, providing that "actions may be sustained against a married woman \* \* \* for any tort committed by her without the actual coercion of her husband, \* \* \* as if she was unmarried," defendant acted without coercion of her husband, and is liable for obstructing the highway.

2. HIGHWAYS—OBSTRUCTION OF, MERELY A TORT.

It is a tort, and not a crime, under Gen. St. Conn. tit. 16, c. 9, § 1, prescribing a penalty therefor, to obstruct a highway.

CARPENTER, J., dissenting.

Appeal from court of common pleas, New Haven county; PICKETT, Judge. Action by Jefferson D. Blakeslee against Margaret Tyler to recover the penalty for obstructing a highway. Judgment was entered for plaintiff, and defendant appeals.

*T. E. Doolittle*, for appellant.

The act charged was a crime, and not a tort, (*State v. Brown*, 16 Conn. 57, 59,) and therefore the action could not be maintained against the wife, (Gen. St. Conn. p. 417, § 9.) The wife acted under the coercion of her husband. Reeve, Dom. Rel. 73; Schouler, Dom. Rel. § 141. If the action could have been brought against the wife, it could not be maintained against her alone. Pom. Rem. § 320.

*W. B. Stoddard* and *S. C. Loomis*, for appellee.

BEARDSLEY, J. The defendant is the wife of Henry Tyler, defendant in the next preceding case of *Blakeslee v. Tyler*, *ante*, 291, which was brought to recover the penalty for placing obstructions upon a highway. She acted with him in placing the obstructions upon the highway, and is sued for the recovery of the statutory penalty. The finding of facts, and of the defendant's claims, in the trial of the former case, are made part of the record in this case, and the court finds the following additional facts specially applicable to this case: "On May 24, 1886, the plaintiff having thrown out said bars, the said Henry Tyler and his wife, the defendant, immediately went towards them together, and she, being more active than her husband, ran ahead of him, and reached the bars first, upon which he, being near, said to her, 'Put them up,' which she proceeded to do in part, until he came up, when they together put up the remainder of the bars. No other request or command was made by him to her, and she was subject to no actual coercion by her husband in doing what she did towards replacing the bars. The title to the land easterly from the bars, and adjacent thereto, was in the said Margaret Tyler. Upon the foregoing facts, the plaintiff claimed that this action was for a tort, and could be sustained under the provisions of Rev. St. p. 417, § 9, against the wife alone, without the joinder of the husband as a party to the action. The defendant claimed that the provisions of the statute had no applicability to this case, as this was an action to recover a penalty under a penal statute, which was not qualified by the statute. The defendant also claimed that the direction given to the defendant by her husband, on the twenty-fourth of May, to put up the bars in question, was such coercion as exempted her from any liability in this action." The court ruled adversely to the claims of the defendant, and this ruling is assigned for error. The statute referred to (Gen. St. p. 417, § 9) is as follows: "Actions may be sustained against a married woman upon any causes of action which accrued before her marriage, and upon any contract made by her since her marriage, upon her personal credit, for the benefit of herself, her family, or her separate or joint estate, and for any tort committed by her without the actual coercion of her husband, and her property attached and taken on execution in the same manner as if she was unmarried, and her husband shall not be liable on any such causes of action."

Two questions arise under this statute: Was the act of the defendant a tort? If so, did her husband compel her to commit it? In *Cansfield v. Mitchell*, 43 Conn. 169, which, like this, was an action upon the statute, and brought upon the same statute, it was decided to be a civil action. Judge Swift says that "this form of action is a species of action on the case." 2 Swift, Dig. 589. The only classification of civil personal actions recognized by law is that of actions upon contracts and actions for torts. 3 Bl. Comm. 117. "All acts or omissions which the law recognizes as the subjects of its provisions and application are either contracts, torts, or crimes." 1 Hil. Torts, § 2. The statute gives to an individual this remedy, to recover a penalty for his own benefit, as well as that of the public, for the wrongful act of the defendant, and thereby, in effect, stamps the act as a tort. This being so, and the tort being of such a nature that those committing it are severally liable for the penalty, (*Curtis v. Hurlburt*, 2 Conn. 309,) the defendant is liable, though she acted in concert with her husband, unless he actually coerced her to commit it. The court finds that he did not coerce her, and this finding is conclusive, unless it is inconsistent with the facts upon which it rests. We think that it is fully justified by the facts. It is apparent that the statute quoted was designed to make radical changes in the civil rights and liabilities of the wife in respect to her torts, as well as contracts. By the common law she was for the most part protected from liability for her torts, as well as responsibility for her crimes committed in the presence of her husband, by the presumption that she acted by his coercion. This presumption in many, if not in most, cases, probably rested upon a slender basis of fact, but generally prevailed, owing to the inherent difficulty of proving that it was not well founded. The statute abolishes this presumption in respect to torts, and requires the wife to prove, for her justification, that her husband *in fact* compelled her to commit the tort for which she is sued.

The facts found fall far short of showing such coercion. The bars in question served to inclose the land of the defendant. The plaintiff had taken them down, and the defendant and her husband started together to put them up. Her husband said to her, "Put them up;" but this was said when she was running towards the bars in advance of him, and was evidently mere language of encouragement. There is no reason to believe that she would have stopped short of doing what she intended if he had said nothing. If it had appeared that the wife put up the bars in consequence of what was said by the husband, the question would still arise whether she was coerced to do so within the meaning of the statute.

There is no error in the judgment appealed from.

(The other judges concurred, except CARPENTER, J., who dissented.)

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### Appeal of O'NEIL.

(Supreme Court of Errors of Connecticut. December 1, 1887.)

#### DESCENT AND DISTRIBUTION—LIABILITY OF ADMINISTRATRIX—OMITTING DISTRIBUTEE.

An administratrix procured an order of distribution, and knowingly omitted therefrom a distributee. *Held*, that payment under such order was not made in good faith, and that the administratrix is liable for such distributee's share on a reversal of the order.

Appeal from superior court, Fairfield county; FENN, Judge.

Petition by James F. B. O'Neil to the probate court to ascertain the heirs and distributees of Patrick Reynolds, deceased, and to make an order for the distribution of the estate. The petition was refused by the probate court. This decree was reversed by the superior court, and the administratrix appeals.

*R. E. De Forest*, for appellant. *D. Davenport* and *C. S. Canfield*, for appellee.

STODDARD, J. The appellant is an heir at law of Patrick Reynolds, deceased, whose estate is in settlement in the Bridgeport probate district. Claiming as such heir at law, he asked the probate court to ascertain the heirs and distributees of the estate, and to make an order for the distribution of the estate to the ascertained heirs. In the orderly administration of an intestate estate, this is the right of the heir to ask, and the duty of the court in due season to make. This duty is commanded by the express words of the statute. Sess. Laws 1885, c. 110, § 197. The only objection that is made to such an order is that upon the application of Rosa Reynolds, the administratrix, the court of probate has heretofore made an order of distribution, and that, in pursuance of such order, the administratrix had in fact paid over to the respective persons named in that order the several sums named therein. The probate court refused the appellant's application. The ground of the refusal does not appear in the record, but presumably it was because the facts found by the appellate court were not made to appear in the probate court. The order of distribution made at the instance of the said Rosa Reynolds was, upon the appeal of this appellant, reversed and set aside. And it is found that the appellant was not named in the first order of distribution. And it is further found by the superior court that "at the time the administratrix applied to the court of probate for the passage of the several orders referred to, [that is, the orders preliminary to and including the first order of distribution,] at the time of making said payments pursuant to the order, and at all times since the death of the intestate, the appellee [Rosa Reynolds] knew that the appellant was in existence, and was an heir to the estate, as hereinbefore recited, and intentionally concealed and withheld said knowledge from the court of probate, and that the several orders were passed in consequence of the representations of the appellee, and in accordance with such representations."

Rosa Reynolds was a sister of the deceased, and an heir at law, and was named as distributee in the first order. Her distributive share of the estate was of course enlarged by the exclusion from the list of the distributees of the name of the appellant, also a lawful heir. She obtained the orders that so resulted, knowing that the appellant was living and was entitled to a share, by intentionally concealing such knowledge from the probate court. In so doing she violated her faith and duty to the appellant. It was a breach of trust, and the orders were obtained through the active, willful fraud of the administratrix. The orders were so fraudulently obtained for the manifest purpose of paying over to herself and the other named distributees the share of the estate that belonged to the appellant. And now her learned counsel says that, having consummated her fraudulent purpose, the administratrix is protected, because, he says, such a payment is a payment made in good faith. In order to make the logic symmetrical, he also defines the "good faith" to be the existence of a belief on the part of the administratrix that the law would protect her if she in fact made the payment under an order of court. We think that the good faith attending a payment made by an administrator, under an order of court, which order is afterwards reversed, is not simply a belief on the part of the administrator that such payment will protect him, and that in the present case the actual bad faith and fraud established by the finding of the court is wholly inconsistent with the existence of the good faith essential to the statutory protection.

It is also said that the action of the probate court denying the application of the appellant was discretionary. Without considering whether it was so discretionary with the probate court, it is the settled law in this jurisdiction that the disposition of discretionary matters of this character by the probate

court is subject to revision by the appellate superior court, and, if it is a discretionary matter, the final exercise of discretion resides in the superior court. *Weisne's Appeal*, 39 Conn. 538.

There is no error in the judgment appealed from.

(The other judges concurred.)

MYERS v. MORRIS *et al.*

(Court of Chancery of New Jersey. January 14, 1883.)

EQUITY—PLEADING—AMENDMENT OF BILL—RIGHT TO COPY—WAIVER.

When a bill to foreclose is amended without service of a copy of the amendment upon defendant, and complainant afterwards asks for the appointment of a receiver, an appearance to that motion will not waive defendant's right to a copy of the amendment.

Bill to foreclose. On motion to strike out.

*Mr. Stephany*, for the motion. *E. S. Perry*, *contra*.

BIRD, V. C. The motion is to strike out the interlocutory decree. I think the motion should prevail. The court had previously said that unless the complainant amended his bill it should be dismissed. He amended his bill without serving a copy on the defendant, or in any way calling upon him to answer. After the bill was so amended, the complainant asked for the appointment of a receiver, and the defendant appeared to that motion, which act it is said was a waiver of the right to have a copy of the amendment. It seems to me that this did not overcome the necessity of complying with the general rule requiring service in such cases as laid down in *Angel v. Railroad Co.*, 37 N. J. Eq. 92.

The defendant is entitled to costs.

NAYLOR v. METTLER *et al.*

(Court of Chancery of New Jersey. January 17, 1883.)

JUDGMENTS—CONCLUSIVENESS—EXEMPLIFIED COPY—MECHANIC'S LIEN.

An exemplified copy of a judgment obtained under the mechanic's lien law (Revision N. J. p. 672, §§ 18-25) is conclusive, as to the facts recited therein, in determining the priority of such judgment over another judgment against the same debtor.

Bill to foreclose. On exceptions to master's report.

*W. D. Holt*, for exceptants. *W. F. Hayhurst*, *contra*.

BIRD, V. C. The bill in this case was filed to foreclose a mortgage. There were two judgment creditors; certainly one judgment perfected, and another perhaps perfected after the filing of the bill. The question is as to the priority of these judgments. The master has reported in favor of the priority of the judgment of George W. Arneth. Cray, the other judgment creditor, excepts to the master's report. Arneth's judgment is a judgment against the owner as debtor, and against the land, under the mechanic's lien law, for materials furnished in the erection and construction of the building thereon. Cray seeks to get rid of the effect of this judgment under the mechanic's lien law, not by showing that the materials furnished were not furnished prior to the recovery of his judgment, but by insisting that Arneth could not claim any benefit by his judgment by way of priority as against him (Cray) by simply offering the exemplified copy of the judgment. Cray insists that, to make his judgment effectual by way of priority, it was the duty of Arneth to offer all the proceedings which were required by the statute in order to justify the court in entering the judgment under the statute so as to make it a lien upon the lands in question.

The point thus made by the exceptants cannot be sustained. The judgment is conclusive, and it need not be sustained by a reproduction of the

proof, or any part of the proof, upon which it was originally founded. Since the matter has been so well considered in our courts in the case of *Hall v. Spaulding*, 40 N. J. Law, 166, I need not enlarge upon the reason of giving such efficacy to a judgment of a court of general jurisdiction. In that case the learned justice of the supreme court said: "The judgment of Matthews and Spence, for the purpose of distribution of the fund, is to be taken as conclusive evidence of the amount due to them, and of their right to share in the proceeds of the sale in the statutory proportion. It establishes, by the highest authority, that the claim is a lien upon the lands, and until set aside must be enforced according to its legal effect. Other claimants cannot aver that the lien does not exist as adjudged." The exceptions must therefore be overruled, with costs.

### GRAY v. ROBBINS et ux.

(Court of Chancery of New Jersey. January 20, 1888.)

#### **SALE—FRAUD BY VENDOR IN SALE OF CORPORATE STOCK—RECONVEYANCE.**

Suit was brought to compel a reconveyance of property alleged to have been obtained through false representations of defendant as to the solvency and success of a corporation of which he was a director, and a number of shares of whose stock had been the consideration of the conveyance. The evidence showed that the stock never had any market value, and but little had ever been sold for an actual money consideration. Most of it had been transferred to employees in payment for alleged services, or to others gratuitously. Defendant owned more than half of the stock, for which he had paid nothing, and the institution had done scarcely any business. Nor was it at the time of the conveyance the owner of the machinery it was represented to own, though some time afterwards there was a pretended purchase thereof from another corporation of which defendant was director or manager. Held, sufficient evidence of fraud upon which to decree a reconveyance.<sup>1</sup>

Bill to set aside fraudulent conveyances.

*John W. Wartman*, for complainant. *George T. Peck* and *J. W. Westcott*, for defendants.

**BIRD, V. C.** In December, 1886, the complainant agreed to sell and convey a house and lot to Ira B. Robbins, and afterwards, on the sixth of January, conveyed it to his wife. The consideration was \$3,000 worth of stock in the Franklin Printing-Press Company, and the assumption by her of a \$1,500 mortgage then upon the premises. Gray now asks to have that sale and conveyance declared fraudulent, and that the defendants may be compelled to execute a conveyance of the premises back to him. The fraud alleged is that Robbins represented that he was the owner of the larger part of the stock of the said company; that the company was in a solvent condition and doing a good business, and was the owner of three four-color printing-press machines, and of two bag machines; whereas, in fact, it was not the owner of the three four-color printing-press machines, nor was it in a solvent condition. There is some dispute between the parties, and some uncertainty in the proof as to what certainly passed between them before the written agreement was signed, but there is no reasonable doubt as to the condition of the concern at the present time. Beyond all question it is utterly and hopelessly insolvent, and admitted so to be. In my judgment there is reasonable ground for believing that, at the time the written agreement was entered into, the company was also hopelessly insolvent, and that if Robbins

<sup>1</sup>Representations which mislead and deceive a party, whereby he makes a contract for the sale of land, are ground for the exercise of equity in rescinding the contract so induced, whether the party making the representations willfully deceived or otherwise. *Mohler v. Carder* (Iowa,) 35 N. W. Rep. 647. When a representation is made of a fact that has nothing to do with opinion, and is peculiarly within the knowledge of the person making it, the one receiving it has the absolute right to rely upon its truthfulness, though the means of ascertaining its falsity were fully open to him. *Gammill v. Johnson*, (Ark.) 1 S. W. Rep. 610, and note.

did not know it, it was his duty to know it. If he did not know it, it was because he closed his eyes to the truth. At that time the stock of the company had no market value whatever, and no one pretended to give it any credit except those who composed the company, and to whom the stock had been issued, whether they held it for a consideration or not. The company did not own the three four-color printing-press machines at that time, nor did it become the owner of them until some time afterwards. As the deed for the premises was delivered to Mrs. Robbins on the sixth day of January, 1887, the printing-presses were not sold and transferred to the company until the fourth day of March next ensuing. Now, upon this question of solvency or insolvency, it is quite important to inquire who sold the printing presses to the company. The bill of sale of two of them is executed by Samuel W. Shreve, and is witnessed by Ira Robbins, while the bill of sale of the other one was executed by Ira Robbins and witnessed by Samuel W. Shreve. Now, Samuel W. Shreve and Ira Robbins were both stockholders, if not managers or directors, of another company which was constructing or manufacturing these very four-color printing-press machines. They were manufacturing the very machines in the place of business of the Franklin Printing-Press Company. Mr. Shreve was therefore interested in selling and disposing of these machines, and so was the defendant Ira Robbins. Ira Robbins held over 50,000 shares of the stock of the Franklin Printing-Press Company, for which, if he ever paid anything, does not distinctly appear. Samuel W. Shreve held 5,000 shares of the stock, for which he himself says he never paid one cent. And according to the bills of sale which they executed, they received for these three machines \$14,000, when, so far as I can learn, there was not a penny in the treasury which they were justified in applying to any such purpose, considering their relation to this company. I have said that this stock had no market value, and that it is very apparent from all the testimony in the case. Notwithstanding there were 100,000 shares of it, there is no proof that any considerable amount of it was sold and transferred for an actual money consideration. If I understood Mr. Shreve aright, besides the 5,000 shares, he at one time held other shares which had been transferred to him for some sort of services rendered; and there were a number of other holders of stock who had taken it for a like consideration. There is nothing to show that any person except Mr. Gray and a man in Philadelphia, who paid in \$700 as part payment of a large amount of stock, and then disappeared, abandoning all his interest in the concern, made any payments—cash payments—for any stock of the concern whatever. It was then in this condition when certain individuals, of whom Mr. Robbins was one, resolved themselves into a corporation according to the forms of law, and declared that they were the owners and possessors of certain stock, to which they affixed, by their own fiat, a value. They rented a building, placed some machinery in it for the manufacture of bags, and had constructed therein the three four-color printing-press machines above named, which were not completed at the time of the sale and transfer of the complainant's land to Robbins. To each other, and their employes for work and labor done, or alleged to have been done, a portion of this stock was transferred; and certain portions of it were transferred without even such an alleged consideration. Before such an institution had done any business worthy of the name; before it was at all in a condition, so far as machinery and the alleged purposes of its creation were concerned, to do any business,—this defendant Robbins insists that it was perfectly solvent.

To my mind it is difficult to conceive of an institution more intangible or imperceptible than this company. It scarcely deserves the name of a bubble. There is no department of trade where such transactions would be considered fair and honest; nor is there any rule of law that will sustain one in appropriating the property of another under such conditions. See *Torrey v. Buck*, 2 N. J. Eq. 366; *Stover v. Wood*, 26 N. J. Eq. 417, 28 N. J. Eq. 253; *Reynell*

v. *Sprye*, 1 De Gex, M. & G. 660. The transaction should be declared fraudulent, and the defendants decreed to execute a deed of conveyance for the premises described in the bill to the complainant, upon service upon them of a copy of the decree which shall be made in this cause, and a deed of conveyance in due form prepared for them to execute; the said deed to be tendered to said Ira Robbins only.

The complainant is entitled to costs.

### Appeal of JEANES.

(*Supreme Court of Pennsylvania*. October 8, 1887.)

#### PLEDGE—OF CORPORATE STOCK—SALE BY PLEDGEE—NOTICE.

Complainant borrowed money on certain notes, pledging stock as collateral security. The note authorized the holder, upon non-payment, to sell the stock at private or public sale without demand of payment or further notice. *Held*, that a sale by the pledgees, after maturity of the note, without notice, was valid, and divested the title of the pledgor.

#### 2. SAME—ORIGINAL POWER OF SALE APPLIES TO SUBSTITUTED PLEDGE.

The maker of a note pledged, as collateral security, certain shares of railway stock, the note containing power of sale of the securities on non-payment. Part of the stock proved to be a fraudulent over-issue by the officers of the company, which was compelled by the court to issue *bona fide* certificates therefor to the pledgees, who, upon non-payment of the note, afterwards sold them, without notice, to the maker. *Held*, that the power of sale in the note applied to the substituted certificates.

#### 3. SAME—SEPARATE SALES BY MEMBERS OF DISSOLVED FIRM.

A partnership discounted a note, taking certificates of stock as collateral. The note contained power of sale of the collateral on non-payment, without notice. The partnership was dissolved, and, the note being unpaid, the collateral was distributed among the partners, who sold it separately at private sale, without notice. *Held*, that the power to sell was properly exercised.

Appeals from courts of common pleas, Philadelphia county.

Six several bills in equity, in all of which William T. Elbert was plaintiff, and the following parties, respectively, defendants, viz.: Isaac Jeanes, surviving partner of the firm of Isaac Jeanes & Co., John W. Patten & Son, the Consolidation National Bank, the Manufacturers' National Bank, John W. Moffly, and D. N. Wetzlar & Co. The West Philadelphia Passenger Railway Company was also joined as a party defendant to all the suits. The bills all averred, in substance, that the plaintiff had procured discounts of his notes from the various defendants, pledging the stock of the West Philadelphia Passenger Company; that the stock was sold; and the bills prayed for accountings, and injunctions against the transfer of the stock. The cases were referred to a master, who reported that the bills and certain cross-bills filed by the railway company should be dismissed. The court dismissed all but the case of Jeanes, against whom he ordered a decree. Jeanes appealed, and Elbert and the railway company appealed the other five cases.

*Henry S. Cattell* and *F. Carroll Brewster*, (with whom were *F. H. Cheyney* and *J. Cooke Longstreth*,) for Elbert. *John G. Johnson*, (with whom was *William G. Foulke*,) for Jeanes. *Robert M. Logan*, for Patten & Son. *Bowers, Gormley & Snare*, for Consolidation Nat. Bank. *John K. Valentine*, (with whom was *Henry P. Brown*,) for John W. Moffly and the Manufacturers' Nat. Bank. *Edward H. Weil*, for Wetzlar & Co.

GREENE, J. It is much to be regretted that no opinion was filed by the learned court below, with a statement of their reasons for reversing the report of the master, upon the vital, fundamental question in this case. A decree for almost a hundred thousand dollars has been entered against a citizen without a solitary reason for the rendition of such a decree appearing upon the record, while very substantial reasons appear there, in the master's report, showing why no decree should be made against him for any amount.

The magnitude of the judgment alone was sufficient to impel any court to justify its action by a most careful and well-considered opinion. In addition to that the orderly course of procedure in this class of cases, especially where a master's report is reversed, requires that an opinion of the court be filed explaining the reasoning and principles upon which its conclusions were founded, so that we might be fully informed upon that subject. We have several times called attention to this matter, and, in a few instances, have refused to hear causes brought up on appeals from *pro forma* decrees without opinions, although they were confirmations of the master's report. In this particular case the situation is especially anomalous, because there are five other appeals from the same court from decrees made upon the reports of the same master, upon substantially the same facts, and in all of them the final and controlling question being the very same as in this, and yet, while the master's report dismissed the plaintiff's bill in all six of the cases, the court's decree sustains the report in five of the cases, and reverses it in one. In the five cases, as in this, there is no opinion of the court, and we thus have the unpleasant spectacle of conflicting decrees made by the same court upon the same question, and without any reason assigned for any of them. If we were in doubt about the determination of these causes we would refer them back, in order that opinions might be filed giving us some information as to the occasion of the seeming conflict of decisions which we have indicated. But we have no doubt as to how they ought to be decided, and will, therefore, dispose of them finally.

In the view that we take of the present case there is but one question which requires consideration, and that is, whether the pledgees of the stock had the lawful right to sell it at private sale, and without notice to the pledgeor. In an ordinary case of pledge of course there is no such right. The pledgee must first give notice to redeem, and, if the pledge is not redeemed, and he proposes to sell it, he must sell it at public sale, and after notice to the pledgeor. If this is not done the pledgeor's rights are unaffected by the sale. But this is not an ordinary case of pledge. It is affected by a special contract. The pledgees made loans of money to the pledgeor upon pledges of certain passenger railroad stock, and the notes given by the pledgeor for the loans expressed the terms of the contract of pledge as well as of the loan. They were all alike, and in the following words:

"§———. PHILADELPHIA, ———, 1877.

"Two months after date I promised to pay to the order of myself \$———, without defalcation, for value received, having deposited herewith ——— shares of West Philadelphia Passenger Railway Company stock, which I authorize the holder of this note, upon the non-performance of this promise at maturity, to sell, either at the brokers' board or at public or private sale, without demanding payment of this note, or the debt due thereon, and without further notice, and apply the proceeds, or as much thereof as may be necessary, to the payment of this note, and all necessary expenses and charges, holding me responsible for any deficiency.

WILLIAM T. ELBERT."

It is not for one moment pretended that there is anything illegal about this contract, and therefore it needs no discussion, except an exposition of its terms, an application of them to the subsequent facts, which are quite undisputed, so far as they are material, and a brief consideration of the rights and duties of the parties respectively. The extreme plainness and simplicity of the language of the instrument make it manifest at once that the pledgee of the stock delivered with the note had the undoubted right, immediately upon the dishonor of the note, to sell it, at either public or private sale, without notice to redeem, and without notice of the sale. The subsequent facts were that all the notes were dishonored, amounting to over a hundred thousand dollars, for which eleven hundred and sixty shares of stock had been pledged. This occurred in August and September, 1877. The plaintiff, Elbert, who

was the pledgeor, failed to pay a single dollar of his indebtedness to the defendants, who were the pledgees, and who with a good faith, which has not been questioned for an instant, advanced the whole of this very large sum of money upon the credit of the collaterals. Shortly after the last loan was made it was discovered, and the fact became public, that some of the officers of the company whose stock had been pledged had made large over-issues of stock, fraudulently and without right, and it was developed on the hearing of this case that 500 of these pledged shares were of this spurious and illegal issue. The market price of the stock at once depreciated very greatly, so that the aggregate of the stock pledged was entirely insufficient to repay the pledgees for the amount of their loans, and as Elbert was a hopeless insolvent, from whom not a dollar could be or ever was collected, the defendants were left with a large quantity of comparatively worthless collateral on their hands, and were obliged to confront, as they did, an enormous loss upon their transactions with the plaintiff. They did not, however, exercise their right to sell the collateral, but held it for several years. In the mean time, upon the proper proceedings against the corporation whose stock had been fraudulently issued, it was held to be responsible for the acts of its officers, and, as a consequence, 500 new and legitimate shares were issued to the defendants in place of the same number of spurious shares which the plaintiff had pledged to them. The defendants surrendered the spurious shares which they had received from the plaintiff, and accepted in their place the same number of genuine shares from the company. They thus held 1,160 genuine shares, instead of 660 genuine and 500 false, which they had received from the plaintiff. In adopting this course they very greatly benefited the condition of the plaintiff, as events later on fully proved. In 1880 the stock of the railway company rose in value after a long period of depression. The defendant's firm had become dissolved in October, 1877, by the death of William J. Morris, one of its members, and the immense debt due them by Elbert was carried by the liquidating partners, who also carried the collateral, until the closing up of the business of the firm in 1880. When this was done the stock was allotted among the different partners in proportion to their interests in the firm. Subsequently, from August, 1880, to May, 1881, the various members of the firm sold, at private sale, their several allotments of the stock, and, while they realized the full market price of the stock at the time of sale, it was altogether insufficient to pay off the debt due them, and a very heavy loss resulted to them upon closing out the transaction. These sales were made without notice to Elbert, and without any special notice to redeem. They were known by Elbert at least as early as April, 1882, but the master finds that in his opinion the statement of Mr. Jeanes that he informed Elbert of the sales immediately after they were made was true. It is a matter of very little moment except as it affects the question of the plaintiff's good faith in bringing this action. In the letter he wrote to Mr. Jeanes in April, 1882, he stated that he assumed the matter as settled in full, and advised them accordingly. The question then recurs, had the defendants the legal right to sell the shares without notice, and thereby divest Elbert's interest in them? It is difficult to understand how there can be any question upon this subject, since the right to sell without notice is expressly given by the contract of pledge. A very slight reference to the authorities shows that the right is well recognized and constantly enforced. Thus it is said in Jones, Pledges, § 611: "A waiver of the requirement of notice of the pledgee's intention to sell, and the time and place of sale, may be made by agreement of parties. A waiver of the common-law rule of notice is generally made when the parties agree upon a special power of sale, for under such a power it is usual either to waive notice of sale altogether or else to provide for a special notice. Such notice is waived by giving the pledgee the option to sell at private sale. Under authority given a pledgee to sell at public or private sale at his option, he may sell without

notice in the usual manner of selling such property in the market." *Loomis v. Stave*, 72 Ill. 623, where a party deposited certain township bonds as collateral security for the repayment of certain sums of money borrowed, it was held that the lender, with whom they were deposited, had the right to sell the same in default of payment without any personal notice to the pledgor of an intention to do so, it being so stipulated in the agreement. Other authorities to the same effect are *Robinson v. Hurley*, 11 Iowa, 410; *Milliken v. Dehon*, 27 N. Y. 364; *Hamilton v. Bank*, 22 Iowa, 306.

It is argued for the plaintiff that as the spurious shares were delivered to the railway company by the defendants and genuine shares were delivered to the defendants in their place, the identity of the pledge was destroyed, and the shares sold were not the same as the shares pledged, and were therefore not covered by the power of sale. It is a most ungracious argument, but as it is altogether untenable it cannot prevail. The shares pledged were 1,160 shares of the West Philadelphia Passenger Railway Company, and the shares sold were also 1,160 shares of the same company. Their identity was therefore absolute as to their number, and as to the particular corporate stock of which they were a part. But 500 of those pledges were false, fraudulent, and spurious shares, which neither Morton, from whom Elbert received them, nor Elbert, who made no advances upon them, could ever have asserted against the company which was defrauded by their issue. Only the fact that the defendants had loaned money upon them gave them a right to have genuine shares issued in their place, and that fact inures to the benefit of the plaintiff by no merit of his. When he pledged the original 1,160 shares for value, which he received, he thereby gave an implied warranty that they were actual, legal, genuine shares of this particular company, and it was *that kind* of shares that he empowered the defendants to sell. All the parties bargained upon the faith of the shares being genuine, and the plaintiff, above all others, is bound by that quality of the shares. But he was guilty of a breach of this warranty; whether innocently or not, is quite immaterial. Legally he was bound to make those shares good. It has been done for him by the act and the merit of the defendants, and they held, after they received the genuine shares, exactly what he agreed to give them, and no more. As a matter of course as between him and them, he never would be permitted to allege his own want of title to the property which he had delivered to them upon ample consideration paid by them to him. *A fortiori*, he cannot be heard to aver their want of title to the identical thing he assumed to deliver them, because they had simply assented to a change in the certificates necessary to perfect the plaintiff's title as well as their own. He is estopped from making any such averment. It would be a monstrous wrong to permit such an iniquity to be perpetrated. To say of this plaintiff that he was denied the rights of an innocent stockholder because he could not prevent the company from issuing the genuine stock in place of the false, is to ignore—*First*, the fact that he never was an innocent stockholder, and, *secondly*, that the issue of the new stock was done by the decree of a court to which his assent was in no manner essential. Even if the company had voluntarily increased their capital stock while the defendants held the pledge, that circumstance could not possibly affect the determination of such a question as this, although it might be true that the aliquot proportion which the genuine shares originally pledged bore to the total capital stock was greater before than after their issue. It has nothing to do with this question.

It is also argued that the sale of the stock pledged was not the single act of the firm in its collective capacity and was therefore not an execution of the power. In point of fact the sales were all made by individual members of the firm; but, as all assented, and none of them are here complaining, so far as the plaintiff is concerned, the sales must be regarded as the act of all. The defendants were not bound to sell all the shares at one time or through any

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particular member of the firm, and the details of the sales are not of his concern, unless some right of his was violated. The defendants, by their long holding of the shares through the time of their great depression, conferred a most signal benefit upon the plaintiff by obtaining a much higher price for them than was possible at an earlier date. Had the price then receded this proceeding would never have been heard of. It happened to advance far beyond the wildest calculations. Of this advance the plaintiff now seeks to take advantage at the ruinous cost of the defendants, although he never tendered a dollar of his indebtedness or made the slightest attempt or offer to redeem the pledge. If by the law he were entitled to this advantage, of course he would obtain it, no matter how great the hardships, but as it is, neither the rules of law nor the principles of equity can give him the decree he seeks, and he must therefore be content without it.

The decree of the court below is reversed, and the plaintiff's bill is dismissed, and it is ordered that the costs be paid as recommended by the master, to-wit, the costs in the original action and of this appeal be paid by the plaintiff, Elbert, and the costs in the cross-action by the West Philadelphia Passenger Railway Company; the master's fee to be paid three-fourths by Elbert, and one-fourth by the railway company.

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#### Appeals of ELBERT.

(*Supreme Court of Pennsylvania. October 3, 1887.*)

GREEN, J. The decrees in these several cases are affirmed for the reasons stated in the opinion of this court in the case of *Appeal of Jeanes, ante, 862*, just filed.

CLARK, J., absent.

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#### Appeal of KLINE.

(*Supreme Court of Pennsylvania. October 3, 1887.*)

##### 1. WILL—BEQUEST—NATURE OF ESTATE—INCOME.

Testator bequeathed to his wife one-half the net income from his lands for her life, and, when the land was converted into money, then one-half the interest arising from the proceeds of such lands. He also empowered the executors to sell lands for the purpose of paying debts and legacies. *Held*, that the widow took, not a life-estate in half the realty, but only one-half the income or interest on the proceeds remaining after the debts and legacies were paid.

##### 2. DOWER—BEQUEST IN LIEU OF—ELECTION.

Where a widow elects to take under the will, in lieu of dower, she must take subject to all the charges and limitations of the will, just as any other devisee.<sup>1</sup>

Appeal from court of common pleas, Union county.

This action was brought by Julia A. Hagenbuch, widow of Peter Hagenbuch, against David Kline, executor of the will of Peter Hagenbuch, to compel the payment of a certain sum claimed to be due her under the will. The clause of the will under which she claims is as follows: "I direct that my real estate shall not be sold until after the decease of my wife, unless it may become necessary, in the judgment of my executors, to sell a portion thereof for the purpose of paying debts and legacies. I hereby give, devise, and bequeath unto my wife, Julia A., the one-half of all the net income arising from real estate during the full term of her natural life; and when real estate is converted into money, so that income ceases to be received from it as land, then one-half of the interest arising from the proceeds of such lands is to be paid to my wife annually during the term of her natural life." The court below

<sup>1</sup> As to the right of the widow to take dower, and at the same time to avail herself of the provisions made in her behalf by the will of the husband, and as to the presumption in such cases, see *Anthony v. Anthony*, (Conn.) 11 Atl. Rep. 45; *In re Blaney*, (Iowa,) 34 N. W. Rep. 788, and note.

held that under this clause the widow took an amount annually equal to half the income of all the real estate of which the testator died seized, and half the interest of the proceeds of such land as was sold; that the gift to her was not abated by the payment of debts or legacies. The defendant Kline appealed.

*Andrew A. Leiser, (Chas. S. Wolfe and Alfred Hayes, of counsel,)* for appellant. *Andrew H. Dill and P. L. Hackenberg, (E. M. Beale and W. H. Hackenberg, of counsel,)* for appellee.

GORDON, C. J. Whatever of estate Julia A. Hagenbuch took in the property of her husband she took under his will, and she is therefore bound by a proper interpretation thereof, and by the intention of the testator, as therein expressed. We must, then, look to that will to discover the rights of the parties litigant; to the intention of the testator, and not merely to the technical effect of the expressions of which he may have made use. Keeping this rule in view, we think the matter before us is not difficult of solution. By his will, Peter Hagenbuch gave to his wife, Julia, a one-half of the net income arising from the one-half of his real estate for the full term of her natural life; and should that realty be converted into money, and thereby the income from the lands themselves cease, she was to receive the one-half of the interest of the proceeds arising from the sale of the lands. From this it is obvious that the intention was not a gift of a life-estate in one-half of the realty as such, but, rather, in the one-half of the net income or interest of the proceeds after sale; that is, the income or interest thereof after deducting all necessary expenses and charges. In this, we think, the master and court below erred, for they assumed that a gift of the one-half of the income was a gift of an absolute estate in the lands. Of course, an unqualified gift of the income of land is to be taken as a gift of the land itself; but where, as in this case, that gift is qualified by a direction to or power in some one else to sell, it is clear that the gift must be confined to the income alone, for the intent to keep the two things separate and distinct is thus made manifest. But in the disposition of this income the master allowed to Mrs. Hagenbuch the interest on the one-half of the several amounts realized from the sales of the land, though the whole or major part of it had been consumed in the payment of debts and legacies. This, on the ground, as the master puts it, "as she took as a preferred creditor, taking by purchase," she was entitled to be equitably subrogated to the rights of creditors, the claims of whom were paid out of her estate in the remaining portion of the testator's property.

Taking the premise here assumed as sound, the correctness of the conclusion cannot be impeached. But the premise is not sound; it is but an assumption. Her estate was not taken for the payment of creditors, but the estate of the testator, and according to the direction of his will. Again we turn to that will, for by it she is held, and cannot avoid its conditions by a resort to technical rules which have no application to her case. The second and fourth items of the testament before us are sufficiently explicit, and read as follows: "(2) I direct that my real estate shall not be sold till after the decease of my wife, unless it may become necessary, in the judgment of my executors, to sell a portion thereof for the purpose of paying debts or legacies." "(4) If my executors can arrange to pay the balance of my debts, and the legacies herein bequeathed, by applying the income of my real estate thereto, then I wish them to do so; but if this cannot be done, or, in their judgment, it is not advisable, then I authorize them to sell and convey by deed or deeds, by them executed, such of my real estate as they may deem best to sell for said purposes." From the above it will be seen that there is a clearly expressed intent on part of the testator to charge his real estate with both debts and legacies; and for the purpose of discharging the same the executors are empowered to dispose, not only of the income, but to sell the land. How, then, can she have the income or interest of that which was sold in execution of that power?

This cannot be. As well might the donee of a property charged with a judgment expect to take it free of that judgment, and, upon sale of it under the lien, attempt to be subrogated to the creditor's right in other property of the donor. It is true that her acceptance under the will must be regarded as an acceptance in lieu of dower, and so to be taken as a purchase for a valuable consideration; but, then, what did she thus purchase? Certainly only that which was expressed in the will; that is, the net income of an estate charged with certain debts and legacies,—nothing more; nothing less,—and she must be held to her bargain.

On the question of jurisdiction we need spend no time, for what we have already said effectually disposes of the plaintiff's bill.

Decree reversed, and bill dismissed, at costs of appellee.

PAXSON, J., absent.

WERNWAG *et al.* v. PHILADELPHIA, W. & B. R. Co.

(*Supreme Court of Pennsylvania.* October 3, 1887.)

CARRIERS—OF GOODS—DELIVERY TO WRONG PERSON—LIABILITY.

Plaintiffs shipped by defendant's road goods consigned to A. B., in Washington. Defendant could find no one of that initial, but found one L. B., and learning from plaintiff's agent that he had sold some goods to L. B., delivered the goods to him. Held, that defendant was liable for the goods.

Error to court of common pleas, Philadelphia county.

William P. Wernwag and T. R. Dawson, the plaintiffs, were partners in business as Wernwag & Dawson in Philadelphia. E. F. Witmer & Co., of Baltimore, were agents for the sale of their goods in Washington, and they employed one Murphy to sell Wernwag & Dawson's goods in Washington. Murphy made a sale to one L. Behrend, and transmitted the order to plaintiffs. Plaintiffs were not able to find the name of L. Behrend in the commercial reports as a merchant in business in Washington, and remembering that they had previously had dealings with one A. Behrend in Washington, concluded that the agent had made an error in the initial, and therefore shipped the goods over the Philadelphia, Wilmington & Baltimore road consigned to A. Behrend. Defendant's agent in Washington could not find A. Behrend, and the goods being claimed by L. Behrend, he inquired of Murphy if he had made a sale to L. Behrend. Murphy replied that he had made such sale. Thereupon defendant delivered the goods to L. Behrend, supposing there was simply an error in marking the packages. Shortly afterwards L. Behrend made a general assignment, and it was not until then that plaintiffs learned of the delivery to him. They brought action against the railroad company to recover the value of the goods, and upon judgment being rendered against them, they bring error.

*Rudolph M. Schick*, for plaintiff in error. *David W. Sellers*, for defendant in error.

GREEN, J. From the facts appearing in the case stated it is manifest that the plaintiffs intended to sell, and in point of fact did consign, the goods in question to A. Behrend, and not to L. Behrend. They knew the former, and were satisfied to sell to him. They did not know the latter, and did not intend to sell to him. They supposed that A. Behrend was intended as the purchaser in the order, though L. Behrend was named. Granting this to be a mistake of theirs in the reading of the order, it does not in the least alter the fact that A. Behrend was the person to whom they supposed they were selling. However that may be, they certainly consigned the goods to A. Behrend, and there was then such a person living in Washington, the place to which the goods were shipped. It cannot be questioned for a moment that it

was the duty of the carrier to deliver the goods to the person to whom the owner consigned them. If the carrier does not so deliver them he acts at his peril, and the whole risk of a wrong delivery rests upon him. In *Shenk v. Propeller Co.*, 60 Pa. St. 109, we said, SHARSWOOD, J.: "Whatever doubt may hang over the question as to the termination of a carrier's or other bailee's responsibility, there is one point which is indisputable, that he must take care, at his peril, that the goods are delivered to the right person; for a delivery to a wrong person renders him clearly responsible, though innocently and by mistake."

In the present case the goods were delivered to L. Behrend, and, as between the plaintiffs and the carrier, that was undoubtedly a wrong delivery. But it is argued that the delivery to L. Behrend was made in consequence of the direction of Murphy, who, it is said, was the plaintiffs' agent. If, in the case stated, it appeared that Murphy did direct the delivery to L. Behrend, this contention would have great force, because it was Murphy who sold the goods and sent the order, and it would be difficult for the plaintiffs to escape the consequences of his act in directing the delivery. But the only averment upon this subject which the case stated contains, is in the following words: "Before delivering the goods to the said Leopold Behrend, the agent of the railroad company, defendant inquired of the said William F. Murphy, the agent who had taken the order, whether he had sold any goods to Leopold Behrend, and what class of goods they were; and after Murphy had said that he had sold goods to Leopold Behrend, and had described them, the agent of the defendant delivered them to Leopold Behrend. The goods so delivered were the same goods which plaintiffs had shipped to A. Behrend, as aforesaid." From this it appears that Murphy gave no directions to deliver the goods to any one. He merely said he had sold goods to L. Behrend, and described them. Granting that they were the same kind of goods, and were the same goods, which Murphy had sold to L. Behrend, (and this important fact is not mentioned in the case stated,) yet that was as far as Murphy went, or as he was asked to go, in giving information. The effect of that information, as sufficing to exonerate the defendant from liability for a wrong delivery, was a matter of which the defendant through its agent took the entire risk. In this, at least, the plaintiffs were in no fault. Their agent, if Murphy was their agent, simply told the defendant's agent that he had sold goods to L. Behrend, and described them, and thereupon the defendant's agent delivered these particular goods to L. Behrend. By what authority did he do this? The goods were consigned to another person, and the defendant's duty was to deliver to that person. Surely that duty was not discharged by a delivery to one who was not the consignee, merely because the plaintiffs' agent had sold similar goods to such a person. The fact still remained that the goods were not delivered to the one to whom they were consigned. The entire risk of a delivery to the right person was assumed by the defendant, and a wrong delivery was made by the mistake of the defendant's agent, which, of course, is their misfortune. We are clearly of opinion that the plaintiffs were entitled to judgment on the case stated.

The judgment is reversed, and judgment is now entered on the case stated in favor of the plaintiffs and against the defendant for the sum of \$240.37, with interest from November 5, 1883, with costs.

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COLLINS v. CRONIN *et al.*

(*Supreme Court of Pennsylvania.* October 3, 1887.)

CONSPIRACY—JOINT DEFENDANTS—PROOF OF JOINT FRAUD.

In an action against a father and son for fraudulently conspiring to defraud the father's creditors by a collusive judgment, an instruction that, for plaintiff to recover, the jury must find that both the defendants were guilty of fraud, is proper.

Error to court of common pleas, Sullivan county.

Michael Collins, plaintiff, sued Cornelius Cronin and John H. Cronin in an action of case for conspiracy to defraud the creditors of Cornelius Cronin. Judgment for defendants, and plaintiff brings error.

*John G. Scouten and Littles & Terry*, for plaintiff in error. *Thos. J. Ingham, E. M. Dunham, and Ellery P. Ingham*, for defendants in error.

PAXSON, J. The plaintiff in error has misapprehended the vital point in his case. The learned judge below did not lay down the broad principle that "there can be no recovery against one only, in an action on the case in the nature of a conspiracy brought against two or more." What he did say was this: "That fraud is never to be presumed, but must always be proven by evidence that is clear and satisfactory to the jury. And this action is founded upon the alleged fraud of the defendant. In order that the plaintiff can recover in this action, they must find that the evidence established by satisfactory proof the fact that the defendants were guilty of fraud; and this must be true of both defendants, as both John H. and Cornelius Cronin must have intended a fraudulent act, in order to entitle the plaintiff to recover." The plaintiff has assigned this instruction for error, and has cited *Lavery v. Vanartsdale*, 65 Pa. St. 507, and some other cases, in support of his position. In our opinion, he is not sustained by any of them. *Lavery v. Vanartsdale* is perhaps the strongest, and that does not touch the case. That was an action on the case in the nature of a conspiracy, brought by Lavery against Vanartsdale and 10 others for injuring him in his business as a school-teacher. The allegation was that the defendants, for the purpose of preventing the plaintiff from being engaged as a school-teacher for another year, willfully and maliciously prepared, signed, and induced others to sign, a petition representing that he was unfit for a teacher; and it was held by this court, in reversing the court below, that "where the action is brought against two or more, as concerned in the wrong done, it is necessary, in order to recover against all of them, to prove a combination or joint act of all. For this purpose it may be important to establish the allegation of a conspiracy. But, if it turn out at the trial that only one was concerned, the plaintiff may still recover, the same as if such one had been sued alone. The conspiracy or combination is nothing, so far as sustaining the action goes; the foundation of it being the actual damage done to the party." And *Hutchins v. Hutchins*, 7 Hill, 104; *Jones v. Baker*, 7 Cow. 445; and *Parker v. Huntington*, 2 Gray, 124,—were cited by Mr. Justice READ in support of his text. This is perfectly good law. Under the facts of that case, the combination or conspiracy was nothing. One of the defendants could have traduced the character of the plaintiff as a teacher as well as a number of them; and, if he had done so, he was clearly liable in damages for his own act, even although the other defendants had no part in it. It was an act capable of being performed by one defendant alone. But in the case in hand the conspiracy was everything. Without it the plaintiff has no cause of action, for the plain reason that the acts charged in the declaration were of such a nature that they could not be committed by one defendant alone. It was alleged that Cornelius Cronin had confessed fraudulent judgments to his son John for the purpose of hindering, delaying, and cheating the creditors of the former; that execution had been issued upon these fraudulent judgments, and his property sold, and bought in by his son, at much less than its value. This, if true, would have been a fraud upon the plaintiff and other creditors. The jury found that it was not true, under proper instructions from the court; for how could fraudulent judgments spring into existence between a father and son without collusion, combination, and conspiracy? And, if the judgments were *bona fide*, then the son was merely using his legal remedies to collect an honest debt due from his father. He had as much right to do this as had any other creditor, and no action lies against him therefor. The case is too plain for argument. Judgment affirmed.

## ARNOLD v. PFOUTZ.

(Supreme Court of Pennsylvania. October 8, 1887.)

## 1. TRESPASS—QUARE CLAUSUM—EVIDENCE TO PROVE TITLE.

Plaintiff in an action of trespass *q. c.* introduced an agreement of sale running to him and another, who did not execute it, and who disclaimed any interest under it. *Held*, it was admissible to show an equitable title to the land in him sufficient to sustain the action.

## 2. SAME—EVIDENCE—LOCATION OF LAND.

In an action of trespass *quare clausum fregit*, plaintiff has the right to rebut the testimony offered by defendants as to the location of the land.

## 3. SAME—ORDER OF EVIDENCE—REBUTTAL.

In an action of trespass *quare clausum fregit*, plaintiff introduced testimony to establish a certain boundary line. *Held*, that defendants must introduce all their testimony to establish another line in chief, and not reserve a portion of it for rebuttal.

Error to court of common pleas, Clinton county; C. A. MAYER, President Judge.

John W. Wertz sued Halsey Arnold and Simeon Summerson, defendants, in trespass *quare clausum fregit*. Wertz died, and his administrator, David R. Pfoutz, was substituted. Judgment for plaintiff, and defendants bring error.

*Seymour D. Ball* and *Jesse Merrill*, for plaintiffs in error. *S. R. Peale* and *W. C. Kress*, for defendant in error.

GORDON, C. J. This was an action of trespass *quare clausum fregit*, brought by John W. Wertz, in his life-time, against Halsey Arnold and Simeon Summerson, for cutting timber on the lands of the said plaintiff. Before the time of trial the plaintiff deceased, and the administrator of his estate was substituted. The main question was one of location, and was fully and fairly submitted to the jury, and of this no complaint has been made in this court.

The first and second assignments relate to Wertz's title, an article of agreement from A. C. Noyes, executor of John W. Pfoutz, deceased; and the complaint is that, as it was drawn to John W. and Taylor Wertz, the court ought not to have permitted it to have gone in evidence, for that this action could not be maintained by but one of these tenants in common. Turning, however, to the paper referred to, we find that, while Taylor Wertz's name is found in the body of it, he did not execute it; and, on being called to the witness stand, he disclaimed all interest therein, so that the entire equitable estate vested in the plaintiff. Were it otherwise, however, as was said by Mr. Justice LEWIS, in the case of *Halsey v. Blood*, 29 Pa. St. 319: "A wrong-doer without title, who endeavors to protect his trespass by the outstanding title of a stranger, has no equity, and is not entitled to any particular favor." As the plaintiff's equitable title was entirely sufficient to maintain his action, (*Miller v. Zufal*, 113 Pa. St. 317, 6 Atl. Rep. 350,) the evidence complained of in the second assignment was of very little moment. Still, there was nothing objectionable in showing that Wertz's agreement had been sanctioned by the orphan's court, and that a deed had been made to him in accordance with its decree.

The third assignment is wholly without merit, for the plaintiff had the undoubted right to rebut the defendant's evidence of location.

The fourth needs no consideration, for, so far as the testimony therein stated was relevant as rebutting evidence, it was admitted, and the witnesses fully examined.

Nor can we see that the fifth assignment convicts the court of error. The proposed evidence was offered, with other testimony, to establish the line of the Carskadden tract, and was therefore clearly evidence in chief, and, regularly, could not be introduced to rebut the plaintiff's rebutting testimony. The transaction stands thus: It was necessary for the plaintiff, in the out-

start, to make out his case, not only by proving title or possession, but also that the timber was cut within the lines of his claim. To do this, he necessarily proves the lines of the Carskadden tract, because it is older than and adjoins the Pfoutz, so that upon him, in the first instance, rests the burden of establishing the line of the Carskadden tract. The defendants then rebut by fixing, if they can, what they designate as the "Baird line," and they are bound to produce all the evidence they have bearing on this point; they will not be permitted to give part of it in chief, and reserve the balance for the purpose of rebuttal. But this is precisely what the defendants attempted to do. If Wertz recognized the Baird line as the line of the Carskadden tract, that was some evidence of the rectitude of the defendant's contention, and as such was clearly evidence in chief. It could be nothing else, for, if it did not go to the establishment of the Baird line, it was to no purpose whatever. It could not be used to contradict declarations of Wertz, for none such were given in evidence. There was but one thing for which, as the case was tried, the proposed proof could be used, and that was as evidence of location. Even as evidence in mitigation of damages,—and a proposition of this kind is not in the case,—it could be used only in rebuttal, and not, as proposed, as surrebuttal. So that, in any view of the case, the court below cannot be reversed on this point without also reversing a well settled rule of practice.

The judgment is affirmed.

#### SNYDER *et al.* v. CITY OF LANCASTER.

(*Supreme Court of Pennsylvania.* October 3, 1887.)

##### EMINENT DOMAIN—USE OF PROPERTY FOR STREET—REMOVING LATERAL SUPPORT.

Defendant, in opening a street, removed a house, one wall of which was used as a wall of plaintiff's house. *Held*, that plaintiff's house was injured; and that under Const. Pa. art. 18, § 8, providing that municipal corporations shall not take, injure, or destroy private property in the construction of highways without just compensation therefor, plaintiff may recover.

Error to court of common pleas, Lancaster county; J. B. LIVINGSTON, President Judge.

Action by William Snyder and Caroline, his wife, against the city of Lancaster, for damages to Caroline Snyder's house by the opening of a street. It appeared that Caroline Snyder owned a house adjoining the house of one Worth. Mrs. Snyder's house was built against Worth's; the gable end of the latter being used as the gable end of the former. In opening Filbert street, it was necessary to remove all the Worth house, except three feet thereof adjoining the Snyder house. The court, in effect, charged the jury that, inasmuch as the new street did not touch plaintiff's house, and there was still left three feet of the Worth house to support it, the plaintiff was not damaged. The jury found for the defendant, and the plaintiffs bring error.

*G. C. Kennedy* and *Philip D. Baker*, for plaintiffs in error. *H. Carpenter*, City Sol., for defendant in error.

GREEN, J. As we understand the facts of this case, the Worth house must be taken down in order to open Filbert street. It is testified that the plaintiff's house will have no gable end when the Worth house is taken down. If such is the case, the plaintiff's house will certainly be *injured* by the removal of the Worth house, and as this removal is a necessary part of the opening of Filbert street, we cannot avoid the conclusion that the opening of the street is or will be the direct cause of the injury to the plaintiff's house. This being so, the case comes within the operation of section 8, art. 16, Const. 1874, and should have been submitted to the jury, with proper instructions. Judgment reversed, and new *verdict* awarded.

PAXSON and STERRETT, JJ., absent.

## TOSPON v. SIPE.

(Supreme Court of Pennsylvania. October 3, 1887.)

## 1. EXECUTION—SALE SUBJECT TO DOWER JUDGMENT—NOTICE TO PURCHASER.

At an execution sale the sheriff stated that the land was sold subject to a dower judgment, which was also fully set forth in the records. *Held*, that the purchaser took it subject to the judgment.

## 2. SAME—DOWER PAYABLE AT DEATH OF WIDOW—INTEREST—SALE FOR.

In a partition suit the widow's dower was declared a judgment on the land, interest on the amount to be paid annually, and the principal to be divided at her death among the heirs of her deceased husband. *Held*, that a sale of the land on an execution issued for interest due to the widow did not divest it of the dower lien.

## 3. SAME—PURCHASE BY EXECUTION DEBTOR—NOTICE—ESTOPPEL.

When the defendant, in an execution, is the purchaser at the sale, he is estopped from alleging that the land is thereby divested of a judgment for dower, if the existence of which he had knowledge, and when the execution was for the interest due by the terms of that judgment.

Error to court of common pleas, Somerset county.

Mary Sipe, widow, Jonathan Sipe, Henry Sipe, John Sipe, Harriet Humbert, Phoebe Atcheson, Roseanna Hoover, and Jacob Sipe, widow and heirs of Jacob Sipe, deceased, brought *scire factas* to revive a judgment against M. A. Sanner, Peter J. Baker, executors of George Humbert, deceased, and A. H. Tospon, terre-tenant. Judgment for plaintiffs, and Tospon brings error.

W. H. Koontz, H. S. Endsley, and Coffroth & Ruppell, for plaintiff in error. Valentine Hay, for defendants in error.

GREEN, J. The learned court below, conceding that in an ordinary case a sale of land by execution, upon a judgment which was a lien on the land sold, would divest the land of all liens, left this cause to the jury on the question whether the defendant, Tospon, bought this land expressly subject to the lien of the judgment for the principal of the widow's dower, and on that question the jury found against the defendant. It was a question of pure fact, and upon the testimony taken the jury could not, consistently with their duty, have found any other verdict than the one they did find. The evidence for the plaintiff was simply overwhelming, not only that the sale was made subject to the dower, but that Tospon agreed to it. The proceedings in partition of the estate of Jacob Sipe showed that the land was ordered to be sold subject to the dower, the amount of the principal and the annual interest payable to the widow during her life being expressly stated. Subsequently, in the estate of Henry J. Humbert, the orphans' court record showed that a decree was made for the specific performance of a contract for the sale by Henry J. Humbert to George Humbert of the land in question, the purchase money being \$1,765, of which \$1,403.81 had been paid by George Humbert to Henry J. Humbert during his life, the remainder, \$361.69, being the principal of the widow's dower, subject to the payment of which to the heirs of Jacob Sipe, at the widow's death, and the interest to her annually during her life, the sale was made. The record of the court of common pleas showed that at the same time the above decree was made by the orphans' court, a judgment was entered against George Humbert in favor of the widow and heirs of Jacob Sipe, deceased, for \$361.69, payable \$21.70 on the twenty-eighth of April, 1866, and annually thereafter, to Mary Sipe, widow, during her natural life, and at her death the said sum of \$361.69 to the heirs of Jacob Sipe, deceased. The same record also showed that this judgment was regularly revived in 1870, in 1875, and in 1879. When the last judgment of revival was entered, it was stated on the record to be "for \$432.37, being for \$361.69, with interest from twenty-eighth of April, 1879, and payable as aforesaid, and \$70.68 arrears of interest due the widow Sipe, due presently." Upon this judgment a *fi. fa.* was issued for \$70.68 interest due the widow, real estate levied, con-

demned, inquisition approved, and sold to A. H. Tospon for \$390. The present proceeding is a *scire facias* to revive the judgment against Tospon issued in 1884, he having bought the land in 1879. It was therefore apparent, upon the record of the judgment itself; that the principal sum was not payable, and could not be paid until after the death of the widow Sipe; that the execution had only issued for the arrears of interest due the widow, and that she only could take any part of the proceeds. None of the remainder of the proceeds could be taken by the heirs of Jacob Sipe. It could only be applied to subsequent liens, or paid to the defendant in the execution.

Of all of the foregoing facts the defendant, Tospon, was abundantly notified by the record, and was chargeable with every consequence of such knowledge. In addition to this, it was most fully and particularly testified by nine witnesses, that, at the sheriff's sale when Tospon purchased, it was distinctly announced to all bidders that the sale was made subject to this dower of the Widow Sipe. The crier testified that he gave notice three or four times that there was a dower of \$361, "and who bought the farm bought subject to that dower." The Sipe dower was named. The crier said, "there was talk about it, but I announced it distinctly that the farm would be sold subject to that dower." He also said that Tospon was present only a few feet distant, and Tospon was the purchaser. Notice to the same effect was also given by Mr. Hay. Some question having arisen at the sale as to whether there were two dowers on the land, to-wit, the Sipe dower and another in favor of George Humbert's widow, Tospon notified the deputy sheriff that he had heard there was an additional dower on the land, and he would not take it, and he refused to pay the 10 per cent. down money. Then George Spangler agreed to take it, and his name was inserted as purchaser in place of Tospon's, but in the mean time Tospon had left the office, but presently returned and said he would take it, and his name as purchaser was restored. George M. Baker testified that immediately after the sale he told Tospon that there were two dowers on the land, one of which was in favor of his mother, "and he was running the risk of buying that also, and on the strength of that he went to the sheriff, and I went with him, and he told him if there were two dowers he wouldn't take the property; that he was willing to take it at one, but not two. He was willing to take it at the Sipe. I was right with him, because that was my business." On cross-examination, he was asked: "Question. Didn't he say if there was a dower on it he didn't want it? Answer. No, sir; he said, if there were two dowers. I wasn't interested in the Sipe dower. I told him about that. He said he was willing to take it at one, but if there were two he wouldn't have it. He understood the Sipe dower already." In addition to the foregoing, Tospon, during two years succeeding the sale, paid to the widow her annual interest, thus fully recognizing her right to have it and his obligation to pay it. It is true, he denied that he agreed to pay the Sipe dower, and also that he heard any of the notices at the sale that the land was sold subject to the dower; but he admits that he heard something about dower, and consulted Mr. Coffroth about it, who advised him that the judgment was divested, and after that paid the 10 per cent. down money, and claimed the land under his purchase, though others wanted to take it with the dower on it. In view of this admission, and of the overwhelming force of the testimony against him, it is a matter of no wonder that the jury disbelieved him, and found that he did buy subject to the Sipe dower. Assuming, then, this fact as established by the verdict, the question arises was the lien of the judgment for the principal of the dower or widow's third divested by the sale? It is true, as a general rule, that a sheriff's sale of land bound by a mortgage, upon a judgment obtained for arrears of interest due on the mortgage debt, divests the lien of the mortgage, and that although the principal debt is not yet due. The reason is that the interest is a part of the debt, and no distinction can be taken between a judgment for the interest and a judgment for the

principal. *Bank v. Chester*, 11 Pa. St. 282. That reason does not exist in the present case, because here there is not, and cannot be, an identity of interest and principal. The interest belongs alone to the widow; the principal belongs alone to the heirs, and they cannot have it until after her death. She has not, and never can have, any right or title to any part of the principal, and hence a judgment for the interest is in no sense a judgment for the principal, or any part of it. It is not due to the same persons, nor in the same right, and cannot be considered as identified with it, either in fact or in legal contemplation. There is another distinction between the interest due a widow, and the principal also, for that matter, and the interest and principal of an ordinary mortgage debt. The latter is a lien only upon the land, and may be divested by a judicial sale. But the former is an estate in the land, which cannot be divested except by a sale upon some prior lien. *Fisher v. Kean*, 1 Watts, 262; *Helfrich v. Weaver*, 61 Pa. St. 390.

In *Luther v. Wagner*, 107 Pa. St. 343, Mr. Justice TRUNKY, in delivering the opinion of the court, said: "In view of the nature of the widow's estate, her annual interest cannot be deemed merely as interest on money. Unlike the lien of a judgment or most other liens, her estate is unaffected by a judicial sale of the land. A lien like a judgment, which will be discharged by a sheriff's sale of the land, whether due or not, if the proceeds be sufficient, will be paid, with accruing interest, till date of sale, and the purchaser takes the land freed from such lien. But the widow's estate is not a lien, and the rent, or interest in the nature of rent, which had not become due before the sale, remains as part of her estate." In *Vandever v. Baker*, 13 Pa. St. 121, COULTER, J., said: "If the land was taken at the appraisal by Phineas and Evan Baker as their purpart of their father's estate, and the \$1,650 mortgage was to secure the annual interest of the one-third to Ann Baker, their mother, and to secure the payment of the principal sum to the heirs and legal representatives of Levi Baker, their father, after her death, the lien could not be divested, either by the mortgage which would be cumulative, or by the orphans' court sale, because the act of assembly in such case makes it a lien upon the land, no matter into whose hands it might fall by sale or otherwise. It is an indefeasible charge for the widow and the heirs and legal representatives after her death." In the case of *Batley v. Com.*, 41 Pa. St. 473, the acceptor of land, on proceedings in partition, gave but one recognizance for the whole appraised value of the land, the widow's share not being provided for. The land was subsequently sold under a judgment obtained against the acceptor. After the death of the widow, the heirs brought a *scire facias* to recover the principal of the widow's third, and the question was whether they could recover it, it being unquestioned that, as a mere obligation for the payment of the shares due the heirs, its lien was divested by the sheriff's sale. It was held there could be a recovery because the recognizance necessarily included the widow's share, which was a fixed charge upon the land, and could not be divested.

It is plain, therefore, that there is no analogy between the cases in which the lien of a mortgage is held to be divested by a sale on a judgment obtained for interest and a sale simply on a judgment for the arrears of interest due to a widow. Her judgment is a mere cumulative remedy, and we are inclined to think it may be enforced, even though it becomes a part of a judgment entered for the principal, where it is specially set forth in the judgment that the principal is not payable until after the death of the widow, and the writ of execution issues for the arrears of interest only due to the widow. We see no essential legal reason why this may not be done as well by means of a judgment as by a mortgage. But whether this be so or not, in the present case it has been established that the defendant bought the land expressly subject to the payment of the dower. In several cases we have held that where one purchases land at a sheriff's sale upon condition that it shall be subject to a lien which would otherwise be divested, the purchaser takes the land subject

to such lien. Instances of this are found in *Muse v. Letterman*, 13 Serg. & R. 167; *Stackpole v. Glasford*, 16 Serg. & R. 166; *Tower's Appeal*, 9 Watts. & S. 103; *Loomis' Appeal*, 22 Pa. St. 312; *Zeigler's Appeal*, 35 Pa. St. 173; *Crooks v. Douglass*, 56 Pa. St. 53; *Ashmead v. McCarthur*, 67 Pa. St. 329. In *Crooks v. Douglass*, AGNEW, J., indicated that there had been conflict of opinion in this court on this subject; but without calling in question the authority of any of the cases, he rested the decision of that case upon the fact that the vendee of the purchaser at sheriff's sale had knowledge that the land had been purchased subject to the lien of the mortgage which would have been otherwise divested, and hence he was estopped from alleging that the land was discharged of the lien, and it was therefore enforced against him. He conceded, however, what several of the cases decided, that the purchaser at sheriff's sale would himself be bound by the terms of the sale because he was a party to it.

That is enough for the purposes of the present case, since here the defendant was himself the purchaser. Judge AGNEW thought that the ground of estoppel was the true basis upon which to rest the doctrine, and that theory was quite applicable to the facts of that case. But in *Ashmead v. McCarthur*, THOMPSON, C. J., placed it upon the broader ground of contract, which should at least be enforced as between the original parties, however it might be if subsequent purchasers were interested. Either ground is applicable to the present case, for it is undoubted that Tospon got the land at the sheriff's sale for at least as much as the amount of the dower less than the price the land would have brought had it not been for the notice of the dower at the sale and his own action at the sheriff's office. We think the case was rightly decided, both on the facts and the law. Judgment affirmed.

#### STIFFLER v. RETZLAFF.

(Supreme Court of Pennsylvania. October 3, 1887.)

##### 1. VENDOR AND VENDEE—BONA FIDE PURCHASER—UNRECORDED AGREEMENT.

Defendant conveyed land to S. by deed duly recorded, and afterwards, by an unrecorded writing, it was agreed between them that part of the land was not intended to be conveyed. Plaintiff purchased the land without notice of the agreement. Held, that plaintiff was not affected by the unrecorded agreement, and that defendant's possession of the part in controversy did not put him on inquiry.<sup>1</sup>

##### 2. EJECTMENT—EVIDENCE—DECLARATIONS.

In ejectment for part of a lot which had passed by intermediate conveyances from defendant to plaintiff, where defendant claimed under a contract with his vendee, evidence was introduced to show by plaintiff's declarations, made when he purchased, that the purchase was with the understanding that the part in controversy was not included. Held, that such declarations could not affect plaintiff's rights under the deed.

Error to court of common pleas, Blair county; JOHN DEAN, Judge.

Ejectment by Charles Retzlaff against John H. Stiffler and others to recover certain real estate in the city of Altoona. There was a trial by jury, with verdict and judgment for plaintiff, and the defendant, John H. Stiffler, brings error.

The facts of the case are as follows: On the sixteenth of July, 1884, John H. Stiffler conveyed to his son, Joseph K. Stiffler, one-half of a lot in Altoona. This deed was duly recorded July 22, 1884. On the eighteenth of July, 1884, the parties entered into a written agreement that a certain portion of the land mentioned in the deed should not pass, but this agreement was never recorded. On February 2, 1885, Joseph K. Stiffler made an assignment for the benefit of his creditors, and the plaintiff purchased from the assignee the

<sup>1</sup> See, also, *Sprague v. White*, (Iowa,) 85 N. W. Rep. 751. As to how far actual possession of land is notice of the rights of the occupant, see *Haft v. Strange*, (Miss.) 3 South. Rep. 190, and note.

lot which had been conveyed to Joseph K. Stiffler by his father. When the plaintiff purchased, defendant was in possession of the part in controversy, claiming under an agreement with Joseph, and had erected buildings thereon. Defendant claimed that plaintiff had notice of this contract, but the jury found for the plaintiff on that point. The defendant submitted the following points:

"That if, at the time of the purchase by Retzlaff, any notice was given at the sale, before the property was offered, of an article of agreement between John H. Stiffler and Joseph K. Stiffler, when Retzlaff was present, then, even if the agreement was not read, it was such notice as should have put him on inquiry, and it was his duty to inquire as to what the agreement did contain; and if he failed to do this, he would be bound by the terms of the agreement, whatever they were. This point is denied. (First assignment of error.)"

"That if, after John H. Stiffler made the deed to Joseph K. Stiffler, he and his tenants occupied from that time down to and including the day of the sale all the store-room, dwelling-house, and ware-room on the lot as claimed by him, including that portion which Retzlaff now claims as a part of his lot, it was the duty of Retzlaff to make inquiry of John H. Stiffler or his tenant in possession as to the extent of his claim; and, if he neglected to do this, he is affected with a knowledge of the title of John H. Stiffler. This point is affirmed, unless you should find, from the evidence, that John H. Stiffler voluntarily made an announcement at the sale which would now estop him from claiming in opposition to his deed. The constructive notice here mentioned would not be conclusive against the purchaser if John H. Stiffler misled him. (Third assignment of error.)"

"That if plaintiff had, prior to the sale, admitted by his declarations that he did not suppose he was getting any portion of the lot covered by John H. Stiffler's buildings, he could not recover. This point is denied. (Fourth assignment of error.)"

"There is no such evidence here as would warrant the jury in finding that the conduct of John H. Stiffler was such as would operate as an estoppel, and the verdict must be for defendant. This point is denied. (Fifth assignment of error.)"

"That if, when John H. Stiffler, by his counsel, undertook to give notice to bidders at the sale of the secret claim upon the property, and that if that notice was confined to his right in the stairway, and in no way to the dimensions of the lot, he is estopped from enlarging and from making any claim other than for the use of the stairway. This point is affirmed, if his silence was reasonably calculated to mislead the purchaser, and he was actually misled by it. (Sixth assignment of error.)"

*H. M. Baldridge*, for plaintiff in error.

Whatever puts a party on inquiry amounts to notice, provided the inquiry becomes a duty, as it always is with a purchaser. *Banks v. Ammon*, 27 Pa. St. 175; *Hottenstein v. Lerch*, 104 Pa. St. 454; *Hill v. Epley*, 31 Pa. St. 336; *Jaques v. Weeks*, 7 Watts, 267; *Lodge v. Simonton*, 2 Pen. & W. 448. A party is not estopped by his acts and declarations from showing the truth, unless such acts and declarations were intended to influence the conduct of another, or he had reason to believe that they would have that effect. 6 Wait, Act. & Def. p. 684, § 4; *Woods v. Wilson*, 37 Pa. St. 379; *Kuhl v. Mayor of Jersey City*, 23 N. J. Eq. 84; *Helser v. McGrath*, 52 Pa. St. 531; *Simpson v. Pearson*, 31 Ind. 1; *Connihan v. Thompson*, 111 Mass. 270; *Diller v. Brubaker*, 52 Pa. St. 498; *Com. v. Moltz*, 10 Pa. St. 531.

*Augustus S. Landis and Alexander & Herr*, for defendant in error.

The defendant having undertaken to give notice, and having withheld notice of what he now claims, is estopped, and cannot claim any equitable principle in his favor. *Bigelow, Estop.* 501; *Com. v. Moltz*, 10 Pa. St. 527; *Hill*

*v. Epley*, 81 Pa. St. 333; *Miranville v. Silverthorn*, 48 Pa. St. 149; *Maple v. Kussart*, 53 Pa. St. 352; *Bigelow, Estop.* 608; *Power v. Thorp*, 92 Pa. St. 346. He who has purchased for a valuable consideration, without notice of claim on the estate, is entitled to the peculiar favor and protection of the court. 2 Sugd. Vend. 498.

GORDON, J. We have examined with care the statement and argument of the learned counsel for the plaintiff in error, who was the defendant below, as well as the other parts of the case.

The deed of John H. Stiffier to his son, Joseph K., is certainly without ambiguity; it conveys the one-half of the Doran lot. This was, no doubt, a mistake; and was corrected, as between the parties themselves, by the agreement of the eighteenth of July. But, while the deed was duly recorded, the agreement was not; and it is hardly necessary for us to say that the purchaser at the assignee's sale could not be affected by a private arrangement of which he had no notice. Hence the principal question of the case was one of notice; and that, not merely of the fact of a collateral agreement, but of its contents; and, as this question was fully and fairly submitted to the jury, the plaintiff in error has really nothing of which to complain.

It is urged that as the defendant's buildings were over the line called for by the deed, that fact should have put the plaintiff on inquiry. But how could this be in the face of his (the defendant's) own deed? There was no question but that he could thus have sold; neither is there any doubt but that, by his deed, he did thus sell. The record negatived an adverse holding, and beyond this the plaintiff was not bound to inquire.

Outside the agreement, to which reference has been made, the defendant had no case; hence the third, fifth, and sixth assignments cover rulings of the court below which were more favorable to the defendant than he could lawfully have required. Retzlaff's admissions as to what he supposed he was to get by his purchase amounted to nothing, for, *prima facie*, he got just what was described in Joseph K. Stiffier's deed, and his rights could neither be enlarged nor abridged by his declarations. The agreement alone changed the *prima facie* character of the deed, and, as of the contents of this the jury found the plaintiff had no notice, he was clearly not bound by it.

What we have said disposes of all the assignments except the sixth, and that is so clearly without merit that we pass it without comment.

The judgment is affirmed.

MERCUR, C. J., PAXSON and TRUNKY, JJ., absent.

### Appeal of PRATT.

(Supreme Court of Pennsylvania. January 3, 1883.)

#### 1. TRADE-MARKS—INFRINGEMENT—INJUNCTION TO RESTRAIN.

A trade-mark, the use of which began in 1810, was relinquished by the owner in 1881, to his son. At the son's death, in 1863, an arrangement was made among his four children by which each should use the trade-mark, by placing their individual names thereon, in place of their grandfather's, as previously used. Held, an injunction to restrain the similar use of it by a stranger would be sustained.

#### 2. SAME—USE OF TRADE-MARK BY DESCENDANTS.

Where by an amicable arrangement, the children, at the death of the father, had, prior to any one else, appropriated to their use a symbol or device used by the father as a trade mark for stamping butter, held, that its use by the several members of the family did not destroy its distinctive features, and leave it open to public use.

Appeal from court of common pleas, Delaware county, in equity.

This bill was filed by Albert Darlington, Jesse Darlington, and Jared Darlington, trading as J. & J. Darlington, and Mary F. Darlington, against T. Minshall Pratt, to enjoin him from using plaintiffs' trade-mark. Plaintiffs

were farmers, and engaged in the dairy business, and made what was known as the "Darlington Butter," and in the course of said business made use of a trade-mark which they had acquired in the following manner: Their grandfather, Jesse Darlington, owned and commenced using the trade-mark, being a cornucopia, at the bottom of which was his name, in the year 1810, continuing its use until 1831, when he relinquished in favor of his son Jared, who resided on the same farm, and who used it until his death. Since that time the farm and business has been conducted by his three sons, and the widow of a deceased son, plaintiffs in this bill. The defendant owns a neighboring farm, and was also a butter maker, using a stamp of his own, until some time after the death of Jared Darlington, when he changed his print, and began using the cornucopia and stamping the butter with his own name. The injunction was granted as prayed for, and defendant appealed.

PAXSON, J. This bill was filed in the court below to restrain the defendant from using plaintiffs' trade-mark. The plaintiffs are farmers, residing in Delaware county, and engaged in the dairy business. They make what is now widely known in many portions of this country as the "Darlington Butter," an article of such superior quality as to command a ready sale, and a high price. The plaintiffs and their immediate ancestors have been engaged in making this butter for a period of about three-quarters of a century. The business was commenced by Jesse Darlington, the grandfather of the plaintiffs, about the year 1810, who continued it to about 1831, when he relinquished it in favor of his son Jared Darlington, residing on the same farm. Jared continued it until his death, in 1862. Since that time it has been conducted by three of his sons, and the widow of a deceased son, the plaintiffs in this bill. During all this period the butter has been stamped with a peculiar print, claimed as a trade-mark, the distinguishing features of which are a cornucopia and the name "Darlington." During the life-time of the elder Darlington (Jesse and Jared) the name "J. Darlington" was imprinted on the margin below the lower or smaller end of the horn. Since the death of Jared, and the use of the trade-mark by an amicable understanding between his children, each of the plaintiffs has stamped his butter with the cornucopia, and his own or individual name, the name of Darlington being common to it all. So extensive has the business become that their aggregate production of butter amounts to over 2,000 pounds weekly. The defendant owns a farm in the same neighborhood, and also makes butter for the market. He has been so engaged since 1878. For some years he used as a print for his butter a stamp which had on it the name of "Pratt," and the words "Cumberland Dairy, 838," which appears to be the print his father Thomas Pratt had used before him. Some time after the death of Jared Darlington, the defendant changed his print, using the cornucopia and stamping the butter with his name. The court below granted the injunction prayed for in the bill, from which decree the defendant appealed, and removed the record into this court for review.

If the defendant's print is an imitation of that of the plaintiffs',—if it is calculated to deceive and mislead,—the motive of the defendant in adopting it is not material, so far as the law of the case is concerned, however much it might affect it in a moral point of view. The protection which equity extends in such cases is for the benefit of the manufacturer, and to secure to him the benefits of his reputation, skill, and industry. The protection of the public is another consideration, and one that does not usually enter into such cases. A man may be adjudged a wrong-doer, and yet have no intention or thought of fraud, as where two traders take the same symbol, each in ignorance that the other uses it, or with an honest doubt as to who has the legal right therein. *Browne, Trade-Marks*, par. 449. The question therefore is whether the defendant's label or mark is calculated to deceive the public, and

to lead them to suppose they are purchasing an article manufactured by the complainants, instead of the defendant.

The master finds as a fact that defendant's print is calculated to mislead the public. In this we cannot say that he committed an error. It is true, the two prints, when placed side by side, present several points of dissimilarity, and the fact that defendant's butter is stamped with his own name was pressed as a reason why there was no danger of deception. The defendant denies any intention of deception, and in this he is sustained by the master. But the thought naturally suggests itself, why did the defendant abandon the trade-mark or print which he had used for years, and his father before him, and adopt the symbol which had been in use in the Darlington family for over 70 years, unless at some time, or in some way, he hoped to benefit by the wide reputation which the Darlington butter had obtained? The master has found, and we think correctly, that the distinguishing feature of the plaintiffs' trade-mark is the cornucopia. It is a symbol, a device, which the plaintiffs have adopted to mark their butter. Had they used merely the name "Darlington," any other person of that name could have stamped his butter as Darlington's butter. The mere name of a person or of a place cannot, as a general rule, be appropriated as a trade-mark; at least not in the sense of preventing another person having the same name, or residing in the same place, from using it. Nor can any word which is generally used to designate the name or quality of an article be so appropriated. This is familiar law, and hardly needs the citation of authority. It is sufficient to refer to *Iron Co. v. Uhler*, 75 Pa. St. 467; *Browne, Trade-Marks*, §§ 157, 177, 182, 195, 243. But when the plaintiffs adopted the cornucopia as a device or symbol to mark their butter, they acquired a property in such device or symbol which they cannot be deprived of by any other Darlington, or any other person whatever. This device, when applied to a pound of butter, means "Darlington Butter," and is so understood, and in this way indicates origin and ownership. The name of the particular plaintiff stamped upon each pound in addition to the symbol, indicates which particular Darlington made that pound of butter. The use of a defendant's name on a spurious trade-mark is no defense to a bill for an injunction to prevent a piracy. *Crucible Co. v. Guggenheim*, 7 Phila. 416; *Gillott v. Esterbrook*, 47 Barb. 455; *Boardman v. Meriden Britannia Co.*, 35 Conn. 402. It is a circumstance, and nothing more, to be considered in connection with the whole appearance of the trade-mark, to determine whether it is an imitation.

It was urged, however, that conceding this symbol to have been a valid trade-mark in the hands of Jesse Darlington, or even of Jared, that upon the death of the latter it ceased to be the property of any one, and that its use by several members of the family of the latter destroyed its distinctive features, and left it open to the public to appropriate it. We cannot assent to this proposition. We do not think it necessary, however, to enter upon an elaborate discussion as to the modes by which a trade-mark may be transferred, nor how far it is descendible, upon the death of the person who originally appropriated it. We do not see that the exigencies of this case require it. When Jared Darlington died, his children appropriated this device or symbol to their own use. They did so before any one else appropriated or attempted to appropriate it. By an amicable arrangement between themselves each one was allowed to use the cornucopia, as a device, each pound of butter being stamped in addition with the name of its manufacturer. It was all Darlington butter. There was no fraud upon the public nor any one else in this. It was not sold as the butter of either Jesse or Jared Darlington. They were both deceased; and it is fair to presume their customers knew it. The business was continued by their descendants bearing the name of Darlington, in the same place, and with the same skill. There is no pretense that the butter now made by the present members of the family is not equal in every respect to the best made by

their ancestors. Under such circumstances their trade-mark cannot be interfered with by a stranger who has never acquired a right in any way to use it. There is no analogy between this case and the *Howqua Fra Case*, (*Pidding v. Howqua*), 8 Sim. 477; the *Night Blooming Cereus Case*, (*Phalon v. Wright*), 5 Phila. 467; the *Balm of a Thousand Flowers Case*, (*Fetridge v. Wells*), 13 How. Pr. 385; and other instances in which courts of equity have refused to enjoin because of the fraud practiced upon the public. It is not the province of a chancellor to aid any one in fraud and imposition. The fact that the plaintiffs at rare intervals purchased milk or cream from others to enable them to supply their customers with butter, and in yet rarer instances purchased small amounts of butter for the same purpose, is not of sufficient importance to require discussion. It was not done for the purpose of imposing upon or deceiving their customers. The latter are not complaining, and the defendant has no standing to do so. There was no fraud in it. If the plaintiffs were to purchase all their cream from other farmers, and manufacture it into butter, the defendant would have no right to pirate their trade-mark.

While the cases are not uniform upon the subject, there is ample and recent authority for saying not only that a business and its accompanying trade-mark may pass from a parent to his children, without administration, but that the business may be divided among the children, and each will have the right to the trade-mark, to the exclusion of all the world except his co-heirs. In *Leather Cloth Co. v. Leather Cloth Co.*, 11 H. L. Cas. 523, it was said by Lord CRANWORTH: "The right to a trade-mark may, in general, treating it as property or as an accessory of property, be sold and transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be lawfully used by the purchaser. Difficulties, however, may arise where the trade-mark consists merely of the name of the manufacturer. When he dies, those who succeed him, (grandchildren or married daughters, for instance,) though they may not bear the same name, yet ordinarily continue to use the original name as a trade-mark; and they would be protected against any infringement of the exclusive right to that mark. They would be so protected because, according to the usages of trade, they would be understood as meaning no more by the use of their grandfather's or father's name, than that they were carrying on the manufacture formerly carried on by him." In *Kidd v. Johnson*, 100 U. S. 617, it was said by Mr. Justice FIELD: "When a trade-mark is affixed to articles manufactured at a particular establishment, and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred either by contract or operation of law to others, the right to the use of the trade-mark may be lawfully transferred with it." To the same point are *Milling Co. v. Robinson*, 20 Fed. Rep. 217; *Southorn v. Reynolds*, 12 Law T. (N. S.) 75; *Dent v. Turpin*, 9 Wkly. Rep. 548. See, also, *Crucible Co. v. Guggenheim*, *supra*.

We have not before us any question arising between the children of Jared Darlington as to their respective right to use this trade-mark as against each other. On the contrary, the contention is between them and a stranger who shows no right whatever.

We find no error in this record. The decree is affirmed, and the appeal dismissed, at the costs of the appellant.

### MISKEY v. MISKEY et al.

(Supreme Court of Pennsylvania. January 3, 1888.)

#### LIMITATION OF ACTIONS—ON DEBT—AGAINST ESTATE OF DECEDENT.

Purd. Dig. Pa. § 1065, provides that an action on a debt shall be brought within six years after cause of action accrues. Section 525 provides that no debt, except v.11a.no.12—56

mortgage and judgment, shall be a lien on decedent's real estate, unless action be brought and duly prosecuted within five years after his death. More than six years after the cause of action accrued, but within five years after the death of defendants' decedent, suit was brought on a debt. *Held*, that it was barred by the statute of limitations.

Error to court of common pleas, Philadelphia county.

Maria E. Miskey, administratrix of Jacob A. Miskey, deceased, sued Elizabeth E. Miskey, Edward H. Hance, and Charles W. Otto, executors of Anthony Miskey, deceased, on a debt due from defendants' intestate. The last payment was made December 1, 1875. Plaintiff's intestate died December 16, 1875. Defendants' testator died March, 1877. Suit was brought March 17, 1882. Defendants pleaded the statute of limitations of March 27, 1713, and plaintiff replied claiming the benefit of the act of February 24, 1834, limiting the lien against decedent's real estate to five years. Demurrer to the replication was sustained. Judgment for defendants, and plaintiff brings error.

*George M. Conarros*, for plaintiff in error. *Francis E. Brewster* and *F. Carroll Brewster*, for defendants in error.

PAXSON, J. It was not error to allow the executors the benefit of the plea of the statute of limitations. *Man v. Warner*, 4 Whart. 455; *Mitcheltree's Adm'r v. Veach*, 31 Pa. St. 455; *Campbell v. Fleming*, 63 Pa. St. 244; *York's Appeal*, 110 Pa. St. —, 2 Atl. Rep. 65. Judgment affirmed.

### Appeal of DETRICK.

(*Supreme Court of Pennsylvania. January 3, 1888.*)

#### 1. DIVORCE—GROUNDS OF—CRUEL AND BARBAROUS TREATMENT—INDIGNITIES.

By Brightly, *Purd. Dig. Pa. tit. "Divorce," § 1*, the wife may obtain a divorce when the husband has, by cruel and barbarous treatment, endangered her life, or offered such indignities to her person as to render her condition intolerable, and life burdensome. *Held*, that this provision creates two separate grounds for divorce, viz.: Cruel and barbarous treatment endangering the wife's life, and the offer of such indignities.

#### 2. SAME—EVIDENCE—SUFFICIENCY.

By Brightly, *Purd. Dig. Pa. tit. "Divorce," § 1*, the wife may obtain a divorce when the husband has, by cruel and barbarous treatment, endangered her life. A husband and wife had been bred to farm life and she had sometimes done outdoor work. He was a tenant farmer of limited means, and compelled her to help care for two large gardens, to milk five cows, and to churn by hand, and tried to compel her to do field work. He provided but a frugal table, though as good as the average in their condition in life, but occasionally scolded, and she suffered some hardships. *Held*, that his conduct did not afford her ground for divorce under this provision.

Appeal from court of common pleas, Monroe county.

This opinion includes the decision of two cases,—one being a suit for divorce *a vinculo* by Moses Detrick against Margaret Detrick, the other a suit for divorce *a mensa et thoro*, by Maggie (*alias* Margaret) Detrick against Moses Detrick. The same evidence was used on the trial in both cases. A decree was entered below against Moses Detrick in each case, and he appeals.

*S. Holmes*, for appellee.

PAXSON, J. This was an appeal from the decree of the court below dismissing the complaint and libel of the appellant, Moses Detrick, praying for a divorce from his wife, Margaret Detrick. The petition of the libellant alleges that he was married to the respondent on the third of January, 1864, and that on September 22, 1865, the said respondent "hath willfully and maliciously deserted and absented herself from the habitation of the petitioner without any just or reasonable cause, and such desertion hath persisted in for the term of 19 years and upwards, and yet doth continue to absent herself from the said petitioner." The answer of respondent admits the marriage, and

avers a number of facts as a justification for her leaving her husband's house and home. The most material averments are as follows: "That on or about the first of April, 1865, libelant having rented a farm of his father, said libelant and respondent moved upon it and went to housekeeping, most of the household furniture being furnished by respondent or her parents. That there were two large gardens which the respondent was required to take care of, five cows to milk, churning by hand, besides all the ordinary work of a farmer's wife, including the care of a young child. In addition, libelant tried to make respondent work in the field, but this she declined to do. Libelant neglected and refused to properly provide for the respondent and her child. He denied his family the necessaries of life. From the commencement of their housekeeping on April first until September 22, 1865, the only articles of provisions furnished by said libelant were some rye flour, some refuse potatoes, and one kit of mackerel. The parents of respondent were obliged constantly to send articles of food to respondent for use in the family. That libelant never bought his wife or child a single article of clothing, and finally, on the twenty-second of September, 1865, respondent, on account of the cruel and barbarous treatment of her husband, and his failure to properly provide for the wants of herself and child, was compelled to withdraw from his habitation, and go home to her father's house. Since that time respondent has earned her own living and supported herself and child by domestic service, and libelant has never sought to induce her to return, nor offered to contribute in any way to her support. Wherefore, said respondent, showing that she has never willfully nor maliciously deserted libelant, but was compelled to absent herself from his habitation by libelant's cruel and barbarous treatment, rendering her condition intolerable and life burdensome," etc.

The desertion not being a disputed fact in the cause, it remains to be seen whether the respondent withdrew from the home of the libelant under circumstances which amount to a justification in law. The causes which operate upon the wife, and force her to withdraw herself from her husband's house and family, must be such as would entitle her to a divorce. The Act of Assembly specifies two causes of divorce for ill treatment: (a) When the husband has, by cruel and barbarous treatment, endangered his wife's life; or, (b) offered such indignities to her person as to render her condition intolerable, and life burdensome. It is necessary to preserve the distinction between these two causes. It is not alleged that the husband offered any such indignities to the person of his wife as to render her condition intolerable and her life burdensome, nor any indignities to her person whatever. This defense, if sustained at all, must be for the first of the causes above mentioned. Indeed, this is the cause specified in the answer of respondent, though in doing so she has blended the two causes together by saying that she was "compelled to absent herself from his habitation by libelant's cruel and barbarous treatment, rendering her condition intolerable, and life burdensome." But, to entitle her to a divorce for cruel and barbarous treatment, it is well settled that there must be actual personal violence, or the reasonable apprehension of it; or such a course of treatment as endangers life or health, and renders cohabitation unsafe. *May v. May*, 62 Pa. 206; *Gordon v. Gordon*, 48 Pa. 226; *Butler v. Butler*, 1 Pars. Eq. Cas. 329. We now turn to the evidence to see whether it measures up to this standard. It is proper to observe in passing that all the allegations of ill treatment contained in the answer of the respondent are denied in the replication of the libelant. Nothing is admitted by the pleadings.

It is among the undisputed facts of the case that, upon the evening of their marriage, the libelant brought the respondent back to her father's house, left her there, and did not return to see her for two weeks. This is one of the libelant's grievances. But there is that in the case which accounts for this in a natural manner, and we forbear further comment upon it. It was not a ground of divorce. She remained with her father until about the first

of the next April. During this time a child was born, and the libelant contributed nothing to her support, or of her child, during that time, beyond the sum of two dollars, which he gave his mother-in-law to pay the wages of a nurse for one week. But it does not appear that he ever refused to pay anything demanded of him; on the contrary, it seems the mother-in-law accepted this two dollars with reluctance. The libelant also testifies that he helped his father-in-law during this time with his harvests and other work, to the extent of some 12 or 15 days, for which he made no charge. The respondent went to live with libelant on the farm on April 9, 1865, and with her child remained there until September 22, of the same year, when she left him. During this time, which was the period during which the alleged cruel and barbarous treatment occurred, her principal causes of complaint were (a) that she was compelled to work too hard; and (b) that the libelant did not properly provide for herself and child. The inadequate provision referred to was in the matter of food. Something was said about clothing, but this really amounts to nothing. There was no evidence that the libelant or her child lacked clothing.

The case of the respondent as to the amount of the work performed by her rests largely upon her own testimony. This much, however, must be conceded; it was admitted by the libelant, who gave his wife credit for being a good worker as well as good housekeeper. She says in her testimony that she took care of two large gardens; had to milk five cows and churn by hand, besides all the work of a farmer's wife, including the care of a young child. That she did some work in the garden is not denied, but there was proof that she did not do it all. It may be conceded that her life was not an easy one; that of a farmer's wife seldom is. There are many women who could do it with ease; there are many others who could not. We must look at the situation of the parties; at the manner in which they have been brought up, and the amount of labor they have been accustomed to from childhood. Both libelant and respondent had been brought up to farm life, and trained in a school of hard work and economy. The respondent had not only been accustomed to the indoors or household work of a farm, but sometimes to the outdoor work where hands were scarce. There is no evidence that she ever complained to her husband that her work was too heavy; on the contrary, she says that she did not. She did say she asked for a little girl to help during the "berry season," but in this she was contradicted by her husband. This branch of the case amounts to but little, and may be dismissed.

It is plain to my mind that the principal grievance with the respondent was that her husband did not supply the table with sufficient liberality. This allegation rests almost entirely upon her own testimony, and she is not only contradicted by her husband, but by several witnesses, work people and others, who had more or less means of knowledge. That the libelant provided a plain table, not overloaded in any respect, may be conceded; but that it was about as good as the average farmer's table of persons of their condition in life is fully proved. Philip Smith, a witness called for the respondent, said: "The most I did was to help get wood, chop wood,—summer wood. The living sometimes was better than others while I was there. Sometimes we had mush and milk for supper, and I call that poor; we had mush and milk for supper; we had potatoes, meat, etc., for dinner, usually. I think the meat was pickled pork, boiled with potatoes. For breakfast I cannot just tell what we generally had; have forgotten. The living was satisfactory to me; I never made any complaints. I call that poor living when they have mush and milk for supper, and pickled pork boiled with potatoes for dinner, because I don't like them. I think we had tea and coffee sometimes." This is not a luxurious diet, but we must remember that the libelant was a young tenant farmer of limited means; was probably living in the manner to which he had been accustomed in his father's house; was a hard-working, industrious, and thrifty

man, and more than usually economical in his habits. The foregoing, with some evidence of occasional scolding and fault-finding, was the substance of the libelant's case, if we except an allegation that the libelant would not allow her to go to church, and treated her family coolly. But as they lived together but three months, and during that time libelant took her to church at least once, these matters are of little importance in the case. While the evidence discloses some disagreements and annoyances, and perhaps some hardships on the part of the respondent, there is not enough to justify her precipitate abandonment of her husband. The marital contract is one of a binding and solemn character, and it is no light reason,—no slight faults or incompatibility of temper,—which will justify one of the parties thereto in rescinding it. The desertion being established, and no sufficient reason having been shown to justify it, it follows that the libelant is entitled to a divorce.

The decree is reversed, at the costs of the appellee, and it is ordered that the record be remitted, with instructions to enter a decree for the libelant.

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Appeal of DETRICK.

(*Supreme Court of Pennsylvania.* January 8, 1888.)

Appeal from court of common pleas, Monroe county.  
S. Holmes, for appellee.

PAXSON, J. This was an appeal from a decree of divorce *a mensa et thoro*. The case was heard upon the same evidence as the *Appeal of Moses Detrick, ante*, 882, (just decided.) As we held in that case that Mrs. Detrick was not justified in leaving her husband, this decree must be reversed for the reasons there given.

The decree is reversed at the costs of the appellee, and the libel dismissed.

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Appeal of FERGUSON *et ux*.

(*Supreme Court of Pennsylvania.* January 8, 1888.)

1. **ABUTTING OWNERS—RIGHTS IN STREET NOT OPEN TO PUBLIC—OBSTRUCTION—INJUNCTION.**

A lot-owner, claiming under a deed from the original owner of the plat, describing the lot by metes and bounds along a designated street, and who has made valuable improvements thereon, may maintain an action in equity to restrain one who claims title to the whole street from so obstructing the same as to interfere with such owner's rights therein, though such street may never have been opened to the public.

2. **DEED—VOLUNTARY CONVEYANCE—LOVE AND AFFECTION.**

A conveyance by a father to his daughter, in consideration of one dollar actually paid, and natural love and affection, is not a voluntary conveyance.

Appeal from court of common pleas, Lackawanna county; R. W. ARCHBOLD, Judge.

This is a bill in equity brought by F. W. Mason and Sarah E. Mason against John S. Ferguson and Frances E. Ferguson, to restrain them from interfering with the opening of a street. Plaintiffs allege in the first paragraph of their bill that on the first day of July, 1869, Joseph T. Fellows, the common source of title of complainants and defendants, was seized in fee of a parcel of land in the city of Scranton, Pennsylvania, which fact is denied by the defendants, who allege the legal title to have been in a trustee from whom they derived title, as well as from Fellows. Upon the hearing before the master it was found that pursuant to an agreement made in April, 1867, between Joseph Fellows and Joseph T. Fellows, the former, in July, 1869, conveyed the said lands in fee to the latter. In 1871, Joseph T. Fellows caused the whole of the lands to be surveyed and laid out into lots, alleys, and streets, with numbers and names, and a map was made of said plat, but it was never recorded. In November, 1871, the said Fellows, in consideration of one dollar actually paid, and natural love and affection, conveyed, by metes and bounds,

lot 2 of said plat, bounded on one side by Rock street, to his daughter, Sarah E. Mason, who erected a house thereon costing about \$6,000, which was paid by F. W. Mason, with the exception of a small portion paid by said Fellows. On the thirteenth day of March, 1878, Joseph T. Fellows sold to his wife, Frances E. Fellows, (now Frances E. Ferguson, the defendant,) a parcel of land bounded on one side by the line of Sarah E. Mason's lot, on Rock street, this including the street in the conveyance. After the death of Joseph T. Fellows, in 1878, the widow refused complainant access to the street, which had never been opened, but had been used in common by the two families for various purposes. After repeatedly removing the obstructions placed in the said Rock street by defendants, the complainants finally brought this action to restrain them from further interference with the opening of the street. Upon the report of the master, the court rendered a decree for plaintiffs, and the defendants appeal.

*A. Ricketts and James E. Carmalt, for appellants.*

Complainants' bill sets out a purely legal claim, which the defendants' answer denies, declaring that defendants are the owners of the legal title. As the case involves the legal title to realty, a court of equity has not jurisdiction. *Norris' Appeal*, 64 Pa. St. 275, 280; *Tilmes v. Marsh*, 67 Pa. St. 507; *Hains' Appeal*, 73 Pa. St. 169; *Grubb's Appeal*, 90 Pa. St. 228; *Washburn's Appeal*, 105 Pa. St. 480. A court of equity has no jurisdiction to try adverse claims to land under any circumstances. *Messimer's Appeal*, 92 Pa. St. 168; *Long's Appeal*, Id. 171; *Barclay's Appeal*, 93 Pa. St. 50; *Emerson's Appeal*, 95 Pa. St. 258; *Transit Co.'s Appeal*, 9 Wkly. Notes Cas. 225. In order to entitle a party to come into a court of chancery to compel specific performance, the contract must have been made upon valuable consideration. *Story*, Eq. Jur. §§ 793a, b, 973; 2 *Spence*, Eq. Jur. 285; *Bish. Eq.* §§ 372, 373; *Adams*, Eq. \*77, \*78; *Kennedy v. Ware*, 1 Pa. St. 445; *In re Campbell's Estate*, 7 Pa. St. 100; *Kidder v. Kidder*, 33 Pa. St. 268; *Crawford's Appeal*, 61 Pa. St. 52. A conveyance of a lot described as bounded by a street carries with it only an implied covenant to open the street and give a right of way over the same. *Robinson v. Myers*, 67 Pa. St. 9, 18; *Spackman v. Steidel*, 88 Pa. St. 453.

*Allan H. Dickson and J. H. Campbell, for appellees.*

The conveyance by warranty deed of a lot described by metes and bounds along a street constitutes a covenant that the grantor will open the street, (*Trutt v. Spotts*, 87 Pa. St. 339; *Transul v. Sell*, 14 Wkly. Notes Cas. 397; *Baxter v. Arnold*, 114 Mass. 577; *Tobey v. Taunton*, 119 Mass. 404; *Bissell v. Railroad*, 23 N. Y. 64; *Cox v. Railroad Co.*, 48 Ind. 179,) and is not affected by the fact that the street has not in fact been opened. *In re Lehigh St.*, 81\* Pa. St. 85; *In re Pearl St.*, 17 Wkly. Notes Cas. 321, 5 Atl. Rep. 430. Action at law would be inadequate to give possession of the street. Trespass would not lie. *Dietrick v. Berk*, 24 Pa. St. 470. The grantee owns to the center of the street, subject to the easement of lot-holders. *Berwind v. Barnes*, 13 Wkly. Notes Cas. 541; *In re Lehigh St.*, 81\* Pa. St. 85. A voluntary conveyance is as effective against the grantor and his heirs and subsequent assigns as though there had been a valuable consideration. *Lancaster v. Dolan*, 1 Rawle, 231-246; *Foster v. Walton*, 5 Watts, 378; *Dougherty v. Jack*, Id. 456; *Baltimore v. Williams*, 6 Md. 235; *Beal v. Warren*, 2 Gray, 447-456.

**PAXSON, J.** The principal question in this case is one of jurisdiction. The general rule is that "where rights which are legal are asserted on one side and denied on the other, the remedies are at law. They cannot be settled under equity forms. In actions respecting real property, therefore, if there be no equitable ground of relief involved, the rights of the parties must be determined at law. When thus determined, or when they are admitted in the

pleadings, or otherwise clearly appear, an equity based upon that right, superinduced by the acts of the parties, may be asserted and a decree for equitable relief made. Thus equity is made the means not of establishing the legal right, but of giving adequate protection in the enjoyment of it when thus established." *Washburn's Appeal*, 105 Pa. St. 480. In that case the point decided was that a court of equity has no jurisdiction to settle a disputed legal title to land, or to a right of way, on a bill in equity filed by the party in possession, averring that a multiplicity of suits at law may result to redress threatened grievances. The facts were disputed, and no clear right to the subjects in dispute established, and no irreparable injury shown. The relief prayed for was therefore properly denied.

It is not so in this case. There are no material facts in dispute, and the plaintiffs' right is clear. It is not denied that Joseph T. Fellows, by a deed in fee-simple, conveyed to his daughter, Sarah E. Mason, one of the plaintiffs, the lot at the corner of Main and Rock streets, and that by the terms of said conveyance the lot in question is bounded by Rock street, aforesaid. It is a well-settled principle of law that where, upon a sale of lots, reference is made to a map or plat upon which they are laid down, and which calls for certain streets and alleys, this constitutes a dedication of these ways to the use of purchasers as public ways, and the map or plan so referred to becomes a material and essential part of the conveyance, and is to have the same effect as though copied into the deed. *Birmingham v. Anderson*, 48 Pa. St. 253; *McCall v. Davis*, 56 Pa. St. 431; *McKee v. Perchment*, 69 Pa. St. 342; *Trutt v. Spotts*, 87 Pa. St. 339; *Transue v. Sell*, 105 Pa. St. 604; *Parker v. Smith*, 17 Mass. 413; *Thomas v. Poole*, 7 Gray, 84. This conveyance, therefore, gave the plaintiff the right to the use of Rock street as a public highway as against the grantor and his heirs and assigns. That Rock street was not opened is not material. It is also undisputed that by the subsequent deed from Fellows to his wife (now Mrs. Ferguson, and one of the defendants) he bounded the lot conveyed to the latter by the line of the lot previously conveyed to Mrs. Mason, thus including the whole of Rock street. This he had no right to do, and his deed passed no title to Mrs. Fellows to that portion of the street embraced therein. Mrs. Mason's deed was on record, and the defendants had constructive notice thereof. There was nothing in the case to show that the plaintiff had either parted with her right to Rock street, or had lost said right in any way. The position that the conveyance to Mrs. Mason was voluntary, and therefore that a court of equity will not enforce her right under it as against the grantee and his heirs, is not tenable. This was a conveyance in consideration of one dollar from a father to his daughter, and was fully executed. Moreover, the plaintiffs had erected a house on the lot at an expenditure of several thousands of dollars. Under such circumstances it cannot be seriously questioned that a court of equity would enforce their rights. If any authority were needed for so plain a proposition, it may be found in *Lancaster v. Dolan*, 1 Rawle, 231; *Foster v. Walton*, 5 Watts, 378; *Dougherty v. Jack*, Id. 456; *Dennison v. Goehring*, 7 Pa. St. 175; *Baltimore v. Williams*, 6 Md. 285; *Beal v. Warren*, 2 Gray, 447. The plaintiffs have also an equity. As before stated, they have erected an expensive house upon their lot upon the faith of its bounding on Rock street. The injury threatened is of a character that would prevent a recovery in damages being an adequate remedy. Such recovery would not give plaintiffs the use of the street.

The facts being undisputed, the case comes clearly within the exceptions pointed out in *Washburn's Appeal*, *supra*, and we are of opinion that the learned judge below was right in entering a decree in favor of the plaintiffs. Decree affirmed, and the appeal dismissed at the costs of the appellants.

**BARCLAY v. GROVE et al.**

*(Supreme Court of Pennsylvania. January 3, 1888.)*

**1. LIMITATION OF ACTIONS—RUNNING OF THE STATUTE—CONTINUING INJURY.**

Defendant's machinery had incumbered plaintiff's building for more than six years after notice to remove it, interfering with the plaintiff's use or rental thereof. *Held*, that the wrong was a continuing one, and that an action for damages was not barred in six years after the refusal to remove.

**2. DAMAGES—MEASURE OF—OBSTRUCTING USE OF BUILDING.**

Plaintiff was the grantee of a building containing heavy machinery belonging to the grantor and another, who for a number of years refused to remove it. In an action for damages for such refusal, the jury were instructed that plaintiff could not recover the loss of the capital value of the property, nor for dilapidation or destruction of it, but might recover the annual loss by reason of being prevented or obstructed by defendant in its use, or of obtaining any income from it. *Held* proper as to measure of damages.

Error to court of common pleas, Philadelphia county; **ARNOLD**, Judge.

In May, 1884, the plaintiffs, Henry S. Grove and others, heirs of Conrad S. Grove, deceased, brought this action against John K. Barclay to recover damages for the loss of use and income from a certain building which the said Conrad S. Grove had purchased of A. Charles Barclay, and which contained a large amount of heavy machinery belonging to John K. Barclay. In December, 1873, Grove notified Barclay to remove the machinery, but he had refused, in consequence of which the plaintiffs and Conrad S. Grove had never received any rent from said building, nor had they been able to make any use of it. Plaintiffs claim damages from May, 1878. Judgment was rendered for plaintiffs, and defendant brings error.

*J. Howard Gendell and George Junkin*, for plaintiff in error.

The conveyance of one of the buildings so united by heavy and valuable machinery that the other is valueless without it was made subject to a license of the co-owner of the machinery to retain and use them in its position. A license connected with a grant is irrevocable. *Wood v. Leadbitter*, 13 Mss. & W. 844. So, also, is a license when acted on. *Lefevre v. Lefevre*, 4 Serg. & R. 241; *Rerick v. Kern*, 14 Serg. & R. 267; *Swartz v. Swartz*, 4 Pa. St. 353; *McKellip v. McIlhenny*, 4 Watts, 317; *Gardner v. Weaver*, 11 Wkly. Notes Cas. 544.

*John G. Johnson*, for defendants in error.

**PAXSON, J.** When this case was here before, (see 106 Pa. St. 155,) it was said by our Brother **GORDON**, in delivering the opinion of the court: "Grove might, in relief of his property, have removed the machinery, but he elected, as he had a right to do, to let it remain where it was, and thus the original condition of affairs continued." And again: "The jury might have found for the plaintiff on either of the three following grounds: For the use and occupation of the premises; on an implied contract for storage; or for an obstruction of the plaintiff's use of the property by an unwarrantable persistence by the defendant in the possession of it without right." The plaintiff went to trial in the court below for the last-named of these causes of action, and the case now comes up with a verdict in his favor.

The assignments of error are numerous, but they are all discussed under the three classifications of the defense as they appear in defendant's (plaintiff in error's) paper book. The said classifications are as follows: (1) "The defendant below had a right to maintain his property in the premises in question." (2) "If the plaintiffs have any cause of action, it is only to be enforced by intervening in the partnership suit." (3) "In this form of action, the cause of action being the refusal to perform a duty, the breach was complete at once. It is not a continuing cause of action. The suit is barred by the stat-

ute of limitations. Even apart from the bar of the statute, the measure of damages is entirely different in this suit from what would be proper in a suit for storage, or for use and occupation." The first two propositions are covered by what was said upon the former writ of error, and will not be further discussed. We do not regard the third ground of defense as well taken. The cause of action was not, as is assumed in the position and argument, a mere refusal to perform a duty. On the contrary, it was substantially for an obstruction of the plaintiff's use of his property by means of which he was unable to occupy or lease it, and lost the rents and profits thereof. Under these circumstances, we are of opinion that this suit is not barred by the statute of limitations. Nor are we able to see any error in the measure of damages as laid down by the court. Upon this point the learned judge said: "The plaintiffs cannot recover the loss of the capital value of the property. They cannot recover anything for the dilapidation or destruction of it, for they might have kept it up; but they have a right to recover what they lost annually by reason of being prevented or obstructed by the defendant in the use of it, or from obtaining any income for it, if you believe that he did obstruct or interfere with them in the use and enjoyment of the property." We see nothing in this language to criticise, nor in that portion of the charge bearing upon the same point embraced in the thirty-sixth assignment of error. None of the assignments of error is sustained. Judgment affirmed.

### BECHTEL v. SHEAFER.

(*Supreme Court of Pennsylvania. January 3, 1888.*)

#### 1. INTERPLEADER—WHEN PROPER—CONTRACT RELATION WITH PLAINTIFF.

In an action on a note, defendant, before plea, admitted his liability, offered to pay the money into court, suggested that it was claimed by a third person, not a party to the suit, and prayed such order as was necessary for his protection. The court directed an interpleader, under St. Pa. March 27, 1848, relating to interpleading in Berks and Schuylkill counties, and extended to all counties of the state by act of February 14, 1857, which provides that the defendant, in any action for the recovery of money, or goods, chattels, or the value thereof in damages, may, before plea, disclaim all interest in the subject-matter of the action, offer to bring the same into court, and suggest that the right thereto is claimed by a third person, and the court may thereupon order an interpleader. *Held*, that these facts show defendant entitled to an interpleader, and the contract relations between him and plaintiff would not affect this right.

#### 2. SAME—INTERPLEADER IN ACTION TO RECOVER MONEY.

In St. Pa. March 27, 1848, § 1, providing for interpleader, *held*, that the words, "which have lawfully come into the hands or possession of defendant," have reference to goods and chattels, and not to money.

Error to court of common pleas, Schuylkill county.

Action of *assumpsit* by Isaac P. Bechtel, for the use of Horatio Jones, trustee for Maria Jones, against Peter W. Sheaffer, to recover a balance due on a due-bill. On the suggestion of defendant, plaintiff and one Zachariah Batdorff were directed to interplead, and an issue was made. Plaintiff brings error.

*J. B. Reilly* and *F. W. Bechtel*, for plaintiff in error.

The court erred in refusing plaintiff judgment when there was no proper affidavit of defense. It is not such a case as comes within the statute regulating interpleading. Act March 27, 1848, (P. L. 1848, p. 265;) St. 1 & 2 Wm. IV. c. 28; 1 Troub. & H. Pr. (Ed. 1880) 272, note 2; *Lindsey v. Barron*, 60 E. C. L. 289; *James v. Pritchard*, 7 Mees. & W. 216; *Horton v. Devon*, 4 Welsb. H. & G. 494; *Turner v. Kendal*, 13 Mees. & W. 170; *Slaney v. Sidney*, 14 Mees. & W. 800; *Crawshay v. Thornton*, 14 Eng. Ch. 1. The right to interplead is confined to cases where the money or goods come lawfully to defendant's hands. *Dalton v. Railway Co.*, 74 E. C. L. 457; *James*

v. *Pritchard*, 7 Mees. & W. 216. A party cannot obtain relief by interpleader where he has incurred a personal liability to either contending party. *Pat-orn v. Campbell*, 12 Mees. & W. 277. So, when work is done under contract. *Turner v. Mayor, etc.*, 13 Mees. & W. 171. Nature and definition of interpleader. *Hoggart v. Cutts*, 1 Craig & P. 197; 2 Story, Eq. Jur. 134, § 801. The court erred in directing an issue in which the interpleading party was made plaintiff, and the original plaintiff defendant. *Brownfield v. Canon*, 25 Pa. St. 299.

*N. Heblieh* and *Guy E. Farquhar*, for defendant in error.

There is but one question to be determined under the issue: Whether plaintiff had assigned his right to receive the money from defendant to Batdorff. If so, defendant Sheaffer is a mere stakeholder, and the interpleader act applies. *Stewart v. Smith*, 1 Phila. 42. Independent of the act of 1848, the common-law process of interpleader would lie. *Brownfield v. Canon*, 25 Pa. St. 301. The issue directed by the court was proper. *Berks Co. v. Levan*, 86 Pa. St. 362; *Armstrong v. City of Lancaster*, 5 Watts, 69; *Crawford v. Stewart*, 38 Pa. St. 34; 1 Purd. Dig. 691.

CLARK, J. On the ninth May, 1883, Peter W. Sheaffer executed and delivered his due-bill to Isaac P. Bechtel, in which he acknowledged himself to be indebted to Bechtel in the sum of \$6,821.92, payable as therein stated; and on the fifteenth February, 1884, an action of *assumpsit* was brought against Sheaffer in the court of common pleas of Schuylkill county, in the name of Isaac P. Bechtel, to the use of Horatio Jones, trustee, etc., to recover \$2,000, the balance remaining unpaid thereon. After the declaration was filed, and before the plea was entered, the defendant, admitting the debt, averring his readiness to pay to the person entitled, and offering to bring the money into court, filed a suggestion that the right to receive it was claimed by one Zachariah Batdorff, a person not a party to the suit, and therefore praying the court to make such order and decree as might be necessary for his protection, etc. A rule to show cause, etc., properly served upon the plaintiff, and also upon the claimant, was subsequently, on hearing, made absolute, and Batdorff and Bechtel were directed to interplead. The question of the defendant's right to an interpleader having been afterwards renewed, the court refused to recede from its former decree, and to enter judgment for want of an affidavit of defense, but directed "an issue to be formed, to determine whether the right to receive the money passed under the alleged assignment to Batdorff; in which issue Batdorff was made plaintiff, and Bechtel, for use, etc., defendant. On the twenty-second September, 1885, a verdict in the feigned issue was rendered in favor of Batdorff; and the single question now for consideration, as we understand the case, is whether or not the court had jurisdiction to direct the issue.

The proceedings for interpleader would appear to have been instituted with particular reference to the provisions of the special statute of twenty-seventh March, 1848, entitled "An act relating to interpleading in Berks and Schuylkill counties," (P. L. 265;) but as this local act is substantially a transcript of the fourth and fifth sections of the act of eleventh March, 1836, (P. L. 76,) conferring certain equity powers upon the district court of Philadelphia, the provisions of which were by the act of fourteenth February, 1857, (P. L. 39,) extended to the courts of common pleas throughout the commonwealth, the question for consideration is one of general interest. And as the sections referred to of the act of eleventh March, 1836, are founded on the English statute of 1 & 2 Wm. IV. 58, the decisions of the English courts upon that statute may with propriety be referred to in the construction of ours.

The plaintiffs contend that as there was a direct and express contract relation subsisting between Sheaffer and Bechtel, by the terms of which Sheaffer

obliged himself to pay to Bechtel the amount of the bill, the former could not disclaim all interest in the subject-matter, so as to occupy the place of a mere stockholder, and was not, therefore, entitled to raise an interpleader between Bechtel and Baldorff.

It is true, as a general rule, the party seeking relief by an interpleader must not have incurred any independent liability to either of the rival claimants; if he has expressly acknowledged the title or right of one of them, and agreed to hold the property for him, or, disregarding the adverse claim of one, has by contract made himself liable in any event to the other, he cannot be said to stand indifferent between them. Illustrations of this rule are found in the several cases cited by the plaintiff in error. In *Crawshaw v. Thornton*, 2 Mylne & C. 1, the general nature of the remedy by interpleader is fully discussed. In that case, A., as the agent of B., deposited certain iron with C. D. claimed to be the owner of the iron, not only under assignment from A., but by an independent acknowledgment and undertaking of C. that he held it at D.'s disposal. It was therefore held that, owing to this independent obligation of C. to hold the iron for D., he had no right to an interpleader between B. and D. "The case tendered by every bill of interpleader," says MAULE, J., ought to be that the whole of the rights claimed by the defendants may be properly determined by litigation between them, and that the plaintiffs are not under any liabilities to either of the defendants beyond those which arise from the title to the property in contest; because if the plaintiffs have come under any personal obligations, independently of the question of property, so that either of the defendants may recover against them at law without establishing a right to the property, it is obvious that no litigation between the defendants can ascertain their respective rights as against the plaintiffs." *Horton v. Earl of Devon*, 4 Welsb., H. & G. 496, is a case precisely similar. The defendants, who were wharfing, had certain goods deposited at their wharf by A., who transferred them to B. B., by order, transferred them to the plaintiff, at the same time acquainting the defendants with the fact. The defendants thereupon placed the goods to the plaintiff's account on their books, and informed him of their having done so. A. and other parties subsequently laid claim to the goods, on the ground that the transfer to the plaintiff was fraudulent. But the right of the plaintiff, as against the defendants, was supposed to be altogether independent of the question to whom the goods in truth belonged, and it was held that the defendants were not entitled to an interpleader. So, in *Lindsey v. Barron*, 60 E. C. L. 289, the personal obligation of Barrow to hold the box of plate for Lindsey was independent of the question of the rightful ownership, as between Lindsey and Medley, the claimants; and in *Patorni v. Campbell*, 12 Mees. & W. 279, Campbell had incurred a personal obligation to Patorni, independently of the actual ownership of the bill in dispute, by his agreement to hold it subject to his disposal under his assignment; and in both cases it was held that the remedy by interpleader did not apply. To the same effect are the cases of *James v. Pirtchard*, 7 Mees. & W. 216, and *Dalton v. Railway Co.*, 74 E. C. L. 457; while the doctrine of *Slaney v. Sidney*, 14 Mees. & W. 800, and *Turner v. Kendal*, 13 Mees. & W. 170, is simply this: that, under the act of 1 & 2 Wm. IV., an interpleader will not be awarded to relieve a party under an express promise to pay or perform against an antagonistic and independent claim. The same rule prevails, also, where an independent liability must of necessity arise out of the very nature of the relation subsisting between the parties, with respect to the subject-matter of dispute, as between landlord and tenant, attorney and client, etc., for, as a general rule, a tenant cannot deny his landlord's title, nor an attorney his client's right to money received for him as such; nor can a bailee ordinarily raise an interpleader between his bailor and one who asserts an independent, antagonistic, and paramount title; but even a tenant, who is under an express promise to pay rent, may interplead his landlord and an opposing

claimant, when the title of the latter is derived from the lessor after the lease; or, generally, when there is privity between the claimant and the lessor, as, for example, when the relation of mortgagor and mortgagee, trustee and *cestui que trust*, assignor and assignee, etc., has been created between them. In such case the tenant does not dispute the landlord's title. So, in the case of an attorney, agent, or bailee, whenever the third person claims the debt or thing under a title derived from the bailor or principal, by assignment sale or mortgage, subsequent to the bailment or agency, he may compel the parties to interplead: for there is no denial of the original title or right. The only dispute is as to the effect of the subsequent act. 3 Pom. Eq. Jur. 1326, 1327, note, and cases there cited. On the other hand, a party to a contract may interplead his co-contractor and other persons who in like manner derive their title from or are in privity with him. Pom. Eq. Jur. *supra*. These general principles, with the exceptions stated, are applicable whether the proceedings are in the law or the chancery forms; for it is enacted, both in law and equity, that the party seeking relief by interpleader shall have no interest in the subject-matter.

The mere fact that a contract relation existed between Sheaffer and Bechtel, by the terms of which Sheaffer was bound to pay the money to him, will not necessarily deprive Sheaffer of the right to an interpleader. In *Pennypacker's Appeal*, 57 Pa. St. 114, a debt was due on a judgment bond given by Worth to Gause. The judgment was assigned to Anne Watson, who afterwards assigned to Buckwalter. Pennypacker, administrator, etc., claimed the money, alleging that the assignments were without consideration, and fraudulent, and that Gause held the money as agent for John F. Watson, of whose estate he was administrator. He gave notice of his claim. Executions having been issued, Worth paid the money into court, and obtained a rule on the claimants to interplead, under the statute. And, although a direct and express contract relation existed between Worth and Gause, it was held by this court to be the precise case for the application of the law of interpleader, either voluntarily or compulsorily. So, in *Coates v. Roberts*, 4 Rawle, 100, the verdict and judgment on an interpleader in a foreign attachment for a common debt upon contract was held to be conclusive upon the claimant, who had notice, under the practice at common law, and failed to defend. In *Brownfeld v. Canon*, 25 Pa. St. 209, the action was in *assumpsit* for a debt due to a contractor, and, although the claimant voluntarily appeared and interpleaded, the case is also worthy of consideration here on a question of jurisdiction. See, also, *McCoy v. McMurtrie*, 12 Phila. 180.

It is true, nevertheless, that the proceeding cannot be sustained by a party who has any personal interest in the subject of controversy. *Dohnert's Appeal*, 64 Pa. St. 814; *Manufacturing Co.'s Appeal*, 106 Pa. St. 275. The party applying for it must occupy the place of a mere stockholder, without any rights of his own to be litigated. The object of the proceeding is to determine to which of several claimants he shall pay the debt or duty, about which there is no dispute except as to the person entitled to receive it; so that, when their respective rights are settled, nothing further remains in controversy. In this case it is clear that Sheaffer had no controversy with either of the claimants as to his indebtedness, or the amount of it. In proof of this, he offers, if the court shall so direct, to bring the whole sum into court, and, if either party had desired this to be done, it doubtless would have been done. The better practice in such cases is to order the money into court; but this, we think, if the offer to do so was distinctly made, was not essential to the exercise of the power of the court in the framing of an interpleader.

The suit was properly brought in Bechtel's name. A recovery could not have been had in any other form; and if Sheaffer had not admitted the debt, and offered to pay the money into court, Batdorff would have been obliged, in order to establish his right, either to resort to some independent and collat-

eral proceeding, or to give notice, promote the recovery, and ultimately to rule the money into court. But, by offering to bring the money into court, Sbeafer assumed the relation of a stakeholder to the contesting claimants; and, if he complied with all the orders of the court in this behalf, it was his right to be relieved of litigation and further costs.

The phrase, in the first section of the act of 1848, "which have lawfully come into the hands or possession of the defendant," has special reference, we think, to "goods and chattels," and not to money. The language may, it is true, be read to apply to both, but the effect of such a construction, if the words are taken in the sense suggested by the counsel for the plaintiff in error, would be to so restrict the operation of the act that it would be applicable to a very small class of cases indeed. The general manifest purpose of the statute, and the well-established practice under it, would not justify us now in giving to it this narrow and restricted operation. The judgment is affirmed.

BRETZ *et al.* v. DIEHLE *et al.*

(Supreme Court of Pennsylvania. January 3, 1888.)

**1. BAILMENT—WHAT CONSTITUTES—QUESTION FOR JURY—DELIVERING WHEAT TO MILLS.**

Plaintiffs delivered wheat at a mill, and, according to the custom and arrangement of the mill, the wheat all went into a common mass, with other wheat. Receipts were given by the miller showing it was received for the use of plaintiffs. Afterwards the sheriff levied on a lot of flour and bran in the mill, by virtue of an execution against the miller. Plaintiffs claimed it as theirs, and on an interpleader issue between them and the attaching creditors, after being fully instructed as to what constituted a sale, and what a bailment in such cases, the jury found for plaintiffs. *Held*, that the finding for plaintiffs necessarily implied a finding that the transaction was a bailment, and not a sale, which was a question of fact for the jury.<sup>1</sup>

**2. TRIAL—REQUESTS FOR INSTRUCTIONS—ASSUMPTION OF FACTS.**

Where it was objected that the court erred in answers to plaintiff's points, and it appeared that the points were based upon an assumption of facts, the truth or falsity of which was for the jury, and were relevant, and disclosed fully the facts assumed, and the law was stated as upon a finding of these facts by the jury: *Held* not error, as the opinion of the court could have no weight with the jurors, unless the facts assumed were in their judgment established by the proofs.

Error to court of common pleas, Bedford county.

Interpleader issue, wherein H. P. Diehle, Elmira Dougherty, William Snell, Levi Smith, and William Brice were plaintiffs, and C. L. Bretz and B. F. Mann, administrator of D. F. Mann, deceased, were defendants, to determine the question of plaintiff's ownership of a lot of flour and feed levied on by the sheriff in the mill of William D. Newman, by virtue of executions in favor of defendants. Judgment for plaintiffs, and defendants bring error.

*Russell & Longenecker* and *Wm. H. Koontz*, for plaintiffs in error.

The transaction in this case is a sale, and not a bailment. There was no obligation on the part of the miller to return to plaintiffs the specific wheat, or the product thereof. 2 Kent, Comm. 590; *Ewing v. French*, 1 Blackf. 353; *Hurd v. West*, 7 Cow. 752; *Smith v. Clark*, 21 Wend. 83; *Slaughter v.*

<sup>1</sup>When by the terms of the contract under which property is delivered by an owner to another, the latter is under no obligation to return the specific property, either in its identical form, or in some other form in which its identity may be traced, but is authorized to substitute something else in its place, either money or some other equivalent, the transaction is not a bailment, but is a sale or exchange. Austin v. Seligman, 13 Fed. Rep. 519; Shoemaker v. Hinze, (Wis.) 10 N. W. Rep. 86; Jones v. Kemp, (Mich.) 12 N. W. Rep. 890; Ledyard v. Hibbard, (Mich.) 12 N. W. Rep. 687; Gleason v. Estate of Bears, (Vt.) 10 Atl. Rep. 86; Kant v. Kessler, (Pa.) 7 Atl. Rep. 586. A conditional sale on credit, followed by a delivery of possession, with a provision to convert the sale into a bailment if the price should not be paid, is insufficient, upon a failure of the vendee to pay the price, to convert the contract into a bailment *ab initio*. Machine Co. v. Crowell, (Pa.) 8 Atl. Rep. 22.

*Green*, 1 Rand. (Va.) 3; *Inglebright v. Hammond*, 19 Ohio, 337; *Mallory v. Willis*, 4 N. Y. 85; *Foster v. Pettibone*, 7 N. Y. 433; *Chase v. Washburn*, 31 Ill. 283; *Dole v. Olmstead*, 36 Ill. 150; *Smith v. Sanborn*, 6 Gray, 136. If the miller mixed his grain with plaintiff's by consent, they became tenants in common in the mass, and they would be entitled to their share; but such was not the case. Cases *supra*, and *Insurance Co. v. Randell*, L. R. 3 P. C. 101; *Arthur v. Railway Co.*, 61 Iowa, 648, 17 N. W. Rep. 24; *Stone v. Quaal*, (Minn.) 29 N. W. Rep. 326; *Sexton v. Graham*, 53 Iowa, 188, 4 N. W. Rep. 1090.

*Alex. King, J. M. Reynolds, and J. H. Jordan*, for defendants in error.

Plaintiffs placed their wheat in the mill for their own use, and the miller had no control over it except to keep it in store; and if he mixed his grain with theirs, it was without their knowledge or consent. The transaction was therefore a bailment. *McDowell v. Rissell*, 37 Pa. St. 169; *Ryder v. Hathaway*, 21 Pick. 305, 306; *Henderson v. Lauck*, 21 Pa. St. 359; *Wilkinson v. Stewart*, 85 Pa. St. 255; 2 Kent, Comm. 365; *Nowlen v. Colt*, 6 Hill, 461; *Young v. Miles*, 20 Wis. 615; *Warner v. Cushman*, 31 Ill. 284; *Buffum v. Merry*, 3 Mason, 478; *Butterfield v. Lathrop*, 71 Pa. St. 225; *Wood v. Fales*, 24 Pa. St. 247; *Wilson v. Cooper*, 10 Iowa, 565.

CLARK, J. The defendants in this case are judgment creditors of William D. Newman, a miller operating a steam flouring mill in the town of Bedford. Having issued executions, they levied on some 80 or 90 barrels of flour and some bran, found on the floor of Newman's mill. The plaintiffs claimed the property levied upon, alleging that it was the product of grain by them delivered to and held by Newman as their bailee. This is a feigned issue, formed under the sheriff's interpleader act to determine the dispute. The plaintiffs, who are farmers residing in the vicinity of Bedford, brought their grain to this mill. No special contract or arrangement was made with the miller by any of the plaintiffs when they delivered their wheat; but in accordance with the practice of the mill in all cases, except where wheat was at once paid for, a receipt or memorandum was given in the following form:

"CRYSTAL MILLS, BEDFORD, PA., September 12, 1884.

Received from D. W. Lee	Price.	Am't.
Four hundred and fifty-five 14-60 bushels wheat,		455.14
" rye,		
" corn,		
Two hundred and fifty-five 12-32	oats,	255.12
"	buck wheat,	

For use of self.

W. D. NEWMAN."

The mill was not arranged to keep the several lots of grain in separate parcels. It was so constructed that all the grain delivered into it was hoisted to the second floor, emptied into a sink on the first floor, and from thence carried by elevators into a bin on the third floor, where, at times, there was a large accumulated mass of wheat. Newman also purchased wheat in considerable quantities, from time to time, which was delivered into the mill, and disposed of as the other wheat. This promiscuous commingling of the grain into a common mass was in accordance with the known usage of the mill, which was supplied for grinding from the mass of the wheat, without any discrimination as to the several lots or parcels in which it was received. The miller was, of course, under no obligation to restore to the plaintiffs the specific or identical wheat which he received, nor the product of it in flour; indeed, this, owing to the manner in which the business was conducted, was practically impossible.

The fundamental distinction between a bailment and a sale is that in the former the subject of the contract, although in an altered form is to be re-

stored to the owner, while in the latter, there is no obligation to return the specific article; the party receiving it is at liberty to return some other thing of equal value in place of it. In the one case, the title is not changed; in the other, it is,—the parties standing in the relation of debtor and creditor. Thus, in *Norton v. Woodruff*, 2 N. Y. 153, a miller agreed to take certain wheat and to give one barrel of superfine flour for every four 86-60 bushels thereof; the flour to be delivered at a fixed time, or as much sooner as he could make it. As the miller's contract was satisfied by a delivery of flour from any wheat, the transaction was held to be a sale. But in *Malloy v. Willis*, 4 N. Y. 76, wheat was delivered under a contract "to be manufactured into flour," and one barrel of the flour was to be delivered for every four 15-60 bushels of wheat. This transaction was by the same court held to be a bailment. If a party, having charge of the property of others, so confounded it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produces it. Where, however, the owner's consent to have their wheat mixed in a common mass, each remains the owner of his share in the common stock. If the wheat is delivered in pursuance of a contract of bailment, the mere fact that it is mixed with a mass of like quality, with the knowledge of the depositor or bailor, does not convert that into a sale which was originally a bailment, and the bailee of the whole mass, of course, has no greater control of the mass than if the share of each were kept separate. If the commingled mass has been delivered on simple storage, each is entitled on demand to receive his share; if for conversion into flour, to his proper proportion of the product. *Chase v. Washburn*, 1 Ohio St. 244; *Hutchinson v. Com.*, 32 Pa. St. 472. It makes no difference that the bailee had in like manner contributed to the mass of his own wheat, for, although the absolute owner of his own share, he still stands as a bailee to the others, and he cannot abstract more than that share from the common stock, without a breach of the bailment, which will subject him, not only to a civic suit, but also to a criminal prosecution. *Hutchinson v. Com.*, 32 Pa. St. 472. But where, as in *Chase v. Washburn*, *supra*, the understanding of the parties was that the person receiving the grain might take from it, or from the flour, at his pleasure, and appropriate the same to his own use, on the condition of his procuring other wheat to supply its place, the dominion over the property passes to the depository, and the transaction is a sale, and not a bailment. To the same effect are *Schindler v. Westover*, 99 Ind. 395; *Richardson v. Olmstead*, 74 Ill. 213; *Bailey v. Bensley*, 87 Ill. 556, and *Johnston v. Browne*, 37 Iowa, 200. In *Lyon v. Lenon*, 7 N. E. Rep. 311, the distinction is thus stated: "If the dealer has the right, at his pleasure, either to ship and sell the same, on his own account and pay the market price on demand, or retain and re-deliver the wheat, or other wheat, in the place of it, the transaction is a sale. It is only when the bailor retains the right from the beginning to elect whether he will demand the re-delivery of his property, or other of like quality and grade, that the contract will be considered one of bailment. If he surrenders to the other the right of election, it will be considered a sale, with an option on the part of the purchaser to pay either in money or property, as stipulated. The distinction is, can the depositor, by his contract, compel a delivery of wheat, whether the dealer is willing or not? If he can, the transaction is a bailment. If the dealer has the option to pay for it in money or other wheat, it is a sale." This distinction is drawn, of course, with reference to cases where grain is deposited in a mass, as in grain elevators, etc. There are cases in which the doctrine of bailment has been carried much beyond the rule recognized in the cases we have cited. See *Sexton v. Graham*, 53 Iowa, 181, 4 N. W. Rep. 1090, and *Nelson v. Brown*, 53 Iowa, 555, 5 N. W. Rep. 719. We think, however, the rule recognized in *Chase v. Washburn*, *supra*, and *Lyon v. Lenon*, *supra*, is a safe one, and is more in accord with the well-settled principles of the law relating to bailment.

But in the case at bar we are not called upon to say what would be the effect upon the transaction if Newman had authority, in the regular course of dealing, to ship or sell the wheat of his customers on his own account. Undoubtedly he had a right to sell of the grain or flour to the extent of his own share, that is to say, what he contributed to the common stock and the tolls to which he was entitled. But the jury has found that he had no authority whatever to sell or to abstract from the common stock beyond the amount to which he was himself entitled. In the general charge, and also in the answers to the points submitted, the learned court instructed the jurors, in the clearest manner, that if they should find from the evidence that Newman, by the nature of his dealings with the several plaintiffs, had acquired such dominion over their wheat as authorized him, at his pleasure, not only to grind it into flour, but also to sell the same for his own use, the transaction must necessarily be treated as a sale; and that, in that event, the plaintiff could not recover. This instruction was repeated with marked emphasis several times during the progress of the charge, and it seems quite impossible that the jury could have labored under any misapprehension as to the nature of the inquiry they were to make. The verdict of the jury was for the plaintiff, and we must assume the facts which, it is plain, the jury in arriving at such a verdict must have found, viz., that Newman had no authority to sell the grain delivered into his mill under the arrangement with the plaintiffs; that is to say, their share of the common stock, nor the flour which was the product thereof. It was the plain duty of Newman, however, to see to it that at all times the mill contained wheat or flour sufficient in amount to answer all demands under the bailment. Failing in this, he was derelict in duty, and liable under the law for the appropriation and conversion into his own use of property which did not belong to him.

Nor do we see that the court committed any error in the answers to the plaintiff's points. These points, according to the general practice, were based upon an assumption of facts, the truth or falsity of which was for the jury, and the law was stated as upon a finding of these facts by the jury. They were relevant to the issue. They disclosed clearly the specific facts assumed, which were fairly and reasonably consistent with the plaintiff's theory of the case upon the evidence, and the opinion of the court thereon, and could not have had any weight with the jurors in their deliberations unless the facts assumed were in their judgment established by the proofs. The points, certainly, were not such as could be disregarded by the court, and we cannot see how the answers thereto could be supposed to have misled the jury.

The learned court defined a bailment and a sale, marking the distinguishing features of each, and as the nature of the transaction depended, not wholly upon the written receipt, but in part on verbal evidence as to the method of conducting the business, the question was undoubtedly one proper to be submitted to the jury. The court instructed the jury, that if certain facts existed the transaction was a sale, otherwise it was but a bailment. And the question was proper for the jury whether or not, under the instructions of the court, according to the facts as the jury might find them, the transaction was a bailment or a sale.

On a careful review of the whole case, we find no error, and the judgment is affirmed.

# INDEX.

NOTE. A star (\*) indicates that the case referred to is an

## ABATEMENT AND REVIVAL.

Pleas in abatement, see *Bonds; Criminal Law*.

### Death of defendant.

1. Under Rev. Code Md. art. 50, § 146, providing that actions for personal injuries and slander shall not survive against an administrator or executor, an action to recover consequential damages for an assault and battery on plaintiff's wife is not maintainable against the executrix of deceased, as the right depends upon the nature of the action, and not upon the character of damages claimed.—*Ott v. Kaufman*, (Md.) 580.\*

### Substitution of representatives.

2. Where administrators of a deceased defendant allege that they were substituted without notice or their knowledge and consent, a record which fails to show how they were substituted is fatally defective.—*Townsend's Appeal*, (Pa.) 300.

3. Code Md. 1860, art. 2, § 1, (Rev. Code 1878, art. 64, § 32,) provides that no action for ejectment, waste, etc., shall abate by reason of the death of the parties. Code 1860, art. 75, § 40, (Rev. Code 1878, art. 64, § 102,) provides that when, in a suit to recover land, or in which the title is involved, a party shall die, and the person to be substituted is an infant, such action shall not be tried during such infancy, unless the guardian satisfy the court that the trial would benefit the infant, but the action may be continued during infancy. The defendant in an ejectment suit died, leaving minor heirs, who were made parties, and a guardian *ad litem* was appointed, who pleaded their infancy in abatement. Plaintiff demurred. *Held*, that article 2, § 1, and article 75, § 40, being formerly sections 1 and 2, respectively, of chapter 80, act 1785, and being both re-enacted in the Code of 1860, neither has superiority over the other, and they must be construed as they were in the act of 1785,—the second section as an exception to the first,—and the demurrer was properly overruled, and a continuance during infancy was proper.—*Tise v. Shaw*, (Md.) 363.

v.11A.—57

## Abstracts of

As evidence in ejectment, 2, 3.

## Accession

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## Account

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## ACTION.

See, also, *Abatement and Battery; Assumpsit; Creditors' Bill; Deceit; Injunction; Libel and Slander; Malicious Prosecution; Nuisance; Pleas; Pleading; Replevin; Specific Performance; Trespass; Trover and Conversion*.

### By and against

Assignee in bankruptcy, and Corporations, see *Corporations*. Executors and administrators, see *Executors and Administrators*. Municipalities, see *Municipalities*, 13-15.

Partners, see *Partnership*. Form, see *Eminent Domain*. For rent, see *Landlord and Tenant*. On bills and notes, see *Banking*.

bonds, see *Bastardy*, 4. leases, see *Landlord and Tenant*. To recover back usurious interest, 3, 4.

### Form of action.

1. When a life-tenant man sue jointly for injury the proper action.—*McIntosh and Coal Co.*, (Pa.) 808.

### Joinder of causes.

2. In an action for rent, upon two counts. In the first was made upon the lease, which stipulated a penalty for non-payment of rent. The second demand

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occupation. The sum demanded in each was the same and greater than the penalty. *Held*, that there was no misjoinder.—*Wagie v. Bartley*, (Pa.) 228.

### Advancement.

See *Descent and Distribution*, 2, 3.

### Adverse Possession.

See *Ejectment; Limitation of Actions*, 1-5.

### Affidavit.

Proof of, see *Evidence*, 5.

To form issue as to distribution of proceeds on execution, see *Execution*, 9.

### Amendment.

Of deposition, see *Deposition*.

## ANIMALS.

Insurance of, see *Insurance*, 4.

### Trespass by—Damages.

The damages which may be appraised and certified under section 3 of the New Jersey "Act concerning trespasses by swine" (Revision, 20) are only such as have been occasioned by the swine at the time of the trespass for which they were distrained and impounded, and such as are visible to the appraisers, and can be determined without the intervention of proof by witnesses, etc.—*Warne v. Oberly*, (N. J.) 146.

## APPEAL.

See, also, *Criminal Law*, 8, 9; *New Trial*.

From assessment of damages in condemnation proceedings, see *Eminent Domain*, 7.

In insolvency proceedings, see *Insolvency*, 5.

Review, questions of fact, see *Intoxicating Liquors*, 5.

Time of taking, see *Criminal law*, 8, 9.

### When lies.

1. Act 1882, Md. c. 355, provides for the institution of proceedings by a landlord against his tenant to recover possession of leased premises, before a justice of the peace. Plaintiff sued his tenant for the possession of rented property, and recovered judgment. Defendant appealed to the circuit court. *Held*, that as the justice of the peace had jurisdiction, and an appeal lay to the circuit court, the judgment of that court was final, and no appeal lies from that court.—*Burrell v. Lamm*, (Md.) 56.

### From police courts.

2. Act N. J. 1886, p. 289, § 23, relating to boards of health, provides for a summary

proceeding before the police justice to recover the penalty for violating an ordinance of the board. *Held*, that such proceeding is not a civil case for the violation of an ordinance within the meaning of the Newark city charter, § 56, granting appeals in such cases from the judgment of the police justice.—*State v. Board of Health of City of Newark*, (N. J.) 181.

### Requisites—Agreement to perfect.

3. On a question of fact as to what agreements were made between the parties, relative to the perfecting of an appeal, the affirmative of the issue is upon the appellants; and where two witnesses of equal credibility, having the same means of knowledge, arrive at different conclusions, the affirmative cannot be said to have been proven.—*Crise v. Lanahan*, (Md.) 842.

### Time of taking.

4. The accounts of township supervisors for the year ending March, 1885, were settled by the auditors, whose report was entered in the township book under date of April 18, 1885. This report, without date, was published in two county papers, issued April 16th. On May 8th a copy was filed in the office of the clerk of quarter sessions, and next day with the township clerk. On May 8th a citizen and tax-payer of the township appealed on its behalf from the decision of the auditors. *Held*, that this appeal was within the time prescribed by law, and that, in the absence of clear evidence of fraud or mistake, the date affixed to such reports is conclusive in determining whether an appeal is in time or not.—*Township of Shippen v. Burlingame*, (Pa.) 547; *Township of Shippen v. Lewis*, (Pa.) 548.

5. Under rule 2 of the court of appeals of Maryland, as amended by rule 27, which provides that the time for the transmission of the record runs from the date of order allowing the writ of error, a writ will not be dismissed where judgment was rendered April 1st, the petition for the writ filed on the 11th, allowed on June 18th, and transmitted to the court of appeals September 5th.—*Gamble v. Sentman*, (Md.) 584.

### Practice—Transmission of record.

6. An appeal from an order in which the record is not sent to this court for more than a year after the order was passed, in the absence of fault or neglect in the clerk, and where it also appears to have been due to the action of appellant, will be dismissed.—*Crise v. Lanahan*, (Md.) 842.

### From courts of probate.

7. Under Revision N. J. p. 753, § 2, the orphans' court has full power and authority to hear and determine all controversies respecting the fairness of inventories. Where, therefore, on appeal from an order

**Civil action—Instructions.**

1. The court charged that if the jury found that plaintiff's testimony, as corroborated by two witnesses, outweighed defendant's, uncorroborated, and the witnesses were all equally credible, the preponderance was with plaintiff, and he had proven the assault as claimed on his own ground. *Held* not error.—*Lillibridge v. Barber*, (Conn.) 850.

2. The court charged that the place where the assault was committed was immaterial, provided it was, as in this case conceded, within the jurisdiction of the court. *Held* not error; there being nothing to show in any manner that, because of the place, the act was justifiable.—*Id.*

**ASSIGNMENT.**

Of patent, by partner, see *Partnership*, 2.

**Equitable—Enforcement.**

1. An equitable assignment of a definite part of the moneys to be raised on an execution upon a judgment at law will be protected and given effect to by the court out of which the execution issued.—*Brown v. Dunn*, (N. J.) 149.

2. When it has been proven to the satisfaction of a court that there has been an assignment of funds, while the same are in court, by claimants under its jurisdiction, such court has ample power to carry out such assignment by proper order.—*Crise v. Lanahan*, (Md.) 842.

**ASSIGNMENT FOR BENEFIT OF CREDITORS.**

See, also, *Bankruptcy*; *Fraudulent Conveyances*; *Insolvency*.

**Effect—Law of domicile.**

1. An assignment by a citizen of one state of personal property situate in another state, when properly recorded, takes effect from its date, and passes the title fully for all purposes. The law of the domicile regulates the transfer of personal property.—*Smith's Appeal*, (Pa.) 394.\*

**Secured creditors.**

2. On bill to restrain an assignee from disposing of property covered by mortgages to its full value, respondent claimed that, whatever the liens upon the debtor's estate, the latter had the right to make assignment for the equal benefit of creditors, and the assignee power to dispose of the assets in disregard of such incumbrances. *Held* that, as an assignor cannot destroy liens of his own creation by making an assignment for the benefit of his other creditors, his assignee disposes of the property covered by such liens at

his peril.—*Arnett v. Trimmer*, (N. J.) 487.

3. Mortgagees had notice of an assignment of the stock of goods covered, and of its inadequacy, and did not interpose until after sale of part of the property, of which they also had notice. *Held*, that the assignee will be permitted to retain from the amount in his hands costs actually incurred by him in the sale.—*Id.*

**ASSUMPSIT.**

Money had and received, overpayments, see *Frauds, Statute of*, 3.

When lies, see *Covenant, Action of*.

**Privy of contract.**

1. *Assumpsit* will lie for money received from plaintiff's guardian, for plaintiff's use, and an instruction that there was no privity between the parties to the suit is properly refused.—*Pugh v. Powell*, (Pa.) 570.

**Damages—Province of jury.**

2. Under a building contract, the value of extra work done and materials provided was to be ascertained by the valuation of the architect. In an action to recover a balance due under the contract, it appeared that the architect had given different valuations to both parties. *Held*, that both valuations were properly submitted to the jury to say which was the correct one.—*Keystone Brewing Co. v. Walker*, (Pa.) 650.

**ATTACHMENT.**

See, also, *Garnishment*.

Property subject to, see *Intoxicating Liquors*, 15.

**Fund in court.**

1. Money paid into the clerk's office by order of court, in a suit pending between H. and others, and claimed by H., is subject to attachment at the suit of a creditor of H.; and, on petition of such creditor, the chancellor will order the money to be retained in court, to be applied to the satisfaction of any judgment which may go against H. in the attachment proceedings, subject, however, to the rights and equities of the parties to the original suit.—*Trotter v. Lehigh Zinc & Iron Co.*, (N. J.) 25.

**Lien—Subsequent conveyance by debtor.**

2. An attachment having been issued against a debtor, the sheriff levied on his interest in lands conveyed to his wife, but for which he had supplied the purchase money. The debtor and his wife subsequently conveyed the lands to one of the defendants, who had full knowledge of the attachment. On a bill filed to set aside the conveyance as fraudulent, *held*, that the

debtor's interest in the lands was held by the law under the attachment, and that no title passed to said defendant by virtue of the conveyance to him.—*Leathwhite v. Bennet*, (N. J.) 29.

### Attorney and Client.

Attorney's authority to admit service, see *Corporations*, 8.  
Notice to attorney, see *Notices*.

### AUCTION AND AUCTIONEER.

Advances on goods fraudulently purchased.

An auctioneer who receives for sale goods fraudulently purchased by another, but has no notice of the fraud, and in good faith advances money on them, acquires a title against the vendor.—*Higgins v. Lodge*, (Md.) 846.

### Auditor.

See *Reference*, 1, 2.

### Baggage.

Liability for loss, see *Carriers*, 6-8.

### BAIL.

#### In civil actions.

1. Under R. L. Vt. § 942, providing for a recognizance conditioned for the payment of a judgment in default of the principal's appearance, the liability is limited to the amount of the judgment, and the recognizance is not irregular though it be for a larger amount than the judgment.—*Worthen v. Prescott*, (Vt.) 690.

#### — Surrender of debtor.

2. Under R. L. Vt. § 1468, the bail has a right, on the return day of a writ of *capias*, to surrender his principal in discharge of himself.—*Id.*

3. Under R. L. Vt. § 1469, upon the surrender of a principal by his bail, it is the duty of the justice to commit him to jail, pending a continuance, unless he procures bail.—*Id.*

### BAILEMENT.

See, also, *Carriers; Pledge*.

#### What constitutes.

Plaintiffs delivered wheat at a mill, and, according to the custom of the mill, the wheat went in with other wheat. Receipts were given by the miller showing it was received for the use of plaintiffs. Afterwards the sheriff levied on a lot of flour and bran in the mill, on execution against the miller. Plaintiffs claimed it as theirs,

and on an interpleader issue between them and the attaching creditors, the jury found for plaintiffs. *Held*, that the finding for plaintiffs necessarily implied a finding that the transaction was a bailment, and not a sale, which was a question of fact for the jury.—*Bretz v. Diehle*, (Pa.) 893.\*

### BANKRUPTCY.

See, also, *Assignment for Benefit of Creditors; Fraudulent Conveyances; Insolvency*.

#### Action by assignee—Limitation.

Rev. St. U. S. p. 975, § 5057, provides that no suit in equity shall be maintained between an assignee in bankruptcy and one claiming an adverse interest in any property, or right to property, transferable to or vested in the assignee, unless brought within two years from the time the cause of action accrued for or against such assignee. Defendant sold some land, and received half the purchase money, but the vendee refused to pay the balance when due, and four years later went into bankruptcy. Four years after his appointment his assignee sued for specific performance. *Held*, that the act of congress was an adequate reply to such a bill, and conclusive, unless the assignee can relieve himself by showing circumstances preventing its application to him, and an amendment of defendant's answer setting up this defense should have been allowed.—*Ruff's Appeal*, (Pa.) 558.

### BANKS AND BANKING.

Checks, see *Negotiable Instruments*, 6-8.

#### Deposits—Misappropriation.

A trustee, authorized to receive trust money in his co-trustee's absence, indorsed a check payable to both, as if he were sole trustee, and it was credited to him as such, in bank. He then gave S. a check on this fund, to pay a debt which he owed in another capacity. The trustee check was refused, when presented to the drawee for payment, because indorsed by but one trustee. The trustee, by agreement with his bank, then added his co-trustee's name to the indorsement of the trustee check, and to the signature of the check to S., and opened the account in the joint trustees' names. *Held*, that the trustee's bank had notice of the misappropriation of the trust funds, and that, by paying the check to S., it became a party to the wrong, and liable therefor.—*Swift v. Williams*, (Md.) 885.

### BASTARDY.

#### Criminal prosecution—Evidence.

1. Defendant introduced evidence to show that the prosecutrix was married, and

also that she testified before the magistrate that she was not married. *Held*, it appearing that she had contracted a marriage in Ohio while under age, that the statutes and laws of Ohio were admissible for the purpose of showing that the marriage as contracted was invalid.—*Easley v. Commonwealth*, (Pa.) 220.

2. The physician who attended the prosecutrix was permitted to testify to declarations as to the paternity of the child made by prosecutrix while in labor, although the physician was not certain that she was *in extremis*. *Held* not error, where the jury were instructed that they were only to consider the declarations if they believed them to have been made by prosecutrix while *in extremis*, and that at the time of making them she believed herself to be in peril, and not likely to survive.—*Id.*\*

3. An instruction that a wife, during coverture, cannot bastardize her own child, and that neither she nor her husband can testify as to the latter's non-access; but if the jury are satisfied of such non-access beyond a reasonable doubt they can then consider the wife's testimony as to the child's paternity, is not erroneous.—*Id.*

#### Action on bond.

4. Where it is charged that a voluntary bond has been given, irregularities in proceedings under the statute are irrelevant in an action on the bond.—*Township of Bordertown v. Wallace*, (N. J.) 267.

5. A joint plea of the infancy of one defendant in an action on a joint and several bastardy bond is bad in substance, as in proceedings under the bastardy act the infancy of the reputed father is no defense, when he is legally chargeable in exoneration of the public.—*Id.*

#### Bill of Lading.

See *Carriers*, 3.

#### Bills and Notes.

See *Negotiable Instruments*.

#### BONDS.

See, also, *Principal and Surety*, 2, 3.

For support of bastard, see *Bastardy*, 4, 5.

#### Action on—Plea in abatement.

1. A joint plea of the infancy of one defendant in an action on a joint and several bond is bad on demurrer.—*Township of Bordertown v. Wallace*, (N. J.) 267.

2. In an action on a joint and several bastardy bond, a joint plea of duress of unlawful imprisonment of one defendant is bad where the relationship, such as father, son, etc., is not averred in the plea.—*Id.*

#### BRIDGES.

Liability for defects, see, also, *Towns*.

#### Knowledge of defects.

Plaintiff, knowing that a certain plank in a bridge was defective, chanced to step upon it in crossing the bridge, and was injured by the plank giving way with him. *Held*, in an action for damages, that his previous knowledge of the defect in the plank in nowise compromised him, and that the bridge company could not avoid the responsibility arising from its own neglect by charging the plaintiff with knowledge of that negligence.—*Monongahela Bridge Co. v. Bevard*, (Pa.) 575.\*

#### BUILDING AND LOAN ASSOCIATIONS.

##### Imposing fines.

1. Building associations incorporated under the general Pennsylvania law of 1859, having no special power to impose fines, can do so only in the exercise of their general right to enact suitable by-laws for their government. The validity of a by-law imposing fines enacted by such a building association depends upon whether the fines imposed are or are not reasonable.—*Lynn v. Freemansburg Building & Loan Ass'n*, (Pa.) 537.

2. A by-law providing that every stockholder neglecting to pay his monthly dues and interest "shall forfeit and pay the additional sum of ten cents monthly on each and every dollar due by him," gives a right to impose a fine that is cumulative, *i. e.*, to be imposed upon the aggregate amount of all money due at the end of each month, no matter for what cause, and, as such, it is oppressive, extortionate, and unreasonable, and therefore invalid.—*Id.*

3. Pennsylvania act of April 10, 1879, § 6, (P. L. 17), providing that the fines or penalties imposed by building associations for non-payment of dues, interest, etc., "shall not exceed two per cent. per month on all arrearages," does not apply to associations incorporated prior to the passage of that act who have not accepted the provisions thereof.—*Id.*

4. A stockholder in a building association gave it a mortgage to secure certain loans to him, for which his stock was also deposited as collateral. Being threatened with forfeiture of his stock under the by-laws, he subsequently paid the association a sum necessary to square his accounts, and pay all his dues, interest, and fines. This money was applied in part to the payment of the fines alleged to be due under the by-laws. Subsequently the stockholder again became in default. The association having forfeited his stock, and proceeded

by *scire facias* on the mortgage, *held* that, as the fines imposed were illegal and void, the stockholder was not estopped by his payment from demanding that the sum paid by him, and applied to these fines, should be credited on the amount due on the mortgage.—Id.

## CARRIERS.

### Contract of shipment.

1. The plaintiff telephoned the defendant for an all-rail rate, and received a 90-cent rate. The next day it shipped the goods, and sent with them to the depot an ordinary dray-ticket. The judge charged that the sending of this ticket without any designation that the freight was to go by an all-rail route was a contract that it should go in the ordinary way, and a revocation of the telephone contract. *Held* a proper charge.—*Hostetter v. Baltimore & O. R. Co.*, (Pa.) 609.

2. The bill of lading signed by the defendant was an ordinary bill of lading, and contained no conditions that the goods were to be shipped all-rail, and the judge charged the jury the bill of lading gave the defendant the option of shipping by any proper route. *Held*, to be a proper instruction.—Id.

3. In an action against a railroad company for losing goods shipped by it, plaintiff asked the court to charge that a bill of lading on its face was but a memorandum, and not in form a contract *inter partes*, and oral testimony might be received to show the real contract; which was refused. *Held* not error.—Id.

### Delivery to wrong person.

4. Plaintiffs shipped by defendant's road goods consigned to A. B., in Washington. Defendant could find no one of that initial, but found one L. B., and learning from plaintiff's agent that he had sold some goods to L. B., delivered the goods to him. *Held*, that defendant was liable for the goods.—*Wernag v. Philadelphia, W. & B. R. Co.*, (Pa.) 868.

### Injuries to passengers.

5. Plaintiff was injured in passing from defendant's waiting-room to the ferry-boat by a swinging door striking against him. *Held*, that as the door was an ordinary one, in plain view, and not part of defendant's machinery for transportation, plaintiff must prove his allegations of negligence.—*Hayman v. Pennsylvania R. Co.*, (Pa.) 815.\*

### Loss of passengers' effects.

6. By the sale of a ticket to a passenger, a railroad company is liable for his safe transportation and reasonable personal baggage, but not for merchandise delivered by him as baggage, without clear proof of

an agreement to that effect.—*Blumenthal v. Maine Cent. R. Co.*, (Me.) 605.

7. A passenger presenting a valise to the baggage-master in the ordinary way to be checked, represents by implication that it contains his personal baggage, and if it in fact contains merchandise, he is guilty of such legal fraud as to absolve the carrier from liability for failure to transport it.—Id.

8. Nor is the company rendered liable because there is evidence tending to show that baggage-masters at other stations on the same line had previously checked the same valise, with a knowledge of its contents.—Id.

## Cemeteries.

Exemption from taxation, see *Taxation*, 1.

## CERTIORARI.

### Before final judgment.

Where the record brought up by writ of *certiorari* shows upon its face that no final judgment has been entered in the court below, and that the cause is still pending there, the writ will be quashed.—*Macrum v. Jones*, (Pa.) 817.

## Charities.

Exemption from taxation, see *Taxation*, 3, 4.

## CHattel MORTGAGES.

Foreclosure, exemptions, see *Exemptions*.

### Description.

1. A mortgage was executed upon a stock of goods, and chattels used in carrying on the business, and the evidence showed that a horse, wagon, sleigh, and harness were used in such business. *Held*, that such chattels were included in the mortgage.—*Arnett v. Trimmer*, (N. J.) 487.

### Receivers—Release of property.

2. A receiver appointed under a chattel mortgage contracted with the mortgagor that certain property covered by the mortgage should be the mortgagor's in payment for services rendered. *Held*, that this contract was binding upon the mortgages.—*Ayers v. Hawk*, (N. J.) 744.

### Title to increase of property.

8. Under Code Md. art. 24, §§ 29, 39, providing that a chattel mortgage duly sworn to and recorded has the same effect in transferring title, though the mortgagor remain in possession, as if the mortgagee had been put in possession of the mortgaged property, the title to the offspring of animals included in such a chattel mortgage is in the mortgagee.—*Cahoon v. Miers*, (Md.) 278.\*

**Checks.**

See *Negotiable Instruments*, 6-8.

**Common Drunkard.**

Rhode Island statute, see *Constitutional Law*, 10, 11.

**Composition with Creditors.**

See *Insolvency*, 4.

**Compromise.**

Offer of, as evidence, see *Evidence*, 4.

**Conflict of Laws.**

Transfer of personal property, see *Assignment for Benefit of Creditors*, 1.

**CONSPIRACY.**

Civil action—Joint defense.

In an action against a father and son for fraudulently conspiring to defraud the father's creditors by a collusive judgment, an instruction that, for plaintiff to recover, the jury must find that both the defendants were guilty of fraud, is proper.—*Collins v. Cronin*, (Pa.) 869.

**CONSTITUTIONAL LAW.**

See, also, *Intoxicating Liquors*, 1-8.

**Local and special laws.**

1. The New Jersey act of May 28, 1886, p. 869, which authorizes the boards of freeholders in the respective counties, except such counties as have road boards, to lay out, open, and improve a public road in each of the counties in this state, is unconstitutional, because one county is excepted from its operation.—*State v. County of Hudson*, (N. J.) 185.

2. Const. Pa. art. 8, § 7, prohibits the passing of local or special laws by the general assembly. Act of June 25, 1885, provides for the collection of taxes in the boroughs and townships of the state, and the last clause provides that "this act shall not apply to any taxes, the collection of which is regulated by a local law." There were and are several special laws relating to the collection of school taxes in various parts of the state. *Held*, that the act of 1885 was a general law, applying to the whole state, except in so far as obstructed by special laws passed prior to the new constitution, and was not repugnant thereto.—*Evans v. Phillipi*, (Pa.) 680.

3. Const. Pa. art. 8, § 7, cl. 27, provides that the legislature shall not enact a special

law by the partial repeal of a general one. Article 9, § 1, provides that taxes shall be levied and collected under general laws. The act of June, 1885, provides for the collection of taxes in boroughs and towns, but by the concluding clause was not to apply to taxes whose collection is regulated by a local law. *Held*, that the law was general and not repugnant to the constitution.—*Id.*

**Exclusive privileges.**

4. The New Jersey act of May 3, 1880, providing that any railroad company whose road is constructed at any seaside resort not exceeding four miles in length, etc., shall be exempted from the provision of the act of February 12, 1874, (Revision, p. 943, § 160,) authorizing the appointment of a receiver, etc., of any company failing to run its trains on any part of its road for 10 days, is repugnant to Const. N. J. art. 4, § 7, prohibiting the granting of exclusive privileges, immunities, and franchises.—*In re Delaware Bay & C. M. R. Co.*, (N. J.) 261.

**Taxation.**

5. Act N. J. March 3, 1854, incorporating the Plainfield Fire Department and authorizing the members to determine the amount necessary for its maintenance, and requiring that the assessor shall return a list of buildings, etc., with an assessment on each building proportionate to its liability to injury by fire, is of the nature of a property tax, and being obnoxious to the constitutional requirement that "property shall be assessed for taxes under general laws and by uniform rules according to its true value," was immediately repealed by the adoption of that requirement as an amendment to the constitution.—*State v. Smith*, (N. J.) 831.

6. The tax imposed under N. J. act March 3, 1854, conferring on the court general jurisdiction to enforce assessments under the general tax law, cannot be maintained or imposed by the court under the act of March 23, 1881, (Supp. Revision, 602,) because the Plainfield Fire Department is a private corporation, and not a political corporation or division of the state, and so the grant of the power of taxation to it was not within the power of the legislature.—*Id.*

7. The Pennsylvania act of June 10, 1881, prohibiting peddling without a license, and the ordinance of the city of Pittsburgh approved December 4, 1886, are not in conflict with Const. Pa. art. 9, § 1, which provides that all taxes shall be uniform upon the same class of subjects.—*Kneeland v. City of Pittsburgh*, (Pa.) 657.

**Due process of law.**

8. Const. U. S. art. 14, § 1, provides that no state shall deprive any person of prop-

erty without due process of law. *Held*, that an ordinance prohibiting the erection of frame buildin s within certain limits of a borough did not violate this section.—*Klinger v. Bicket*. (Pa.) 555.

9. Plaintiffs were manufacturers of eleo-nargarine. They were indicted for its manufacture and sale contrary to the provisions of the Pennsylvania act of May 21, 1885, entitled "An act for the protection of the public health, and to prevent adulteration of dairy products, and fraud in the sale thereof." *Held*, that the act was not in violation of the fourteenth amendment to the United States constitution.—*Walker v. Commonwealth*. (Pa.) 628.\*

#### Rights of accused.

10. Pub. St. R. I. c. 244, § 24, provides that every person who shall have been convicted three times within a period of six months of intoxication, etc., or who shall be proved to have been thus intoxicated three times within six weeks, shall be deemed a common drunkard. *Held*, that this section is not affected by the fifth amendment to the constitution of the United States, that no person shall be subject for the same offense to be twice put in jeopardy of life or limb, which imposes restriction only on the general government.—*State v. Flynn*. (R. I.) 170.\*

11. Pub. St. R. I. c. 244, § 24, provides that every person who shall have been convicted three times within a period of six months of intoxication, etc., or who shall be proved to have been thus intoxicated three times within six weeks, shall be deemed a common drunkard. *Held*, not to violate the provision of the Rhode Island constitution securing the right of trial by jury, there being nothing to prevent any person complained of under the act from having a trial by jury on any question of fact arising, and there being provision for jury trial on complaint for indecent intoxication.—*Id.*\*

## CONTRACTS.

See, also, *Apprentice; Assignment; Assump-sit; Bailment; Bonds; Carriers; Chattel Mortgages; Covenants; Deed; Frauds, Statute of; Fraudulent Conveyances; Gifts; Indemnity; Insurance; Landlord and Tenant; Master and Servant; Mortgages; Negotiable Instruments; Orders; Partnership; Pledge; Principal and Agent; Principal and Surety; Sale; Specific Performance; Usury; Vendor and Vendee.*

Corporate contracts, see *Corporations*, 2.

Damages for breach, see *Damages*, 5-7.

Of infants, see *Infancy*.

Reformation, see *Equity*, 4-7.

Rescission, see *Equity*, 8.

Restraining breach, see *Injunction*, 4.

#### Validity—Consideration.

1. Plaintiff paid defendant five dollars for an option on a corner lot until November 1st. Defendant sold the lot. Between that date and December 1st, plaintiff tendered defendant the purchase price, and demanded a deed, which was refused. *Held* that, as an alleged extension of time to December 1st was without consideration, it was *nudum pactum*, and not enforceable.—*Coleman v. Applegarth*, (Md.) 284.

#### Public policy.

2. Complainant conveyed property to his father-in-law for no other consideration than that the latter was to use his influence in opposition to an extension of a street across the property, with an understanding that it was to be reconveyed to the original owner. The influence was used successfully, but the father-in-law died before the property was reconveyed. *Held* that, as the object of the contract was the defeat of a public enterprise, the court would not enforce it.—*Slocum v. Wooley*, (N. J.) 284.

#### Parties.

3. A contract for the sale of stock in a manufacturing company provided that it should be paid for in goods made by the company; that on payment the stock should be retired for the benefit of the company; but that, if the delivery of the goods injuriously affected the rights of the company's creditors, the contract should be void. The directors, after partial payment, determining that the creditors' rights would be impaired by further delivery of the goods, abandoned the contract. *Held*, that the contract was made with the company, and, the condition avoiding it having happened, the seller had no individual claim against the nominal purchaser.—*Mitchell v. Wedderburn*, (Md.) 780.

#### Privity.

4. Defendant was under contract to supply a town with water for the extinguishment of fires. Plaintiff's brewery in the town was destroyed by fire, owing to deficiency of water. *Held*, that plaintiff's interest in the contract was too remote to raise such privity therein as would enable him to maintain a suit against defendant.—*Beck v. Kittanning Water Co.*, (Pa.) 800.

#### Interpretation.

5. A father gave money to his son, in return for which the son was to give an obligation binding himself to pay his father interest on the money as long as the father lived. *Held*, that the son was not required, and did not obligate himself, to repay any part of the principal.—*Appeal of Ames*, (Pa.) 282.

6. An agreement for the sale of a stock of merchandise contained the following

stipulation: "Said Adamson [the purchaser] further agrees to pay all rents on building where goods are found for which said Coen is liable, and to receive all rents coming to said Coen on the above-named building, from the day of the completion of invoice until the first day of April, 1888." Parol evidence was offered to show that Coen was then indebted for the rent of the building for the entire year, and that the purchaser was aware of that fact, and had agreed to pay such rent. *Held*, that the language of the stipulation was unambiguous, and the oral testimony properly excluded.—*Coen v. Adamson*, (Pa.) 74.

7. *Held*, also, that under such stipulation Adamson was liable only for the rent for the period beginning with the completion of the invoice.—*Id.*

8. A water company contracted with plaintiff to supply him with water for use about his brewery. The brewery was destroyed by fire, owing, as plaintiff claimed, to deficiency of water. *Held*, that the plaintiff had no contract with defendant for a supply of water for the extinguishment of fires, and on the basis of such contract he had no cause of action.—*Beck v. Kittingan Water Co.*, (Pa.) 300.

9. Plaintiff agreed to build two bridges for defendant on piles of a specified length at a certain rate, and to make additions, if required, at the same rate, provided that they should not be of a more costly class of work than contemplated by the contract. Piles of the specified length proved insufficient, and, by defendant's direction, those for one bridge were spliced, and additional piles furnished, while those for the other were capped, and upon them a trestle was built, whereon the bridge was laid; these additions cost more than the agreed rate. *Held*, that instructions, assuming, as matter of law, that the additions were of the class contemplated by the contract, were properly refused.—*Annapolis & B. S. L. R. Co. v. Ross*, (Md.) 820.

10. Plaintiff agreed to build some bridges according to certain plans, at a certain rate of compensation, and, if required, to make additions to the work at the same rate as the whole amount, provided that no alteration should entail on plaintiff expense beyond the proportion of the balance of the work. *Held*, that plaintiff was not required, in making additions, to do a class of work more costly than that contemplated by the agreement.—*Id.*

11. Where the jury are allowed by conflicting instructions to place two different and inconsistent interpretations on the same state of facts in a written instrument, which it is the province of the court to construe, it is error for which a new trial will be granted.—*New York, P. & N. Ry. Co. v. Bates*, (Md.) 705.

## Performance — Waiver of stipulations.

12. Plaintiff and defendant having purchased and partitioned between them a plat of land, entered into a contract to grade and pave certain streets in distinct clauses of the contract. All the clauses except the last were tacitly waived. The street named in the last clause became a public nuisance, and plaintiff, having ineffectually called upon defendant to perform his part of the contract, graded and paved such portion of the street as passed through his own land, and sued defendant for breach of the contract. *Held*, that he was entitled to recover, there being nothing in the contract making the prior stipulations conditions precedent.—*Broumel v. Rayner*, (Md.) 838.

## Excuse for non-performance.

13. In an action for breach of contract for purchase of stock in a manufacturing company for the purpose of retiring it, it is a good plea that the stock was to be paid for in goods made by the company, on the express condition that, if the delivery of the goods affected the interests of the company's creditors, the contract should be void, which condition had happened.—*Mitchell v. Wedderburn*, (Md.) 760.

14. A member of a firm executed a mortgage, which was upon the property of his wife, which mortgage, in the course of business, fell into the hands of a third party, who held as collateral security a note of the firm, upon which a dividend had been awarded him by the receiver, and that award ratified by the court. It was agreed between said third party and the attorney of the firm that before taking the dividend he should first exhaust the mortgaged property, which he was prevented from doing by injunction. *Held*, that he was relieved from his agreement, and at liberty to take his dividend.—*Crise v. Lanahan*, (Md.) 842.

## Rescission.

15. The agreement between complainant and defendant showed a joint purchase of a contract to purchase real estate. Defendant, after the date at which the contract was to be carried out, sold the property and took a mortgage in part payment, but refused to account to complainant for his share of the profits, on the ground that he had abandoned his interest in the venture. On motion to dissolve a preliminary injunction restraining defendant from parting with the mortgage, *held*, that the burden was on defendant to prove that complainant had abandoned the agreement.—*Stevens v. Ross*, (N. J.) 114.

16. In an action for damages for breach of a covenant to move "mammoth swings" to lands of the defendant, and lease the

lands to be occupied thereby, the payment of the costs and expenses of removal to be secured by chattel mortgage on the swings. It is no defense to such action that at the time of the agreement the plaintiff did not own the swings, but the title was in his wife, or that the plaintiff had employed another to move the swings, if the defendant was not hindered, deceived, or injured thereby. He could only rescind by showing fraud; and could not require security before performance, and the costs and expenses ascertained.—*Gilvery v. Trenwith*, (N. J.) 825.

### Conversion.

Testamentary, see *Wills*, 16.

## CORPORATIONS.

See, also, *Banks and Banking; Building and Loan Associations; Gas Companies; Insurance; Municipal Corporations; Railroad Companies.*

### Officers.

1. Plaintiff's intestate had contributed to the guaranty fund of the defendant, of which he was a director. The by-laws provided that, on the death of a subscribing director, his subscription should be returned to his representative, after his successor was elected. Plaintiff was elected to succeed his intestate, and the board voted to withdraw all but 20 per cent. of the guaranty capital. Plaintiff received the note held by the company for decedent's subscription, and gave a check on the funds of the estate for the 20 per cent. to the company. Nine years after he sued to recover; defendant pleaded limitation, and plaintiff replied that one L., whom he supposed to be general manager, told him it must be paid to get the note, and that he was in ignorance of the by-law until within three years. *Held*, that as he was a director, his ignorance of the by-law was the result of his own want of care, and that as there was no proof that L. was an agent acting in the scope of his authority, or that defendant had subsequently ratified what he had said or done, no fraud could be imputed to defendant, and the statute of limitations was a bar.—*Mutual Life Ins. Co. v. McSherry*, (Md.) 577.

### Contracts.

2. In action for personal services against a railroad company, defendant asked that the jury be instructed that if they found from the evidence that the unpaid vouchers of plaintiff were not signed and approved by one P. until after he had ceased to be president of the road, then, in the absence of proof that any other official of the company had authority to sign and approve

them, the vouchers in themselves were not evidence of indebtedness, and the jury were not at liberty to so consider them. *Held* improperly refused.—*New York, P. & N. Ry. Co. v. Bates*, (Md.) 705.

### Actions.

3. A writ was served on the solicitor of defendant corporation, who subscribed an admission of service. Complainants asked for an interlocutory decree for want of appearance, and obtained a decree for sale, which at their instance was carried out. Several years after some of complainants sought to set aside the decree on the ground that the corporation was never summoned. *Held* that, having taken advantage of the service, they could not complain of the manner in which it was effected.—*Presstman v. Mason*, (Md.) 764.

### Members and stockholders.

4. Certain heirs, for the purpose of realizing a profit from land left by their ancestor, purchased the same from the executors, giving a mortgage for the purchase price, formed a corporation, and chose defendants as trustees to carry out the object of the corporation which was to parcel the land, and sell it in residence lots. After a certain number of lots had been sold, and about one-fourth of the mortgage paid off, the trustees ceased active efforts to sell the land, and the sales stopped, in consequence of which the interest on the mortgage falling due was not paid. The executors of the estate foreclosed the mortgage, and the trustees were purchasers at the foreclosure sale, whereupon one of the heirs filed a bill in equity for relief, accounting, and receiver. Defendants claimed that, relief being asked by complainant alone, it should be confined to him. *Held* that, as the heirs were bound by mutual agreements not to sever their interests, there could be no sale of complainant's interest separately, so long as such agreements were binding, and hence, if injunction were necessary to protect his interest, the writ must cover the whole property.—*Raleigh v. Fitzpatrick*, (N. J.) 1.

5. The alleged fact that complainant, as a member of the corporation, was offensive to defendants, and obstructive in his manner and methods, did not afford defendants just cause for suspending the sales altogether, or to such an extent as to be unable to meet the demands upon them by the accruing interest on the mortgage.—*Id.*

6. The fact that complainant had a suit pending at law against one of the defendants, on his claim as stockholder in the corporation of which defendants were trustees, did not deprive him of a standing in a court of equity to set aside the purchase by the trustees at foreclosure sale; such claim not extending to the whole case, nor

disposing of all the issues involved in the bill.—Id.

### Members and stockholders—Liability.

7. Pennsylvania act of June 2, 1874, relating to joint-stock companies, provides that when execution, or any other process in the nature of execution, shall have been issued against the effects of a company, and returned unsatisfied, an execution, sequestration, or other process shall issue against the individual members to the extent of their unpaid subscriptions, but only on the order of the court in which the action shall have been instituted; and the court may compel the production of books showing names of members, and amount unpaid on their subscription. *Held*, that no execution can issue against the members of such a company, by rule on the company to show cause why execution shall not issue against the individual members, but the rule should be upon the individual members sought to be charged.—*Lauder v. Tillia*, (Pa.) 86.

8. The rule should be served, and, if the defendant is a non-resident, such order as to the manner of service as the case requires should be made, and service had in accordance therewith.—Id.

### Insolvency—Priority of claims.

9. A creditor who obtains judgment the day on which a bill for the appointment of a receiver is filed, and a restraining order issued, is entitled to no preference over general creditors.—*Doane v. Milville Mut. Marine & Fire Ins. Co.*, (N. J.) 739.

10. Under the New Jersey corporation act, § 80, providing that in the payment of creditors and distribution of the funds of a company, the creditors shall be paid proportionately to the amount of their debts, excepting mortgage and judgment creditors, the latter class is entitled to preference though all the assets are equitable.—Id.

11. A wool dealer applied to the Wool Growers' Exchange for money to purchase wool. The exchange not being able to raise the money on its credit, the directors discounted their individual notes for the amount, and the dealer gave his note as collateral. The directors paid their notes without receiving money from the exchange for that purpose. The exchange made an assignment for the benefit of its creditors. An attorney employed, succeeded in collecting some of the money still due on the dealer's collateral. *Held*, that the attorney's fees should first be paid out of this money, and that the balance should be distributed among the directors, in preference to the creditors of the exchange.—*Appeal of Atkinson*, (Pa.) 359.

## COSTS.

### After tender.

Defendants paid into court \$160 under Rev. Code Md. 1878, art. 64, § 81. Plaintiff, under section 82, replied that the sum paid in was not enough to satisfy the claim. The statute provides that, "in the event of an issue thereon being found for the defendant, the defendant shall be entitled to his costs of suit, and the plaintiff to so much of the sum paid into court as shall be found for him." The jury brought in a sealed verdict for plaintiff for \$160, without stating whether it was for the sum paid in for damages *ultra* that amount. *Held*, the verdict being for the precise sum paid into court, the court, after directing the money to be delivered to plaintiff, should have ordered judgment with costs for defendants.—*Gamble v. Sentman*, (Md.) 684.

## COUNTIES.

See, also, *Bridges; Highways; Poor and Poor Laws; Schools and School Districts; Towns.*

### Powers.

1. The general clause of reference in the New Jersey act to create the county of Union, (March 19, 1857, Laws 244,) to "all the jurisdiction, powers, rights, etc., which any other county in this state doth or may enjoy," includes and incorporates those general powers and provisions which belong to other counties as a class, and not such as are exclusive and exceptional.—*State v. County of Union*, (N. J.) 143.

2. It does not include the special provisions in the act of February 27, 1857, which give the custody of the jails and prisoners in the counties of Essex and Hudson to the board of chosen freeholders.—Id.

## COURTS.

Appellate jurisdiction, see *Appeal*, 1, 2.  
Chancery jurisdiction, see *Equity*, 1-3.  
Justices' courts, see *Justices of the Peace*.

### Quarter sessions—Opinions of justices.

When the associate justices (unlearned in the law) of a court of quarter sessions filed a brief opinion refusing certain applications for liquor licenses, which opinion had been drawn for them by the president judge of the court, who himself filed a lengthy dissenting opinion, the said associate justices had the right, after a *certiorari* had been taken from their decree, to file a supplemental opinion, as of the date of their first opinion, setting forth the facts on which they had acted.—*Leister's Appeal*, (Pa.) 387.

## COVENANT, ACTION OF.

### When lies.

In an action of covenant upon a contract which stipulated that no claim for extra work should be allowed, unless such work was done upon a written order signed by the engineer and approved by the examiners, plaintiff alleged, in one count of his declaration, that defendant was indebted to him for extra work done under the contract; that defendant had failed to give him written orders for such work, but had expressly agreed to pay for such extra work. *Held*, that a demurrer to the count was properly sustained; that plaintiff might have an action in *assumpsit* for such work, but, in the absence of the stipulated written orders, could not recover for it under the contract.—*O'Brien v. Fowler*, (Md.) 174.

## COVENANTS.

### Survival.

Decedent purchased a mine of defendant with the understanding that if, within a year, he should be dissatisfied, defendant would refund the money. Decedent died in nine months, intestate. *Held*, that this agreement was not a personal one, but could be taken advantage of by the representatives of the decedent.—*Fuller v. Dempster*, (Pa.) 670.

## CREDITORS' BILL.

### By fraudulent assignee of judgment.

1. A party to whom a judgment has been assigned, in pursuance of an understanding with the judgment debtor that the assignee shall hold the same for the purpose of protecting the defendant's property from the claims of his creditors, will receive no aid from a court of equity, in reaching and applying to the payment of the assigned judgment property which the judgment debtor has placed in the name of a third party, in fraud of his creditors.—*Winans v. Graves*, (N. J.) 25.

### Parties.

2. In a suit brought by a creditor of a fraudulent vendor to charge a judgment upon land formerly owned and fraudulently conveyed by such vendor, and which, after several intermediate conveyances through parties who each took title with notice of the fraud, finally reached an innocent vendee, who paid a part of the purchase money, the immediate grantor to such vendee should be made a party to the suit. If no objection is made to the absence of such party till final hearing, the court may still, in its discretion, refuse to make a decree in the cause.—*Id.*

## CRIMINAL LAW.

See, also, *Arrest; Indictment and Information; Witness.*

Particular crimes, see *Bastardy*, 1-8; *Incest; Intoxicating Liquors; Larceny; Lotteries.* Postponing trial for insanity of defendant, see *Insanity*, 1.

Rights of accused, see *Constitutional Law*, 10, 11.

### Plea in abatement.

1. When the respondent, in a criminal prosecution, pleads misnomer in abatement, and the plea is sufficient in form, the question of *idem sonans*, being a question of fact, must be raised by replication, and not by demurrer.—*State v. Malia*, (Me.) 602.

### Conduct of trial.

2. It is entirely proper, upon a trial for murder, to read the bill of indictment to the jury precisely as it was found by the grand jury.—*Onofri v. Commonwealth*, (Pa.) 462.

3. The trial of any indictment (except for a capital offense) commenced in the presence of a defendant may be continued in his voluntary absence.—*State v. Peacock*, (N. J.) 270.

4. Error will not lie to the refusal of the court to direct the district attorney to call one whose name is indorsed on the indictment as a witness for the commonwealth, even if the person be present in court under subpoena of the commonwealth.—*Onofri v. Commonwealth*, (Pa.) 462.

5. The defendant was indicted for selling liquor without a license. At the conclusion of the evidence the defendant asked the court to permit him to be heard by his counsel before the jury. The court refused, giving as a reason that "there is nothing in the judgment of the court to justify wasting time arguing." *Held*, that to deny altogether the right to be heard by counsel was beyond the power of the court.—*Stewart v. Commonwealth*, (Pa.) 370.

6. It is not error to allow the bill of indictment, with indorsements of a previous trial and conviction and the granting of a new trial, to go out with the jury against the objection of the prisoner.—*Onofri v. Commonwealth*, (Pa.) 462.

### Evidence.

7. An indictment containing three counts, and the commonwealth electing to go to trial on the second and third counts, evidence which would be admissible only upon a trial on the first count is irrelevant, and should be excluded. *GORDON, C. J.*, dissenting.—*Quinn v. Commonwealth*, (Pa.) 531.

### Appeal—Time of taking.

8. Rule 28, Maryland court of appeals, provides that in criminal cases the appeal

or writ of error allowed by law shall be taken without delay, and the transcript shall be forthwith, or as soon as may be, transmitted to the court of appeals. The record not being transmitted for more than four months after verdict rendered, appeal prayed, and affidavit that the same was not taken for delay filed, no pretense being made that the time was necessary for the preparation of the bill of exceptions, the appeal will be dismissed, notwithstanding the delay was with the consent of opposing counsel.—*Clark v. State*, (Md.) 762.

9. Petitioner was sentenced for keeping intoxicating liquors for sale in violation of Pub. Laws R. I. c. 596, as amended by chapter 684, and brought in reasons of appeal on the second day of the term of the court to which he appealed. The clerk refused to file and docket the reasons of appeal, and the petitioner asked a *mandamus* to compel the clerk to do so. *Held* that, under section 82 of chapter 596, amended by section 8 of chapter 684, providing that reasons for appeal from sentence for any offense under those chapters shall be filed at least five days before the sitting of the court appealed to, it was too late to file such reasons on the second day of the term, even though Pub. St. R. I. c. 219, containing the general provisions in regard to criminal appeals, allows the appellant to file his reasons on such second day.—*Denneny v. Webster*, (R. I.) 295.

## CURTESY.

Election not to take under will, see *Ejectment*, 4.

### Forfeiture by willful desertion.

1. Under act Pa. May 5, 1885, forfeiting a husband's curtesy for willful and malicious desertion of his wife for a year preceding her death, proof of willful desertion for such period throws on the husband the burden of proving that the desertion was for reasonable and lawful cause.—*Bealor v. Hahn*, (Pa.) 776.

2. The question as to whether the desertion was willful is for the jury.—*Hart v. McGrew*, (Pa.) 617.

### — Evidence.

3. An order of the quarter sessions on plaintiff for his wife's maintenance is admissible to prove that he had deserted her.—*Bealor v. Hahn*, (Pa.) 776.

4. In an action to enforce curtesy, the declarations and manifestations of sorrow of his wife at the time of an alleged desertion by him are admissible as part of the *res gestæ* to prove such desertion.—*Id.*\*

5. In ejectment by a husband claiming as tenant by the curtesy against his wife's devisee, where it appeared that the hus-

band and wife had not been living together for a long time, plaintiff may introduce declarations of the wife to disprove his alleged willful and malicious separation.—*Hart v. McGrew*, (Pa.) 617.

## DAMAGES.

For trespass by animals, see *Animals*.

In condemnation proceedings, see *Eminent Domain*, 5, 6.

Injury to property, see *Waters and Water-Courses*, 1.

Penalty, see *Frauds, Statute of*, 4.

Province of jury, see *Assumpsit*, 2.

### Exemplary damages.

1. In an action of trespass on the case for wrongful levy and sale, the jury are not confined to the actual damage sustained. They may go beyond that, if the evidence shows a wanton invasion of plaintiff's rights, or any circumstances of aggravation or outrage.—*McDevitt v. Vial*, (Pa.) 645.\*

### Penalties and liquidated damages.

2. A lease for one year contained a covenant providing \$300 as a penalty for subletting the premises, to be collected as rent in proportion to the time the premises were sublet. In an action on the covenant defendant filed an affidavit of defense that he was not liable; no actual damages having been alleged or proved. The court treated the penalty as liquidated damages, and entered judgment for want of sufficient defense. *Held* not error.—*Miller v. Rankin*, (Pa.) 615.

3. Under a lease for a year providing for a penalty of \$300 for subletting, to be computed from the time of subletting, plaintiff may recover \$25 per month as liquidated damages for the period of subletting.—*Id.*

4. In an action for rent, plaintiff alleged that, "under and by virtue of [a] contract in writing signed by and sealed with the seal of [defendant] he the said [defendant] continued in the possession and occupancy of the demised premises from term to term and from year to year. \* \* \* until the first day of April, 1885, when a large sum of money, to-wit, \$620, the rent aforesaid for the term of 81 years \* \* \* became due and payable \* \* \* and still is in arrears." The contract offered and admitted in evidence was, "that the said [defendant] binds himself, his heirs or his administrators, to, \* \* \* for the use or rent of said farm for the term of three years from the first day of April, 1884, to pay the said \* \* \* the sum of \$600. And for the true performance of the above agreement, the parties bind themselves \* \* \* in the penal sum of \$200." *Held*, that under the pleading and the proof as

action of debt would lie for an amount greater than the penalty.—*Wagle v. Bartley*, (Pa.) 223.

### Breach of contract.

5. Defendant, for an executed consideration, agreed to remove plaintiff's swings to defendant's land, and execute a lease to plaintiff of the land for two years. After the swings had been blocked for removal defendant refused to perform his contract. *Held* that full compensatory damages might be given if, by defendant's breach, the plaintiff was obliged to take the swings apart and sell them, at a loss.—*Gilvery v. Trenwith*, (N. J.) 825.

6. In an action for breach of a contract, jointly to grade and pave a street, where plaintiff had requested defendant to perform his part of the contract, and, upon default, had done the work himself, half the cost of grading and paving the street was *held* a proper measure of damages.—*Broumel v. Rayner*, (Md.) 883.

7. Defendant agreed to buy all its carbons from plaintiff at list price, less a certain discount. At the time of making the contract, plaintiff sold only one grade of carbons, known as "firsts." A more defective grade, known as "seconds," was used as raw material. From July, 1885, to March, 1887, however, they sold the "seconds," although without a fixed list price, and all the carbons bought by defendant from plaintiff during that period were "seconds." *Held*, that damages for non-compliance with the contract during the above interval should be assessed according to the profits on "seconds," and before that according to the profits on "firsts."—*Appeal of Brush Electric Co.*, (Pa.) 654.

### Injuries to property.

8. In a suit for damages for obstructing a ferry-landing, where it appears that the lease under which the ferry was operated had expired, the measure of damages is the actual loss by the obstruction, as shown by the loss of tolls. See 2 Atl. Rep. 410.—*Jones v. Pittsburgh & L. E. R. Co.*, (Pa.) 608.

9. Plaintiffs sued for damages for the obstruction of a landing where plaintiffs operated a ferry under a franchise which had expired before the suit was brought. The court refused to allow plaintiffs to show the value of the ferry before and after the obstruction. *Held* no error. See 2 Atl. Rep. 410.—*Id.*

10. Plaintiff was the grantee of a building containing heavy machinery belonging to the grantor and another, who for a number of years refused to remove it. In an action for damages for such refusal, the jury were instructed that plaintiff could not recover the loss of the capital value of the property, nor for dilapidation or de-

struction of it, but annual loss by reason of being obstructed by defendant obtaining any income therefrom, as to measure of damages.—*Grove*, (Pa.) 888.

### Dea

Abatement of action by  
*Abatement and Reviv*  
Effect on covenant, see

### DECE

#### Intent.

1. Where the representation of financial standing, which induced the buyer to induce the seller to sell goods on credit, were to be false, it is no defense to the seller, to recover for fraud, that defendant, who had no definitely settled design to defraud, and, on the contrary, bought the goods in expectation of being able to sell them.—*Judd v. Weber*, (Conn.)

#### Evidence.

2. A manufacturer of machinery applied to a dealer in machinery in 1883, "to open an account and obtain a *line of credit* from the dealer." The dealer, who knew that he was relying on his truth, and credit. February 28, 1883, the manufacturer wrote the dealer the "statement" made by the dealer, admitting that it was made, and that it was true. The dealer paid for when the bill was presented in an action by the dealer for damages for fraud in the sale of machinery subsequently sold on credit, and letter tendered in evidence, obtaining a general verdict for the plaintiff, were admissible in evidence.

### DEE

See, also, *Covenants; Deeds; Easements; Vendor and Vendee; Work and Construction*, see *Works and Courses*, 2.

Description, mistake, see

#### Voluntary conveyance

1. A conveyance by a father to his daughter, in consideration of money actually paid, and not a voluntary conveyance, is not a voluntary conveyance.—*Peal of Ferguson*, (Pa.)

## Delivery.

2. Where a deed was made in settlement of a guardianship account, and was found, duly executed but not recorded, among the grantor's papers after his death, *held*, that its delivery was a question for the jury.—*Stoney v. Winterhalter*, (Pa.) 611.

## DEPOSITION.

### Amendment.

A deposition, on being returned to the court, had not the word "commissioner" affixed to the name of the person taking it. It was returned to him, the word added, then sent back to the court, again filed, and notice of filing served on the other party. *Held*, that the deposition was properly admitted in evidence.—*Jenkins v. Anderson*, (Pa.) 568.

## DESCENT AND DISTRIBUTION.

See, also, *Dower; Executors and Administrators; Wills*.

### Rights of widow.

1. Under Pub. St. R. I. c. 185, § 4, providing that if there be no children or their descendants living, the court of probate shall allow and set off real estate to the widow from her deceased husband's estate, not required for the payment of debts, as may be suitable, etc., and in accordance with the circumstances of the estate, in addition to dower, to hold upon the same terms, etc., as if dower estate, there being no children, and the whole of the estate being suitable for the support of the widow, the court of probate must first assign dower before it can proceed to assign the widow any more of the real estate.—*Mathewson v. Mathewson*, (R. I.) 166.

### Advancements.

2. Advancement is a question of intent. That intent must be proven to have existed at the time of the transaction, and by the contemporaneous acts and declarations of the parties.—*Frey v. Heydt*, (Pa.) 535.

3. Defendant gave to his mother-in-law an absolute obligation for the payment of a sum of money. In a suit brought thereon by the executors of the mother-in-law, after her death, defendant contended that the amount thereof was an advancement to his wife. Defendant paid interest on the obligation for some time, and offered to pay it on two occasions. On the trial, the court permitted proof of the declarations of deceased, made three weeks prior to the execution of the note, that the money was an advancement to defendant's wife. *Held* that, as the declarations were

not contemporaneous with the giving of the obligation, this was error.—*Id.*

### Rights of heirs and distributees.

4. The fact that the executor has wasted personal property coming into his hands, does not discharge the land of decedent from liability for his debts.—*Smith v. Seaton*, (Pa.) 661.

5. A part of the legatees under a will, who were all blood-relations, but not all heirs at law, of the decedent, entered into an agreement, under seal, as follows: "This article of agreement, made by and between the subscribers, is to certify that, for good and sufficient considerations, we do hereby agree that, in case our effort to break the will shall succeed, each one of the said heirs who shall sign this paper shall retain in full such portion of the estate as may be received by any one of said heirs, or to which such said heirs would be entitled in the event of the establishment of said will; that is to say, that, in the event of the breaking of said will, only such portions of the estate shall be distributed to the heirs aforesaid as is not given by the said alleged will to the blood-relations of the deceased." Upon the breaking of the will, and the sale by the administrator of realty devised to one of the legatees, *held*, that such legatee, though not an heir of the deceased, was entitled under the agreement to the proceeds of such sale.—*Patterson's Appeal*, (Pa.) 70.

6. An agreement not under seal, and made by an heir at law of a decedent, in which he releases to one who is not an heir, but is a devisee under the will, all claim he may have to the property so devised, if the will is set aside, is invalid, unless there is proof of a consideration for the promise.—*Id.*

7. A letter written by the heir at law of a decedent offering to release any claim she may have upon property which has been devised by will to one who is not an heir, in case the will is set aside, is not sufficient to convey her interest to such person.—*Id.*

## Discovery.

Against co-surety, see *Principal and Surety*, 4.

## DISTRICT AND PROSECUTING ATTORNEYS.

### Compensation.

The question whether a district attorney is entitled to extra compensation for his services and the use of his office for an investigation of the treasurer's books, is one of law for the court.—*Geiser v. County of Northampton*, (Pa.) 507.

## DIVORCE.

### Grounds for.

1. By Brightly, *Purd. Dig. Pa. tit. "Divorce,"* § 1, the wife may obtain a divorce when the husband has, by cruel and barbarous treatment, endangered her life, or offered such indignities to her person as to render her condition intolerable, and life burdensome. *Held*, that this provision creates two separate grounds for divorce.—*Appeal of Detrick, (Pa.) 882; Id. 885.*

2. By Brightly, *Purd. Dig. Pa. tit. "Divorce,"* § 1, the wife may obtain a divorce when the husband has, by cruel and barbarous treatment, endangered her life. A husband and wife had been bred to farm life and she had sometimes done outdoor work. He was a tenant farmer of limited means, and compelled her to help care for two large gardens, to milk five cows, and to churn by hand, and tried to compel her to do field work. He provided a table, as good as the average in their condition in life, but occasionally scolded, and she suffered some hardships. *Held*, that his conduct did not afford her ground for divorce.—*Id.*

3. Whenever a husband commits a matrimonial offense which entitles his wife to a divorce, he does that which justifies his wife in leaving him.—*Weigand v. Weigand, (N. J.) 118.*

4. A wife is not obliged to stay under her husband's roof with his prostitute; and if she leaves his house for that reason, and he refuses to support her, she is entitled to a decree against him, under the twentieth section of the New Jersey statute concerning divorces, affirming 8 Atl. Rep. 690.—*Id.*

### Defense—Separation and maintenance.

5. Defendant, in his answer to complainant's bill for separation and maintenance, set up that complainant represented to him that she was in a family way by him, and that he, knowing that he had had connection with her, married her, and afterwards discovered that her representations were false, and that they had no affection for each other. *Held*, that this was no defense to a suit for maintenance.—*Fairchild v. Fairchild, (N. J.) 426.*

### Pleading—Answer.

6. In her bill for separation and maintenance complainant alleged that defendant, to procure a divorce in another state, falsely swore that complainant had abandoned him, and that her residence was to him unknown. Defendant pleaded that he could not be compelled to answer this charge, as in so doing he might incur a penalty for the crime of perjury. *Held* that, in the absence of a showing that the crime of perjury was punishable in the state where it was alleged to have been committed, an

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exception that defendant had in the charge would be sustained.

7. Complainant, in her bill for separation and maintenance, alleged that defendant had not, since their marriage, given her any support. Defendant alleged that he was unable to support her, and that he was unable to support himself. *Held*, that this did not constitute an allegation, and was not a proper ground for divorce. Defendant should have stated not he had, since the marriage, given her any support.—*Id.*

8. Defendant's answer to complainant's bill for separation and maintenance contained a clause as follows: "But he did, that he had been fraudulently trapped into his said marriage by complainant." There were no facts immediately following for the fraud to rest upon. In a subsection of the answer the facts upon which the fraud could rest were set up. *Held*, that the clause in the answer was not a proper ground for divorce. *Held*, that the clause in the answer could not be aided by the facts so recently stated.—*Id.*

9. Complainant, in her bill for separation and maintenance, alleged that defendant had abandoned her without cause. The answer to this charge was specific, and admitted of two defenses. *Held*, that an exception to the answer was well taken.—*Id.*

## DOWER.

Assignment, see *Descent and Distribution*.  
Lien, charge on land, see *Executors*.

### Divesting.

1. A borough having, by right, a certain domain, taken for a street which, as appeared by the records of the orphans' court, a widow's dower was charged, and having, after a view of the assessors' assessment, set aside the owner, the widow being no party to these proceedings, and the borough having no knowledge of the widow's interest, that her interest was an estate in fee simple, fully protected by the fact that he appeared upon the records; that she was not to be in any way prejudiced by the proceedings which, as to her, were *ex parte* by occupying the entire lot for a street. The borough had left nothing which was subject to distraint; the land could not be sold, nor could a private estate be granted, the borough holding it in fee simple; that the borough was not to "assign" of the acceptor of the land, and that, the remedy by distraint taken away, an action of debt properly lies.—*Borough of York v. (Pa.) 890.*

...more, by the terms of the will, the widow takes two-thirds of the entire income of the personal property, and the use of nearly one half of all the real estate, it will be presumed that such liberal provisions were intended to be exclusive of dower as such.—Anthony v. Anthony, (Conn.) 45.\*

8. Where a widow elects to take under the will, in lieu of dower, she must take subject to all the charges and limitations of the will, just as any other devisee.—Appeal of Kline, (Pa.) 866.\*

### Duress.

Plea in abatement, see *Bonds*, 2.

## EASEMENTS.

### By express grant.

1. A lot-owner, claiming under a deed from the original owner of the plat, describing the lot by metes and bounds along a designated street, and who has made valuable improvements thereon, may maintain an action in equity to restrain one who claims title to the whole street from so obstructing the same as to interfere with such owner's rights therein, though such street may never have been opened to the public.—Appeal of Ferguson, (Pa.) 885.

2. Those claiming under deeds from the associates of the Jersey Company made after and referring to the map adopted by the associates as owners of the fee and accepted by them as trustees for the public, have not such a legally established private easement or reversionary interest after their vacation in all the streets laid down in said map, as will warrant an injunction against a railroad proposing to destroy the thoroughfare in accordance with a plan approved by the municipal authorities, and acted on by them in vacating a portion of a street for railroad purposes for the public benefit, as provided by Rev. N. J. p. 44, § 163.—Dodge v. Pennsylvania R. Co., (N. J.) 751.

8. It appeared that plaintiff's grantor had promised plaintiff a certain right of way, a continuation of which was to be, and had been, obtained from a third person; that a surveyor, called upon by the grantor to survey an adjoining lot, had been instructed by the latter to leave room for a road to plaintiff's premises; that after selling the lot to plaintiff, the grantor had moved his fence to give plaintiff a way out. *Held*, sufficient to sustain a finding of an express grant of a right of way.—Allen v. Vanderbilt, (Pa.) 816.

### By prescription.

4. Plaintiff had a license from the officers of a town to use a reservoir for fishing and

to maintain an absolute title by prescription to last forever.—Dunham v. City of New Britain, (Conn.) 854.

### Light and air.

5. The court will take judicial notice that a brick wall built three feet and eight inches from certain windows, and at least fifteen inches above them, is a detrimental obstruction of light and air.—Ware v. Chew, (N. J.) 746.

6. An agreement by a lessee to surrender to an adjoining owner, who contemplated building, all his rights of light and air over said owner's lot, is within the statute of frauds.—Id.

7. The lessee of a building who has notified the intending purchaser that he insists on his rights under his lease in case the purchaser shall build, is not in *laesha* by taking no steps to protect those rights until after the purchaser has begun to excavate so near the leased building as to seriously obstruct the light and air.—Id.

8. Where an intending purchaser of a vacant lot informed the lessee of an adjoining building of his intention to purchase and build thereon, and asked him if he had any objection, an answer that he had none, only that his rights under his lease should be respected, is complete notice of such rights to the purchaser, and later conversations not containing any express or formal waiver of those rights, will not estop the lessee from claiming them after the purchaser has made excavations for the building.—Id.

9. Evidence that the lessor refused the lessee, at the time the lease was made, the use of an adjoining lot on the ground that he or a purchaser from him might want to build thereon, no kind of building being specified, is no bar to a bill to restrain a purchaser from erecting a building over the whole of said lot in such a manner as to obstruct the lessee's light and air.—Id.

## EJECTMENT.

Adverse possession, see, also, *Limitation of Actions*, 1-5.

Barred by decree in specific performance, see *Judgment*, 1.

### Adverse possession.

1. Whether a party claiming title by adverse user has such continuous, notorious, and hostile possession as would give him title under the statute of limitations, is a question for the jury.—Mason v. Ammon, (Pa.) 449.

### Evidence.

2. The admission of a writ of ejectment, though not set forth in a plaintiff's abstract

of title, in an action of ejectment, is not error.—*Logan v. Quigley*, (Pa.) 92.

3. Under rule 90, court of common pleas, Allegheny county, Pennsylvania, which provides that the plaintiff, in ejectment, shall file in the office of the prothonotary an abstract of the title on which he relies, it is proper to admit such abstract in evidence.—*Hart v. McGrew*, (Pa.) 617.

4. Where a husband brings ejectment for land belonging to his deceased wife, the election by which he took his wife's real estate as tenant by curtesy, instead of assenting to her will, is evidence pertinent to such issue.—*Logan v. Quigley*, (Pa.) 92.

5. In ejectment for part of a lot which had passed by intermediate conveyances from defendant to plaintiff, where defendant claimed under a contract with his vendee, evidence was introduced to show by plaintiff's declarations, made when he purchased, that the purchase was with the understanding that the part in controversy was not included. *Held*, that such declarations could not effect plaintiff's rights under the deed.—*Stiffler v. Retzlaff*, (Pa.) 876.

### Instructions—Possession.

6. A charge to the jury in an action of ejectment that they would determine whether or not the tenants of the land in question were holding under lawful authority, or as tenants under the plaintiff, and, if the latter, that the action would not lie if no notice to quit had been given, or demand of possession made, is correct, and it is also proper in such action to leave the question of possession to the jury.—*Logan v. Quigley*, (Pa.) 92.

### Mesne profits.

7. Where plaintiff died before trial, and his administrator prosecuted the suit, a notice served by him on defendants, claiming mesne profits, is competent evidence.—*Hart v. McGrew*, (Pa.) 617.

8. Under New Jersey practice act, § 286, (Rev. N. J. 898,) which provides that, in any action in which the right to real estate is in controversy, the court may make an order for the protection of the property from waste or removal beyond the jurisdiction of the court, the supreme court has no power to appoint a receiver to take charge of the rents of premises pending an action of ejectment.—*Oehme v. Rucklehaus*, (N. J.) 145.

### Election.

Of survivor of marriage to take under will, see *Dower*, 2, 8; *Ejectment*, 4.

## ELECTIONS AND VOTERS.

Municipal, see *Municipal Corporations*, 9-12.

### Majority of votes.

1. The rule that, when an election is held at which a subject-matter is to be determined by a majority of the qualified voters, those absenting themselves, and those who, being present, abstain from voting, are considered as acquiescing in the result declared by those actually voting, applies equally where, at a general election, the measure, though receiving a majority of the votes cast on that subject, failed to receive a majority of the votes cast upon some other subject.—*Walker v. Oswald*, (Md.) 711.

2. Act Gen. Assem. Md. Jan. Sess. 1886, c. 245, § 7, relating to the adoption of high license, after providing that "the voters of said county at the general election" shall determine by ballot upon the adoption or rejection of the provisions of the act, and after directing the form of ballots to be used, by making it the duty of the judges to "make a full return of the votes cast as *aforesaid*," (on which return the clerk is to proclaim the result,) makes the adoption of the act dependent solely upon the votes cast for and against it.—*Id*.

3. Section 8, giving the act effect "if a majority of the voters of said county shall determine by their ballots" in its favor, must be read in conjunction with section 7, and, thus read, clearly means, not a majority of all the voters of the county voting upon some other subject, but a majority of all the voters of the county who vote upon this act.—*Id*.

### Emblements.

Mortgagor in possession after foreclosure, see *Mortgages*, 8.

## EMINENT DOMAIN.

Divesting dower rights, see *Dower*, 1.

Presumption as to payment of damages, see *Highways*, 5.

### Title acquired.

1. In Pennsylvania, land seized by and appropriated for the use of the state vests in the commonwealth in fee.—*Delosier v. Pennsylvania Canal Co.*, (Pa.) 400.

### Right to compensation.

2. Defendant, in opening a street, removed a house, one wall of which was used as a wall of plaintiff's house. *Held*, that plaintiff's house was injured; and that under Const. Pa. art. 16, § 8, providing that municipal corporations shall not take, injure, or destroy private property in the

construction of highways without just compensation therefor, plaintiff may recover.—*Snyder v. City of Lancaster*, (Pa.) 873.

### Evidence.

8. Whatever facts tend to enlighten the jury on the subject, and thus enable them to reach a correct conclusion as to the value of the property taken, are admissible.—*Pennsylvania S. V. R. Co. v. Keller*, (Pa.) 881.

4. In an action to assess damages for property taken by a railroad company, where the title is in dispute, evidence that part of the premises in question did not belong to plaintiff, and that his claim is excessive, is admissible.—*Id.*

### Measure of damages.

5. The testimony was conflicting, and estimated the damages from about \$350 up to \$750. The court charged that the damages could not well be less than the \$350 or more than \$750; "though it is merely an opinion of our own, and not intended to sway you." *Held*, that the opinion of the court was properly qualified, and was not error.—*Cresson, C. C. & N. Y. Short Route R. Co. v. Aunsman*, (Pa.) 561.

6. The court instructed the jury that the measure of damages for the land taken for a railroad was the actual damage to the land; that that would be best ascertained by what the land was worth before the road was built, and what afterwards, and they were not to consider speculative or imaginary damages. *Held*, that this was the proper rule governing the assessment of damages.—*Id.*

### Appeal—Pleading.

7. At the application of plaintiff, viewers were appointed to assess the damage to his land caused by the construction of defendant's railroad. Defendant appealed from their award to the court, who directed an issue to try the question of damages. Plaintiff filed his narr in trespass *quare clausum fregit*, and the defendant pleaded not guilty. *Held*, that the form of the issue was of no consequence, and gave both parties an opportunity to obtain their full rights.—*Id.*

## EQUITY.

See, also, *Creditors' Bill; Fraudulent Conveyances; Mortgages; Partnership; Specific Performance; Subrogation; Trusts.*

Jurisdiction, action pending at law, see *Corporations*, 8.

—in partition, see *Partition*, 1.

—relief against penalty, see *Executors and Administrators*, 25.

Laches, see *Easements*, 7; *Estoppel*, 2; *Specific Performance*, 1.

Marshaling assets, see *Mortgages*, 10.

## Jurisdiction—In general.

1. Complainant held a chattel mortgage made by one of the defendants upon a stock of goods, mortgages upon which were also given to two other persons. The goods were subsequently seized under an execution against the defendant mortgagor, and some other of the defendants then brought suit in replevin, and caused the coroner to demand possession from the sheriff of a portion of the goods in question. Complainant then filed a bill of foreclosure and asked for a sale of the goods. The landlord of the defendant mortgagor also claimed a lien for rent on the goods. An injunction having been granted and a receiver appointed, the replevin plaintiffs (defendants herein) insisted that possession of the goods should be delivered to them, and that the question of title might be tried at law. *Held*, that a court of equity having jurisdiction of the cause would not surrender its jurisdiction, but to avoid a multiplicity of suits would determine upon the rights of all parties concerned, and an application to allow the replevin suit to proceed was denied.—*Collins v. Colley*, (N. J.) 118.

2. Defendant's property was sold under an execution regularly issued upon a decree of foreclosure. Defendant filed her petition in chancery, asking to have the sale set aside on the ground of surprise. The facts were that defendant was a German woman, understanding little English; that she lived upon the property, and did not understand the nature of the proceedings against her; that she thought if the house was to be sold that a notice of the sale would be posted on the house; that she knew nothing of the decree or sale until the property had been sold; that she then tendered to the sheriff the amount of the execution, with costs, and stood ready to pay the same at any time. *Held*, that upon these facts a court of equity would grant relief.—*Schulling v. Lintner*, (N. J.) 153.

3. Plaintiffs, claiming to own a certain alley, brought a bill in equity to enjoin defendants from using it. Defendants claimed that the alley was a common alley, and that they had a right to use it. *Held*, that equity had no jurisdiction of the matter, and the plaintiff's remedy was at law.—*Appeal of Quinn*, (Pa.) 649.

## Reformation of contracts—Fraud.

4. The evidence requisite to reform a written instrument on the ground of fraud, accident, or mistake, must be clear, precise, and indubitable. If the evidence when admitted is not such as would move a chancellor to reform the contract, the case should not be submitted to the jury

without binding instructions as to its insufficiency.—*Sylvius v. Kosek*, (Pa.) 892.

#### — Mistake.

5. In defense to an action on a promissory note, A., the payee and first indorser, set up mistake in so indorsing, and on that ground claimed reformation of the note, so that B., the plaintiff, should be substituted in his place. The evidence was that the note was the last of several renewal notes; that one C. was the real debtor; that C. made the original note and the other renewal notes payable to B., and then, for C.'s accommodation, first B. and then A. indorsed them, and C. delivered them to D., who had them discounted by a bank; that, at the time of A.'s indorsement of the note in suit, there were no other indorsements on it, and that, in the usual course of the dealings, C. procured A.'s indorsement, then B.'s above A.'s, and delivered the note to D.; that A. had no special understanding with B. as to the manner of the filling, or as to the order of their liability as indorsers. The evidence as to whether the body of the note was filled before A. indorsed it was conflicting. On C.'s default, B. paid the bank the amount of the note, and claimed as a *bona fide* purchaser for value. *Held*, that the evidence was not sufficient to warrant the reformation.—*Ahlborn v. Wolff*, (Pa.) 799.\*

6. Land held by P. in trust equally for himself, S., and D., was platted, and lots 30, 31, 32, and 35 were sold to Mrs. S. Each owner then selected four lots, D. taking 26, 27, 28, and 29, and S., 34, 35, 36, and 37. After the lots had been improved, deeds were made to Mrs. S. for 31, 32, 33, and 34, to D. for 27, 28, 29, and 30, and to S. for 35, 36, 37, and 38. Afterwards the remaining lots were divided, 26 lots being conveyed to each owner, and lot 38 was again included in the conveyance to S.; S. then having 31 lots, D. 32, and P. 34. The lots were sold as first selected for 17 years, and largely improved, P. superintending the improvements, and never claiming lot 26. *Held*, that these facts show a mistake in inserting wrong lot number in the deeds, which equity will correct.—*Dod v. Paul*, (N. J.) 817.\*

7. Plaintiff and his father sold certain land to a town, taking back an agreement in writing allowing them certain privileges in the property. In an action to reform the deed, by inserting in it the privileges as set out in the agreement, plaintiff offered parol testimony of the conversations in relation thereto. *Held*, that it was not admissible, as the parol agreement was all merged in the written one, and, as no mistake was claimed to have been made in the deed, it could not be reformed.—*Dunham v. City of New Britain*, (Conn.) 354.

#### Rescission of contracts—Undue influence.

8. Defendant's intestate executed an assignment of her expectancy in her sister's estate to secure certain indebtedness claimed to be due from her to the assignee. It appeared that at the time of the execution of the assignment she was 90 years old, and her memory was seriously impaired; that she had not sufficient memory and mental vigor to understand whether she owed the debts or not; that she could not distinguish between her own debts and those of others, and allowed debts to be included in the assignment simply on the allegation of the creditor that they were all right; that a large amount of the debts so included were mere guess-work of the assignee, and not based upon any known agreement; that she was influenced by her son to sign the assignment, the inducement being that she could always be with her son, who had kept her supplied with liquor. *Held*, such a showing of mental incapacity and undue influence as warranted setting aside the assignment.—*King v. Cummins*, (Vt.) 727.\*

#### Marshaling assets.

9. Mortgagees of chattels must, as regard subsequent execution creditors of the mortgagor, first exhaust any property not covered by the execution.—*Ayers v. Hawk*, (N. J.) 744.

#### Laches.

10. He who delays asserting his rights until the proofs respecting the transaction out of which he claims his rights arose are so indeterminate and obscure that it is impossible for the court to see whether what seems to be justice to him is not injustice to his adversary, has no right to relief.—*McCartin v. Administrator of Traphagen*, (N. J.) 156.

11. A bill to set aside a deed for fraud was filed within less than three years from the date of the deed, and 18 months after the death of the grantor. *Held*, that no laches could be imputed to complainant.—*Canton v. McGraw*, (Md.) 287.

#### Pleading—Original bill.

12. An allegation in a bill in equity that the complainant "had been informed and believed" the facts set out were true, is not sufficient; it should allege the facts on information and belief.—*Messer v. Storer*, (Me.) 275.

#### — Bill of review.

13. A bill of review filed in December, 1865, to set aside a judicial sale had in April, 1874, is not filed in time in Maryland, and ignorance of facts of which their counsel had notice is no excuse to complainants.—*Presstman v. Mason*, (Md.) 764.

**Pleading—Answer.**

14. On motion to strike out the answer, where the language of the notice recited that the answer was not responsive to the bill, set up no defense thereto, and admitted all the equity of the bill, *held*, the motion was too broad, and was properly overruled.—*Conway v. Wilson*, (N. J.) 784.

15. A reservation of exceptions, and a general clause denying combination, in an answer to a bill in equity, being against rule of court, an exception to that part of the answer should be sustained.—*Fairchild v. Fairchild*, (N. J.) 426.

16. To a bill by a wife against her husband to recover a sum of money alleged to have been paid by her in building and furnishing their house, and for which defendant had given her no security, an answer that the money had been given him by complainant, and that there was no agreement, contract, or understanding that he was to repay or in any way secure the money, is responsive, and can only be overcome by the testimony of two witnesses, or one witness corroborated by circumstances.—*Appeal of Gleghorne*, (Pa.) 797.

17. Complainant in his bill charged that the defendants had done certain acts which were but a part of a scheme to injure and ruin complainant. The answer set up only certain business transactions, and did not answer the charge of participation in the attempt to injure the complainant. *Held*, that the complainant was entitled to a decree, and the motion to modify the decree so as to relieve one of the defendants of costs should be denied.—*Bowker v. Gleason*, (N. J.) 824.

**— Amendment.**

18. When a bill to foreclose is amended without service of a copy of the amendment upon defendant, and complainant afterwards asks for the appointment of a receiver, an appearance to that motion will not waive defendant's right to a copy of the amendment.—*Myers v. Morris*, (N. J.) 859.

**— Multifariousness.**

19. Complainant, in a bill to set aside a deed for fraud, asked also that the grantee in the deed should account for the rents and profits of the property she had held under the deed, and also that she be removed from her trusteeship under the will of the grantor in the deed. The court in its decree dismissed the bill so far as it prayed for her removal from the trusteeship, for multifariousness. *Held*, that this action of the court was authorized under equity rule 88, and it was in the scope of equity jurisdiction to compel the fraudulent grantee to account for the rents and profits.—*Canton v. McGraw*, (Md.) 287.

**Parties.**

20. In a suit to set aside a deed for fraud, brought by the son of the deceased grantor, the other children of such grantor, who would have an interest in the property if such deed should be set aside, as well as the grantee and her husband, are proper parties.—*Id*.

**Evidence.**

21. In an action to recover for work and labor defendant filed an answer claiming that an important provision was fraudulently omitted from the contract. *Held*, that the reply is conclusive unless contradicted by two witnesses, or one witness and corroborating circumstances equivalent to a second witness. Since parties have been made competent witnesses, the reason for enforcing this rule is stronger than ever.—*Sylvius v. Kosek*, (Pa.) 892.

**Practice—Dismissal of bill.**

22. When a cause of action, cognizable at law, is entertained in equity, on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice.—*Gamage v. Harris*, (Me.) 422.

23. A complaint alleged an illegal distress for rent which was not due, and an illegal foreclosure of a chattel mortgage on account of the distraint. On motion to show cause why the distraint should not be enjoined, the answer and affidavits contained distinct denials, robbing complainant of all equity. *Held*, that, as the complainant could not sustain his action as to the rent, the other part of the case, containing only a single issue, triable at law, must fall with it.—*Browne v. French*, (N. J.) 606.

24. Complainants filed their bill to establish a claim of title to the land mentioned in the bill in their favor, against defendants, and after that for partition of the land among complainants. Defendants were adjudged to have no interest in the land. *Held*, that the court had no jurisdiction to proceed to make partition of the lands between complainants, and a decree for that purpose could not bind the parties.—*Emerson v. Pierce*, (N. J.) 745.

**— Examiners.**

25. Code Md. art. 16, § 144, gives an examiner in equity the right to have a clerk write down the testimony. *Held*, that this provision of the Code is still in force, and has not been affected by any equity rule.—*Canton v. McGraw*, (Md.) 287.

26. After a cause was at issue on motion of the complainant, leave was given to take testimony before any examiner of the court. The first examiner notified to take

testimony being sick, complainant took testimony before a second, and finally before a third, examiner. The defendants were present and cross-examined the witnesses. The court, on motion of complainant, ordered the testimony as taken to stand, and that the third examiner should continue taking the testimony under the original order. *Held*, that the order of the court violated none of the equity rules, nor any of the general principles of equity.—*Id.*

#### — Decree.

27. In a suit to set aside a deed, the court, having decided to set it aside, gave the complainant leave to amend by making the executrix and trustee under the will of the grantor, her father, a party as such executrix, she being the grantee in the deed, and already a party in her own right. After the executrix was served, the court refused to hear further testimony, or delay the passage of the decree. *Held* that, as the grantee had taken much testimony in her own behalf, and needed none to sustain her title as executrix, if the deed was set aside, the order of the court was a proper one.—*Id.*

### ERROR, WRIT OF.

When lies, see *Highways*, 6.

#### Review.

Under the New Jersey practice, on a writ of error where the only error assigned is the common one that the judgment was given for plaintiff instead of defendant, the court will not look into the bill of exceptions to consider errors relating to the charge to the jury, the bill of exceptions not being a part of the strict record to which only the assignment of the common errors relates.—*Driscoll v. Carlin*, (N. J.) 482.

#### Estates.

See *Dover; Husband and Wife*, 1-8; *Tenancy in Common and Joint Tenancy; Trusts; Wills*, 21-42.

### ESTOPPEL.

By deed, see *Trusts*, 4.

By record, see *Execution*, 7; *Judicial Sales; Mortgages*, 7.

— *res adjudicata*, see *Judgment*, 1, 2.

In pais, acceptance of benefits, see *Corporations*, 8; *Trusts*, 13.

— acquiescence, see *Easements*, 8; *Execution*, 10.

— conduct, see *Master and Servant*, 4; *Mortgages*, 6.

#### By record.

1. The defendant in trover is estopped to claim ownership of the property, when

he has, in a sworn petition to the court, in relation to the same property, alleged it to be the personal property of his son; and the record of such petition is admissible in evidence.—*Garber v. Doersom*, (Pa.) 777.

#### In pais.

2. Where the defendant's claim had once been before a court of competent jurisdiction, where it should have been adjudicated, in which court the claim had been in part satisfied by a judgment in offset, *held*, that the defendant was estopped by her neglect from setting up the balance of the original claim in a subsequent suit between the parties.—*Spaulding v. Warner*, (Vt.) 186.

3. Where a party sets up an estoppel, and in support thereof offers evidence which is wholly verbal, and which, if believed by the jury, would amount to an estoppel, it is error in the court to withdraw such evidence from their consideration.—*Wilcox v. Rowley*, (Pa.) 397.

4. Plaintiff had been in possession of land for 20 years under a parol contract, but had not fully paid therefor, when he leased the premises from his vendor's grantee. *Held*, that as the evidence did not show that plaintiff intended to abandon his claim under the parol contract, and as there was evidence that the lease was security for the purchase money advanced by such grantee, plaintiff was not estopped to assert his claim.—*Brinser v. Anderson*, (Pa.) 809.

### EVIDENCE.

See, also, *Deposition; Witness*.

Competency and relevancy, see, also, *Arbitration and Award; Bastardy*, 3; *Criminal Law*, 7; *Currency*, 8-5; *Damages*, 9; *Deceit*, 2; *Eminent Domain*, 3, 4; *Highways*, 14; *Insanity*, 2; *Lotteries*, 1, 2; *Trespass*, 4. Declarations and admissions, see, also, *Bastardy*, 2; *Ejectment*, 5; *Gifts*, 8; *Judgment*, 9; *Limitation of Actions*, 5.

Documents, see *Bastardy*, 1; *Ejectment*, 2-4; *Trespass*, 1.

Judicial notice, see *Easements*, 5.

Offer of evidence, see *Trial*, 8.

Opinion, see, also, *Factors and Brokers*, 2. Parol, to establish a trust in lands, see *Trusts*, 5.

— to vary writing, see *Contracts*, 6; *Equity*, 7.

Rebuttal, see *Trespass*, 2, 3.

Weight and sufficiency, see *Appeal*, 13, 14; *Equity*, 21; *Estoppel*, 3; *Executors and Administrators*, 6; *Master and Servant*, 3; *Negotiable Instruments*, 2.

#### Weight and sufficiency.

1. J., the defendant, asked that C. be held liable for the difference between what the complainant C. received for certain

lands, and what about 50 witnesses testified it should have brought. *Held*, that the real-estate agent selling the land being an expert, and the fact that no larger price could be received for the land after being in the market for a long time, were better evidence of the worth of it than the testimony of the witnesses who were not experts, and who testified in a general way. —*Childs v. Jones*, (N. J.) 16.

#### Declarations and admissions.

2. Plaintiffs' agent, in transmitting a duplicate copy of a contract to them, sent a letter detailing his acts, and stating his understanding of the arrangement with defendants. He died before the trial. *Held*, that his letter was no part of the *res gestae*, and was inadmissible. —*Henkel v. Trubee*, (Conn.) 722.

3. In a suit to set aside a deed for fraud in obtaining it, the court allowed letters to be introduced, written by parties to the suit, alleged to be the chief perpetrators of the fraud, but written after the deed was obtained. *Held* that, as the letters contained admissions of parties to the suit in regard to the fraudulent obtaining of the deed, those portions containing the admissions were admissible. —*Canton v. McGraw*, (Md.) 287.

4. In an action for damages for personal injuries, defendant offered in evidence a letter written to him by plaintiff's attorney stating the extent of the injury, and containing an offer to accept a certain sum as compensation. *Held* that, as the letter contained an offer of compromise, it was inadmissible as a whole for any purpose whatever. —*Knowles v. Crampton*, (Conn.) 593.

5. A person in possession of land declared that "it was hers as long as she lived, but after her death it was Mr. Miller's." *Held*, that this declaration was competent evidence against those claiming under the possessor, and that it tended to prove that the possession was not adverse to Mr. Miller's title to the property after the death of the declarant. —*Miller v. Ternane*, (N. J.) 136.

6. Evidence that at the time of making a lease the lessor refused the lessee the use of an adjoining lot on the ground that he might want to build on it, or might sell it to one who would want to build, is admissible in an action to restrain building on said lot. —*Ware v. Chew*, (N. J.) 746.

#### Opinion.

7. Practical railroad men called as experts may give evidence as to the safe and cautious methods of passing trains on a single-track road. —*Lewis v. Seifert*, (Pa.) 514.

#### Parol, to vary writing.

8. A written agreement may be modified, explained, reformed, or altogether set aside

by parol evidence of an oral promise or undertaking, material to the subject-matter of the contract, made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name to it. Such evidence must be clear, precise, and indubitable; that is, the witnesses must be found credible. They must distinctly remember the facts to which they testify, and narrate the details exactly; and their statements must be true. —*Thudium v. Yost*, (Pa.) 436.\*

#### Exhibits.

9. In an action for damages for personal injuries, it appeared that the wagon in which plaintiff was riding was run into by defendant's wagon, and plaintiff was thrown out, and one of her ribs broken. Defendant, to contradict certain evidence introduced by plaintiff, offered to show the exact location of ribs by means of a section of a human body. *Held* that, such an exhibition being unnecessary and offensive, it was a proper exercise of discretion for the court to refuse it. —*Knowles v. Crampton*, (Conn.) 593.

#### Materiality.

10. The exclusion of evidence of facts already admitted, is not error. —*Henkel v. Trubee*, (Conn.) 722.

11. Where the question as to whether one held certain land as tenant or proprietor was not in dispute, evidence as to a parol lease was properly refused. —*Garber v. Doersom*, (Pa.) 777.

## EXECUTION.

See, also, *Attachment; Garnishment.*

Distribution of proceeds, see *Assignment*, 1. Wrongful levy, see *Damages*, 1.

#### Levy and lien.

1. Two judgment creditors levied on what they both claimed to be a growing crop of corn,—one making his levy after the corn was put into the ground, but before it had made its appearance above the surface; the other levied after such appearance. *Held*, that the first was a valid levy, and entitled to priority. —*Ayers v. Hawk*, (N. J.) 744.

#### Satisfaction and discharge.

2. The answer to a bill to foreclose a chattel mortgage set forth that the complainant proceeded at law, and recovered a judgment for the amount due on his claim, and then issued an execution, and levied upon the mortgaged goods, together with others not covered by his mortgage, and without selling or realizing anything therefrom, directed the sheriff to release all the goods levied upon to the defendant; and therefore complainant, having once had a levy on goods enough to satisfy his claim,

his demand was presumed to be satisfied. *Held*, this rule could not apply where the defendant himself had received and retained the goods.—*Conway v. Wilson*, (N. J.) 734.

#### Sale.

3. A petition to set aside a sheriff's sale alleged that the land was not sold in parcels, according to law and the practice in such cases, and this was admitted by the purchaser. *Held*, that the sale would not be confirmed.—*Schulling v. Lintner*, (N. J.) 538.

4. In a complaint to set aside an execution sale of land, it was alleged that no notice of the extension of plaintiff's land was given to plaintiff, and also that no affidavit was made that the rental had fallen due and remained unpaid before the *venditioni exponas* was issued. *Held*, that these were mere irregularities, which were cured by the acknowledgment of the sheriff's deed.—*Critchlow v. Critchlow*, (Pa.) 235.

5. At an execution sale the sheriff stated that the land was sold subject to a dower judgment, which was also fully set forth in the records. *Held*, that the purchaser took subject to the judgment.—*Tospon v. Sipe*, (Pa.) 873.

6. In a partition suit the widow's dower was declared a judgment on the land, interest on the amount to be paid annually, and the principal to be divided at her death among the heirs of her deceased husband. *Held*, that a sale of the land on an execution issued for interest due to the widow did not divest it of the dower lien.—*Id.*

7. When the defendant, in an execution, as the purchaser at the sale, he is estopped from alleging that the land is thereby divested of a judgment for dower, of the existence of which he had knowledge, and when the execution was for the interest due by the terms of that judgment.—*Id.*

8. Defendant acquired from his father, in fraud of the latter's creditors, and in trust for the latter and his heirs, a farm, to be divided among the heirs after the father's death. The father died, and defendant continued to hold the farm as his own until after a judgment had been obtained by one of his creditors against him, and the land sold thereunder. Between the time of the judgment and that of the sale, he had the land divided between himself and his co-heirs. *Held*, that the purchaser at the sheriff's sale has no standing to prevent the execution of the trust.—*Dougherty v. Mortland*, (Pa.) 234.

#### Distribution of proceeds.

9. Under section 2 of the Pennsylvania act of April 20, 1846, (Purd. Dig. p. 763, pl. 118,) providing that an issue shall be directed by the court upon the distribution of money arising from sales under execu-

tion, etc., there must be material facts in dispute, which must be set forth in an affidavit, and upon which the court will determine whether such issue shall be granted. It cannot be said that there is a material fact in dispute where the affidavit is made upon information, is vague, uncertain, and indefinite in the facts stated, is not made in conformity with the act, and is not supported by a single fact or circumstance shown to the court upon which it can form an intelligent conclusion.—*Irvin's Appeal*, (Pa.) 430.

#### Setting aside sale.

10. In 1886 suit was commenced to set aside an execution sale of land for certain irregularities in the sale. The evidence showed that in 1873 a judgment was entered against plaintiff, upon which execution was issued, the land levied upon, inquisition held, and the land extended. Subsequently a *venditioni exponas* was issued, the land sold, the deed acknowledged in open court, and delivered to the sheriff's vendee, who subsequently conveyed to defendant, C., who leased to the other defendants. They were improving the land by putting down an oil well at the time suit was brought. *Held*, that plaintiff was estopped by his long acquiescence, and by the changed circumstances.—*Critchlow v. Critchlow*, (Pa.) 235.

### EXECUTORS AND ADMINISTRATORS.

See, also, *Descent and Distribution*; *Wills*.  
Inventories, see *Appeal*, 7.

#### Removal.

1. Defendant qualified as administrator of a decedent in February, 1896. In March, 1897, the person entitled to administer filed her petition asking the removal of defendant. *Held*, that the petition was filed too late; following *Edwards v. Bruce*, 8 Md. 392.—*McColgan v. Kenny*, (Md.) 819.

2. Acts Pa. March 29, 1832, and May 1, 1861, authorizing the orphans' court to remove executors and administrators for causes therein set forth, do not empower it to revoke letters on a petition showing that the administratrix has given a stranger to the estate an irrevocable power of attorney to act for her in settling the estate.—*Appeal of Johnston*, (Pa.) 78.

#### Action on bond.

3. On a motion to vacate an order staying a suit, which had been commenced on the bond of an executor by direction of the ordinary, it was claimed that the ordinary had power to direct the commencement of such suits, but had no power to stay such suits after commencement. The orphans' court act (Revision, N. J. p. 788, § 164) pro-

vides that, when an administrator's bond shall become forfeited, "the ordinary may cause the same to be prosecuted in any court of record," and shall cause the money recovered to be applied as he shall direct. *Held*, that the intent of the statute plainly is that the commencement and prosecution of an action, upon a bond, is to be left to the sound discretion of the ordinary.—In re Lee, (N. J.) 124.

4. An action was commenced on an executor's bond, by order of the ordinary, on a showing that the executor had failed to account within the time required by law, and had failed to answer a citation to appear and account, and that the failure to appear had been contumacious. On motion to stay such action, it appeared that the failure to account was due to an action in the courts of New York to determine some of his obligations as such executor, which had not been decided, and that he did appear in answer to the citation, and conferred with the judges as to what he ought to do, but that his appearance was not recorded. It also appeared that the bondsmen were responsible, and that a judgment lien against them would be oppressive. *Held* that, under these facts, the suit would be stayed, and time given the executor to file his account.—*Id.* 125.

#### Allowance of claims.

5. Payments of interest by executors, and promises to pay claims, will not toll the statute of limitations; but where it appears that the reason for the non-presentation of a claim within the six years was to enable the executors to carry out the intention of the testator, and where the executors were personally benefited by an agreement not to present the same, the statute of limitations will not be applied.—*McWilliams' Appeal*, (Pa.) 888.

6. A note filed as a claim against an estate was contested on the grounds of forgery. The only evidence to support the forgery was that of expert witnesses, who testified that in their opinion the signature had been forged. There were others, also, who testified to the contrary. One witness testified to having heard the deceased say he owed the owner of the note the same amount called for by the note. The son of the owner testified that at one time he showed the note to the deceased, and that the latter had said that it ought to be paid. *Held* sufficient evidence upon which to allow the claim.—*Appeal of Fox*, (Pa.) 228.

#### Settlement and accounting.

7. An administrator from time to time, both before and after the passing of his final account, supplied the two infant distributees, for whom no guardian had been appointed, with board and clothing; paid certain grocery bills for them; and rented

to one of them, a girl, who married before she became of age, one of his own houses. *Held*, that although the disbursements were so irregular as to call for the closest scrutiny, yet they were all, with the exception of the rent, such as would have been sanctioned by a court of equity had the administrator occupied the position of a guardian; and in the absence of proof of bad faith on his part, they should be charged against the distributive shares; the rent being disallowed on the ground of the liability of the distributee's husband.—*Rogers v. Traphagen*, (N. J.) 336.

8. The will of a decedent was proved by his executor in the orphans' court of his domicile, and a debtor resident in a foreign state voluntarily paid his debt to such executor, who accounted for it to the court. Subsequently the executor took out ancillary letters of administration in the state where the debtor resided, and he proved a claim against the estate there, which had arisen since the payment of his debt, and sought to surcharge the executor with the amount of the debt so paid. *Held*, that the executor, having accounted for such debt in the court of the domicile, could not be surcharged in the court of ancillary administration.—*Gray's Estate*, (Pa.) 66.

9. Upon the death of an executrix of an estate, an accounting was had which resulted in a decree that she was indebted to the estate for \$402. *Held*, that that decree, being unreversed and unappealed from, was a final decree for a debt due by her at and before the time of her death.—*Smith v. Seaton*, (Pa.) 661.

10. An acquiescence of 18 years in the settlement of an administrator's account of which they had full notice and to which they consented, will estop the next of kin and their descendants from disputing it.—*Yearly v. Cockey*, (Md.) 566.

#### Interest.

11. An administrator who received 2½ per cent. interest on deposits made in a bank cannot complain of being charged therewith, even on funds not so deposited, as they ought to have been.—*Dalrymple v. Gamble*, (Md.) 718.

12. On the audit of an executor's account, the same was surcharged. On appeal by the executor, this surcharge was reduced, though there was still left a large balance found against him. This balance he neither tendered to, nor offered to distribute among, those to whom it belonged. *Held*, the account was properly charged with interest during the time his appeal was pending. *Hoopes v. Brinton*, 8 Watts. 73, and *Dieterich v. Heft*, 5 Pa. St. 87, distinguished.—*Wilson's Appeal*, (Pa.) 678.

13. An administratrix, having collected large sums of money belonging to the es-

tate, deposited them in a bank near her home, where they were subject to her check, she receiving no interest on such deposit. It was sought to surcharge her account with interest on the sums so deposited. *Held* that, as she was not required to put the money at interest, and was not shown to have profited by the deposit, she could not be chargeable with interest.—*Appeal of Johnston*, (Pa.) 78.

#### — Costs and expenses.

14. Letters of administration were granted appellant in Maryland on the personal estate of his brother, supposed to have died intestate. In his own interest as distributee, though in good faith, he unsuccessfully resisted a will executed and offered for probate in another state, and his claim for expenses incurred thereby was, upon revocation of his authority, disallowed, as not incurred to recover or secure part of the estate, as provided for in Code Pub. Laws Md. art. 98, § 5, cl. 5, and the *bona fides* of prosecuting such action not having been certified to as provided in section 106, same article. *Held*, that the claim was properly disallowed.—*Dalrymple v. Gamble*, (Md.) 718.

15. A reasonable sum may be allowed from the estate for counsel fees in an amicable suit for the construction of the will.—*In re Simons' Will*, (Conn.) 86.

16. Expenses for counsel fees reasonably incurred in litigation against the administrator, which resulted in the recovery of a portion of the estate, are a proper charge against the estate; but expenses incurred in respect to personal demands of beneficiaries under the will are not, although they were recovered in the same litigation.—*Id.*

#### — Commissions.

17. The allowance of commission to an administrator is entirely in the discretion of the orphans' court, and, unless transcending the limits of law, is not reviewable.—*Dalrymple v. Gamble*, (Md.) 718.

18. A charge of 4 per cent. on the amount realized by an administratrix who files her account within one year after her appointment is not extravagant, and no cause of complaint exists in the fact that she divided her commission with her agent in the settlement of the estate.—*Appeal of Johnston*, (Pa.) 78.

19. Where testator's widow was appointed one of the executors of an estate, and collected rents and profits, in which she had an estate for life, her co-executor is not entitled to commissions out of the estate for the collection of such rents, but should have been paid out of the income.—*Woodruff v. Lounsberry*, (N. J.) 118.

#### Liabilities and misconduct.

20. Where executors proceed to sell and take mortgages to secure payments on said property, chargeable with any loss which by the depreciation in value of the property and the consequent loss of the mortgage thereon.

21. A note payable to the persons was presented for payment by the administrator of one of the executors of the maker of the note, and the auditor allowed the claim, and the amount was paid by the executor administrator. *Held*, that the executor should pay the other payee one-half of the amount.—*Appeal of Van Vo* 238.

22. Executors who, contrary to general law and to the directions of the will, invest the funds of an estate in bonds, are liable for any loss thereby, and this, although the trustees of the will agree, in writing, to charge them with any loss from an exchange of such bonds for bonds to be issued by the city; affirmed.—*Woodruff v. Lounsberry* 118.

23. An administratrix procured distribution, and knowing thereof from a distributee. *Held*, that the order was in good faith, and that the administratrix was not liable for such distributee's share of the order.—*Appeal* (Conn.) 857.

#### Executor de son tort.

24. Defendant, after his debt was taken possession of 50 cows covered by a bill of sale, absolute on their face during the debtor's life-time, filed by another creditor of defendant, set aside the bill of sale as fraudulent for general relief, the court deeming there was no sufficient evidence to rebut the presumption of the bill of sale, the consideration of the sale, the description in the bill of sale, the pass title, and in subsequent proceedings defendant was treated as executor de son tort, and his debt postponed to other creditors. *Held*, that defendant's claim to have taken possession of the cows, and under color of title, to relieve him from liability as executor de son tort, as the bill filed against him sufficient notice that his title was defective.—*Baumgartner v. Haas*, (Md.) 51.

25. A suit by creditors of an estate against an executor de son tort to account for the proceeds into court for distribution among them, postponing the executor's claims to theirs, is not a

force a penalty, against which equity may relieve, but simply to recover a just debt; and at law the executor is required to pay the assets to other creditors, though nothing would be left to pay his own claim.—*Id.*

### **Actions against.**

26. A devisee brought suit to procure a settlement and a division of the estate according to the terms of the will, and to compel the executrix and executor, and the legal representatives of a deceased executor whose heirs at law he also made parties, to make good losses alleged to have been sustained by their breach of trust. *Held*, that the heirs at law of the deceased executor were proper though not necessary parties to the proceeding.—*McCartin v. Administrator of Traphagen*, (N. J.) 158.

27. Judgment was rendered against an administratrix on decedent's debt without making the widow and heirs parties, and decedent's land was sold under execution. *Held*, that under act Pa. Feb. 24, 1834, providing for the sale, etc., of a decedent's real estate, the heirs were necessary parties, and the sale did not pass title as against the heirs or other creditors of the estate.—*Appeal of Mangan*, (Pa.) 805.

### **EXEMPTIONS.**

From taxation, see *Taxation*, 1-4.

Time of filing claim, see *Garnishment*.

### **Foreclosure of chattel mortgage.**

The right of exemption from execution sale is purely statutory, and in New Jersey has not been extended to sales under foreclosure of chattel mortgage.—*Conway v. Wilson*, (N. J.) 734.

### **FACTORS AND BROKERS.**

#### **Negligence of factor.**

1. The Lilburn Tower sailed from Newport, England, for Montreal, on the 11th of June. The usual time of her voyage was 12 or 14 days. The agent in Montreal, advised of the probable date of her departure, made contracts for a return cargo for "June loading," by which was meant that the shippers could cancel the contracts if the vessel was not ready to receive their shipments in the month of June. The ship, being delayed, was not ready to receive the cargo in June, and the contracts were canceled. The agent accepted a reduced rate of freight, conceded, however, to be the highest then obtainable at that port. The owner refused to pay the agent for services rendered and advances made, objecting that the agent made the contracts with too early a canceling date, and therefore was chargeable with negligence. *Held*,

that the agent was entitled to recover for his services and advances.—*Stumore v. Shaw*, (Md.) 360.

2. The agent offered ship-brokers as experts to testify as to whether, under the circumstances, it would have been reasonably prudent for a broker, as consignee of the vessel, to engage outward cargo from Montreal for June loading; whether it would have been prudent for such broker to engage grain and cattle for June loading; and whether it was possible for the vessel to be loaded and sail from Montreal in June. *Held* that, as the question was one of which the court or jury could decide the facts, it was not a case for the admission of expert testimony.—*Id.*

3. In such a case the telegrams by cable and letters by mail between the parties had been offered in evidence, subject to exception. The agent prayed the court to withdraw from the consideration of the jury all the letters of instruction received by him from the principal after the sailing of the vessel from Montreal. *Held*, that the prayer was properly granted.—*Id.*

### **FALSE IMPRISONMENT.**

#### **Execution of writs.**

1. The sheriff and constables, in executing the writ of a court of general jurisdiction having cognizance over the class of cases to which it appertains, are entitled to immunity for every act done necessarily in putting it into effect.—*Lloyd v. Hann*, (N. J.) 848.\*

2. A like immunity is possessed by a prosecutor of the pleas who directs such officers to execute such a writ calling for the arrest of a person.—*Id.*

### **FISHERIES.**

#### **Throwing open shell-fish beds.**

1. The proceedings provided by the Connecticut act of 1870 (Gen. St. p. 215, § 11) for throwing open to the public ground claimed to be a natural oyster bed, when designated to an individual, and inclosed by him for planting oysters, are not applicable where the ground so designated and inclosed is a natural clam bed; the act of 1878, prohibiting such setting off and staking of a natural clam bed, providing no specific penalty or mode of redress, and the recognition of the fact that clams and oysters are distinct species of shell fish being apparent from the discrimination made by the legislature between the statutory provisions for the protection of oysters, and those for the protection of clams.—*Town of Clinton v. Buell*, (Conn.) 88.

#### **Violation of laws.**

2. Acts Conn. 1878, c. 24, entitled "An act relating to oyster grounds and fish-

ries," was enacted solely for the protection of the public right of fishery, and, in the absence of any legislative permission of the town to sue, the state is the only party to enforce the remedy, if any exists, or its violation.—Id.

— **Indictment.**

3. In an indictment under the New Jersey act of March 23, 1886, relating to game fish, it is sufficient to describe the interdicted material alleged to have been unlawfully put in the lake as "acid," in the language of the statute, without specifying what particular "acid" it was.—*State v. American Forcite Powder Manuf'g Co.*, (N. J.) 127.\*

4. The first two counts of such indictment are defective because there is no verment that the acid was discharged into the water in such quantity as would prove fatal to the fish therein, nor that any of said fish had perished in consequence of the defendant's act.—Id.

**FIXTURES.**

**What constitute.**

The following machinery in a brewery held to be fixtures as between the mortgagee of the land and a subsequent judgment creditor of the mortgagor: Engine and boiler, copper beer kettle, and all the upper and iron pipes connected therewith; on flat cooler, malt-mill, wash-tub, two pumps and appurtenances, windmill and attachments, plunger and iron elevator; so, all gearing and shafting and all machinery immediately connected therewith and operated thereby and not operated by lifting. Affirming 1 Atl. Rep. 698.—*Schelle v. Schmitz*, (N. J.) 257.\*

**Fraud.**

Deceit; *Fraudulent Conveyances.*

ground for rescission of sale, see *Sale*, 2-4.

inspiration to defraud creditors, see *Conspiracy*.

purchase of goods, rights of subsequent bona fide purchaser, see *Auction and Auctioneer*.

marriage procured by, see *Divorce*, 5, 8.

formation of contract, see *Equity*, 4.

due influence, see *Equity*, 8; *Wills*, 2.

**FRAUDS, STATUTE OF.**

agreements relating to land, see *Easements*, 6.

oral evidence to establish a trust in lands, see *Trusts*, 5.

efficiency of memorandum.

A simple receipt, not under seal, for

purchase money of land, is not suffi-

cient, under the statute of frauds, to divest the interest of the vendor.—*Mason v. Ammon*, (Pa.) 449.

**Sale of lands.**

2. To take such a contract out of the statute of frauds, the evidence as to the terms of the contract, its performance, and the change of possession, must be, not only credible, but of such weight and directness as to make out the facts alleged beyond a doubt.—*Erie & W. Val. R. Co. v. Knowles*, (Pa.) 250.

3. Defendant bought land for 40 cents per square foot, and sold orally a part thereof to plaintiff, agreeing to charge him 10 cents per square foot less than he had paid. The conveyance was made and defendant told plaintiff, who did not know the facts, that he had paid 50 cents, and plaintiff paid him 40 cents per square foot. Upon learning the facts, he brought *assumpsit*, to recover back the excess. *Held*, evidence showing these facts is admissible, the action not being brought to charge the defendant on his oral contract to sell land at 10 cents less per square foot than he paid for it, but to charge him on an implied contract to refund the money, which, in consequence of his misrepresentation, plaintiff paid to him in excess of the contract price. Therefore the clause of the statute of frauds, "no action shall be brought whereby to charge any person upon any contract for the sale of lands, \* \* \* unless the promise \* \* \* shall be in writing, signed by the party to be charged," etc., does not apply.—*Arnold v. Garst*, (R. I.) 167.

**Contracts not to be performed within a year.**

4. The mother of deceased attempted by writing to bind him, then 20 years of age, as apprentice to defendants, for 5 years, for a stipulated sum; \$200 to be retained by defendants from the wages as a penalty if deceased left for any cause. The contract was not signed by defendants. Deceased remained with them after coming of age, until killed by accident. *Held*, that the contract was void, under the statute of frauds; but as deceased continued to work after coming of age, with knowledge of the terms, he would be bound to that rate of compensation, but the forfeiture could not be enforced.—*Baker v. Lauterback*, (Md.) 708.\*

**FRAUDULENT CONVEYANCES.**

See, also, *Creditors' Bill*.

By surety in fraud of co-surety, see *Principal and Surety*, 4.

Rights of purchaser, *see Vendor and Vendee*, 5.

Who may attack, *see Execution*, 8.

### Conveyances between husband and wife.

1. A husband in 1889, as administrator of an estate, had \$222, which was due to his wife; in 1853, as executor of another estate, \$385.15. In 1866 there was paid to him for his wife, as proceeds of a sale of real estate in which she was interested, \$210.26. In 1879 the husband executed a bond and mortgage for \$8,000 to his son, who assigned it to the wife. The next day, the husband, being insolvent, made a general assignment. From the first transaction, in 1889, until the day before the assignment, there had been no claim made by the wife for the money, and no account asked or submitted. *Held*, that as, under the law of 1889, the husband had the right to reduce the property of the wife to possession, he will be presumed to have held the money received at that time as in his own right, and not as administrator and trustee, and, in view of the circumstances of the case, the mortgage was void as against creditors.—*Smock v. Jones*, (N. J.) 497.

2. In a suit to set aside a conveyance by the defendant to his wife on the ground of fraud, the grantor set up as a defense an antenuptial verbal agreement upon his part to give his wife all he had or might have, if she would marry him. The wife testified that she would perhaps have married defendant without the agreement. No deed passed until 18 years after the marriage, and then only upon the default of a guardian upon whose bond the husband was surety. *Held*, that the evidence was insufficient to establish a valuable consideration.—*Nellson v. Williams*, (N. J.) 257.

3. The wife of a debtor gave notes signed by her husband as her agent, and indorsed by one S., for a stock of goods, and entered into an alleged trust agreement with S., by the terms of which her husband was to conduct the business, at a salary of \$2,000 per year, and upon the payment of the notes indorsed by S. the stock was to become the sole and separate property of the wife. *Held* that, in law and in fact, the transaction was between her husband and S., and the trust was good for nothing, as against creditors.—*Vowinkle v. Johnston*, (Pa.) 634.

4. The wife of a debtor gave certain notes signed by her husband as her agent, and indorsed by one S., for certain goods to be used in a business conducted by her husband as her agent. The notes were paid out of the business. *Held* that, as the wife paid nothing for the goods, the notes, as against her, were void.—*Id.*

5. The interest of a purchaser of property who had taken the conveyance in his wife's name was levied on under a writ of attachment against him. The wife claimed to be entitled to the land on the ground that she had advanced money to her husband a long time previous, which money he had invested and disposed of in his business. *Held*, that such advances would not support a conveyance of the purchaser's lands to his wife, to the exclusion of his creditors.—*Leathwhite v. Bennet*, (N. J.) 29.\*

### GARNISHMENT.

Interpleader by garnishee, *see Interpleader*, 3.

Lien, *see Negotiable Instruments*, 6.

#### Claim of exemptions.

A claim of exemption made by defendant at the time the garnishee in an attachment execution files an answer is in time.—*Kuhn v. Warren Sav. Bank*, (Pa.) 440.

### GAS COMPANIES.

#### Entering city without consent.

A natural gas company which prior to May 29, 1885, without the consent of the councils, had begun in good faith to lay its pipes within the city of Allegheny, for the purpose of supplying the city with natural gas, is within the exception of Pennsylvania act of May 29, 1885, § 16, which provides that this act shall not be construed to permit any corporation to enter into any city without the assent of councils, except where the corporation had, to some extent prior to the passage of this act, begun supplying natural gas within such city, or had laid pipes for such purpose therein.—*Appeal of City of Allegheny*, (Pa.) 658.

### GIFTS.

Voluntary conveyance, *see Deed*, 1.

#### Inter vivos—Parol gift of realty.

1. The evidence was that the donor had had the lot staked off, and had told a third person to tell the donee that he had given it to him, and that the donor had stood by and watched the donee build a house on the lot. The donor afterwards sold the lot. *Held* that, as against the vendee of a purchaser without notice, the gift was void.—*Dolan v. Kelly*, (Pa.) 690.

2. To establish a parol gift or sale of land between parent and child, the evidence must be direct, positive, express, and unambiguous; the terms of the sale or gift must be clearly defined; and all the acts necessary to its validity must have special reference to it, and to nothing else.—*Erie & W. Val. R. Co. v. Knowles*, (Pa.) 350.

8. The declarations and admissions of the grantor are admissible in evidence to prove a gift, but should have but little weight attached to them as against any act of such grantor inconsistent therewith.—Id.

4. A. sued a railroad company for entering upon her land and tearing down a house thereon. Plaintiff claimed the property by a parol gift from her mother, made in 1866. Her testimony was that "she [her mother] gave me this lot, and told me to build on it. She gave me it to use to build on, and I thought it belonged to me, and we had paid the taxes on it." That, in pursuance of his gift, she and her husband had taken possession of the land, and built a home upon it at their own expense. There was also some evidence of admissions and declarations by the grantor that she had so given the property. Defendants proved a conveyance to them of the property by the plaintiff's mother in 1888, at which time plaintiff's husband contracted in writing to remove the house in question on 60 days' notice; in the contract referring to the sale of the land to the railroad company by plaintiff's mother, "the owner of the premises." Also that, at the time of the alleged gift, the lot was part of a larger tract, not improved or inclosed or in any way identified: that the taxes had been assessed against plaintiff's husband, but were paid by her mother; and that, when the sale to the railroad company was being negotiated, and when it was finally consummated, plaintiff was present, and never claimed any interest in the property. This plaintiff denied, but admitted that she knew all about the sale and her husband's contract. Plaintiff's mother, though living, was not called by either party. The court submitted the case to the jury, who found for plaintiff. *Held*, that the court should have charged the jury, as requested by defendant, that, under all the evidence, plaintiff could not recover.—Id.

## GOOD-WILL.

### Sale of—Violation of terms.

1. In an action on the note for the purchase money of a stock, good-will, and fixtures of a business, formerly conducted by a third person, from whom plaintiff had purchased it, which plaintiff sold to defendant agreeing not to engage in, nor assist such third person to engage in, the same business in the neighborhood of the store sold, the defendant cannot *recoup* as damages the injury done to the good-will sold him by the third person's engaging in the same business just opposite the store sold.—*Webb v. McCloskey*, (Md.) 715.

2. In such case, there being no evidence that plaintiff had authority to bind a third person not to engage in a certain business

in competition to defendant, an instruction to that effect is not erroneous.—Id.

## Governor.

Powers, see *States and State Officers*.

## Guardian and Ward.

Liability of sureties on bond, see *Principal and Surety*, 2, 8.

## Hawkers and Peddlers.

License, see *Constitutional Law*, 7; *Municipal Corporations*, 1-3.

## Health.

Violation of ordinance of board, see *Appeal*, 2.

## HIGHWAYS.

Determination of boundaries, conclusiveness, see *Judgment*, 2.

Obstruction by *feme covert*, see *Husband and Wife*, 9.

### Establishment.

1. County commissioners have authority to locate a highway over and upon a previously existing town way whenever either terminus of such location connects with a highway, although the whole of such location is within the limits of the same town.—*Town of Wells v. County of York*, (Me.) 417.

2. The Maine special act of 1885, c. 497, which provides that "a highway may be laid out, constructed, and maintained in the manner provided in Rev. St. c. 18, across the tide-waters of the Ogunquit river," confers jurisdiction on the county commissioners to make the location.—Id.

3. The viewers appointed, under provisions of Pennsylvania act of June 18, 1836, reported that "after due consideration, and diligent inquiry as to the necessity for said road, they are of opinion that the prayer of the petitioners should be granted, for the reasons set forth in their petition," and "have therefore located and distinctly marked upon the ground, and do recommend for public use, the following described road," etc. *Held*, that the report need not be made in the very words of the act, and that the report in question was a substantial finding that the road was necessary.—*In re Road in Upper St. Clair and Snowden Tps.*, (Pa.) 625.

4. A survey designating the point of beginning as near E.'s house, thence to run by courses 24 rods to a heap of stones, sufficiently designates the point of beginning.—*Blakelee v. Tyler*, (Conn.) 291.

5. A town in 1819 voted in favor of establishing a highway, providing one E. should pay half the expense. The town records showed that it had paid one-half. The road had been maintained at the expense of the town for 70 years. *Held* that, under these circumstances, it will be presumed the owners of the land taken for the road have been paid their damages.—*Id.*

6. Under Code Gen. Laws. Md. art. 28, § 12, providing that no appeal shall lie from the judgment of the circuit court on appeal from establishment of a road by the county commissioners, a writ of error does not lie to the circuit court.—*Greenland v. County of Harford*, (Md.) 581.

### Alteration.

7. A road was laid out and established as a public highway by the surveyors more than 50 years ago. The evidence showed that the course of this road had not been changed since it was first laid out. The justices of the peace and the surveyors of the highways, in determining encroachments upon this road, laid out a road which left the original course, and went upon plaintiff's land. *Held* that the laying out of the new course was not within the authority of the officers to determine encroachments.—*State v. Briggs*, (N. J.) 428

### Vacation and discontinuance.

8. Where a committee, appointed on an application for the reversal of the action of a town in discontinuing a road, reported that the road was not of common convenience and necessity, but was convenient and necessary for plaintiff, his family, and a few of his neighbors, *held*, that the latter finding was not decisive of the question of common convenience and necessity, and was not inconsistent with their general finding.—*Scutt v. Town of Southbury*, (Conn.) 854.

9. Where a committee, appointed upon an application for the reversal of the action of a town in discontinuing a highway, reported that the way was not of common convenience and necessity, *held*, that new matter, offered upon objections to the reception of the report, tending to contradict the report, could not be introduced where the opportunity was given to present it before the committee.—*Id.*

### Defects.

10. A township owes a duty to the public to keep a reasonably safe road at any given place, and if an injury occurs from its failure to do so, it is responsible for its negligence.—*Township of Burrell v. Uncapher*, (Pa.) 619.

11. Whether the maintaining of a road by a township in a certain condition was or was not negligence is a question of fact

within the province of a jury, and its finding will not be reversed.—*Id.*

12. In an action for damages arising from a defect in a highway, it was shown that plaintiff was driving in a wagon with a chained wheel, sitting on the top of a load partly of hay and partly of straw, according to the finding, "properly placed," when the wheel fell into a hole in the road, in going down a hill, and plaintiff was thrown off. *Held*, that in view of all the circumstances, and that the unsafe state of the road was wholly responsible for the injuries, it cannot be said that plaintiff could not safely drive as he did over a road in a reasonably good condition.—*Davis v. Town of Guilford*, (Conn.) 850.\*

13. In an action for injury from a defective highway, the complaint alleged that plaintiff was riding on a load of hay, that the wheel dropped into a hole, the wagon was overturned, and he and the hay were thrown upon the ground. The proof showed that only a portion of the hay was thrown off and the wagon was not overturned. *Held* that, as the complainant sufficiently advised defendant of the charge he was required to meet, and did not induce him to omit any matter of preparation for defense, the variance was not fatal.—*Id.*

14. In a suit for damages caused by a defective highway, plaintiff testified that, after the injury, he applied to the selectmen of the town to repair it, and determined if they did not, he should sue the town for damages. He was asked on cross-examination if he meant to say that if the town had repaired the highway he would not have sued. *Held*, that the question was properly excluded, as its answer could in no wise assist in determining the amount of plaintiff's injury.—*Id.*

### Obstructions.

15. It is a tort, and not a crime, under Gen. St. Conn. tit. 16, c. 9, § 1, prescribing a penalty therefor, to obstruct a highway.—*Blakeslee v. Tyler*, (Conn.) 835.

16. Trespass on the case will not lie as for a public nuisance against commissioners who, under Pub. Laws R. I. c. 849, have built a bridge over a river so as to permanently close a public highway by the abutment, since the law, though it does not in terms confer on them the power to close a public highway, does authorize them to build the bridge "in such manner as they might determine," it appearing, moreover, that their discretion has been exercised with a due regard to the interests of the public.—*Sullivan v. Webster*, (R. I.) 771.

17. In 1819 a highway was laid out with a gate at each end, and one intermediate; it was described in the lay-out as "a pent highway." *Held*, that the character of the

road as a highway was not qualified by the authorization of gates upon it, and those using it were entitled to the protection of the statute against unauthorized obstructions on it.—*Blakeslee v. Tyler*, Conn.) 291.

18. In a *qui tam* action for obstructing a highway by placing bars across it, it was found that defendant and his ancestors owning the land adjoining the highway had maintained bars during the summer, and sometimes in the winter, at the places in question, from 1818 to 1879, by common consent. In 1874 defendant applied to the selectmen for permission to keep the bars there, which was refused. *Held*, that there was no presumption that defendant had acquired from the public the right to obstruct his highway.—*Id.*

#### Law of the road.

19. In an action for damages for personal injuries, the court instructed the jury that, when teams are passing along the highway in the same direction, the rear team may pass the one in advance, and, if damage results without fault of the advance team, the one attempting to pass is liable for the consequences. *Held*, that the charge is equally applicable when the team in advance is standing still, and, if the jury is charged as to negligence, the instruction is properly given.—*Knowles v. Crampton*, Conn.) 593.

### HUSBAND AND WIFE.

See, also, *Divorces; Dower.*

As witnesses, see *Bastardy*, 8; *Witness*, 3. Conveyances between, see *Fraudulent Conveyances*, 1-5.

Mortgage by husband in fraud of wife, see *Mortgages*, 1.

Property rights, burden of proof of ownership, see *Mortgages*, 2.

Rights of widow in husband's estate, see *Descent and Distribution*, 1.

#### Property rights.

1. Complainant's wife, while the wife of a former husband, had received certain lands as a bequest, and had joined her husband in selling the same. Before the purchase money was paid, the husband, having the legal right to the money, executed an instrument in which he disposed of the same, by appointing a trustee to receive it, and invest it to the sole and separate use of his wife, and that she might by last will dispose of it to whom she saw fit, and renounced all his rights in the premises. The wife accepted the declaration of trust, and the trustee received the money and invested it. Afterwards the wife, then the wife of complainant, by will bequeathed the trust funds and proceeds, absolutely,

to complainant. Defendants claimed that the first husband never reduced the trust fund to possession, and therefore had no right to dispose of it. *Held*, that it was clearly the intent of the parties that the money should belong to him, and that intent being made known and acted upon, the declaration of trust, and the execution of the will by the wife under the power, were binding on all parties.—*Horner v. Clements*, (N. J.) 465.

2. Where a husband and wife are living together, the presumption is that the personal property in the house belongs to the husband; and, in order to overcome this presumption, the wife must show that she owned the property before her marriage, or that she acquired it since in a way entirely independent of her husband.—*McDevitt v. Vial*, (Pa.) 645.

#### Wife's separate property — What constitutes.

3. Money or property donated to a wife for her use, and for the use of her family, is her separate property, and cannot be levied upon for the debts of her husband.—*Id.*

4. In an action of trespass on the case for wrongful levy and sale, the plaintiff offered in evidence a subscription paper to show that the property was bought with money belonging to the wife. *Held*, that money given to a wife is presumed to be for her separate use, and the subscription paper was properly admitted in evidence.—*Id.*

#### — Rights of husband.

5. In an action by a wife to recover from her husband money alleged to have been paid by her in building and furnishing their house, complainant testified that, when she gave defendant the money, she told him to pay it on their home. "He took the money, and paid it out. It went into the house. It was for the purpose of paying the contractor." *Held* to be inconsistent with the idea of a loan or a trust.—*Appeal of Gleghorne*, (Pa.) 797.

#### — Wife's power to charge.

6. A married woman is not liable upon a bond or note given by her for money borrowed for repairs to her separate estate, and actually applied to that purpose.—*Sellers v. Heinbaugh*, (Pa.) 550.\*

7. The fact that a wife's signature to a joint bond with her husband is invalid, will not prevent the foreclosure of a valid mortgage given by her on her separate estate, to secure the bond.—*Conway v. Wilson*, (N. J.) 607.\*

8. The fact that the bill to foreclose a mortgage against the property of a married woman, alleges the debt secured to be a joint one of herself and her husband, while the answer alleges that the debt is that of

the husband, the mortgage in either case being admittedly legal, will not prevent a decree.—*Id.*

### Liability of wife for tort.

9. As defendant and her husband advanced to place bars across a highway, the latter said, "Put them up," which defendant did with his assistance, but without further request or command. *Held*, that under Gen. St. Conn. tit. 19, c. 5, § 9, providing that "actions may be sustained against a married woman \* \* \* for any tort committed by her without the actual coercion of her husband, \* \* \* as if she was unmarried," defendant acted without coercion of her husband, and is liable for obstructing the highway.—*Blakeslee v. Tyler*, (Conn.) 855.

### Post-nuptial contract—Bond for kind treatment.

10. A bond given by a husband in pursuance of a post-nuptial agreement between him and his wife, which agreement stipulated that the bond was only to be due on the contingency of the husband not treating his wife kindly and faithfully, is not void, and, upon the maltreatment of the wife by the husband, payment of the bond may be enforced by an action thereon.—*Reamey v. Bayley*, (Pa.) 488.\*

## INCEST.

### Indictment.

An indictment for incest is not bad because the word "incestuous" is spelled "incestous."—*State v. Carville*, (Me.) 601.

## INDEMNITY.

### Action by beneficiary.

A., being indebted to plaintiff, a bank of which defendant was an active director, assigned to defendant certain shares of the stock of plaintiff, in consideration of which defendant agreed "to indemnify him from his liability" aforesaid. The stock, afterwards transferred to defendant on the books of the bank, was subsequently sold by him for more than enough to pay A.'s indebtedness. A. was insolvent when his indebtedness matured, and no part of it was ever paid to plaintiff. In an action to recover the amount of A.'s indebtedness, the court instructed the jury, upon the above facts, to render a verdict in favor of plaintiff. *Held* that, while it would have been as well to have submitted the case to the jury on all the evidence, yet as, if the jury had given the evidence proper consideration, the result should have been the same, there was no error in the direction.—*Maynard v. Lumberman's Nat. Bank*, (Pa.) 539.

## INDICTMENT AND INFORMATION.

Misnomer, see *Criminal Law*, 1.

Misspelling, see *Incest*.

Particular crimes, see *Fisheries*, 3, 4; *Intoxicating Liquors*, 9; *Larceny*, 1, 2.

### Finding and filing.

Where an indictment has been found against a party and has been lost, or not accounted for, and another is found against him for the same offense, it is immaterial upon which one he is tried.—*Rosenberger v. Commonwealth*, (Pa.) 783.

## INFANCY.

As affecting limitation, see *Limitation of Actions*, 11.

Disabilities, see *Abatement and Revival*, 3. Pleading, see *Bonds*, 1.

### Contracts—Ratification.

An indorsement of these words upon a note: "The within note being paid, I hereby discharge the property thereby secured,"—is not such a ratification in writing, within the meaning of Rev. St. Me. c. 111, § 2, of an alleged warranty by the defendant, when a minor, of the soundness of a horse for which the note was given, as will support an action for breach of warranty, the plea of infancy being set up.—*Bird v. Swain*, (Me.) 421.

## INJUNCTION.

Decree, see *Nuisance*, 7.

Excuse for non-performance of contract, see *Contracts*, 14.

Invalid ordinance, see *Municipal Corporations*, 7.

Jurisdiction, protection of unascertained rights, see *Easements*, 2.

### Jurisdiction—Acts pendente lite.

1. A bill in equity was brought for an injunction to restrain the town surveyor from removing a building and obliterating the boundaries of the complainant's lot. The answer admitted the removal, but claimed that the land where the building stood was a part of the public highway. A supplemental answer said the complainants ought not to maintain their bill, because the respondents had fully carried out their objects by removing the building and grading the lot. General replications were filed to both answers. Upon respondents' motion to dismiss the bill, on the ground that the bill does not state a case for equitable relief, and, if it does, the case stated has ceased to exist, *Held*, the motion must be denied. The case falls within the class of cases in which threat-

ened trespasses are enjoined. The statements of the supplemental answer are not reasons for granting the motion, those statements being denied by the replication. Even if admitted, they do not make a case for dismissal, for a defendant, in an injunction suit, cannot oust the court of its jurisdiction by committing, *pendente lite*, the very acts to prevent which the suit was begun.—*Lewis v. Town of North Kingstown*, (R. I.) 178.

#### **Rights transferred and wrongs prevented.**

2. Plaintiff and defendant entered into a parol agreement by which defendant agreed to devise to plaintiff certain property, and upon the performance of which agreement defendant honestly and faithfully entered and continued for several years. Afterwards defendant sold and conveyed the property to another, and the plaintiff brought an action to enjoin such conveyance. *Held*, that the agreement was binding upon defendant, and plaintiff was entitled to the relief asked.—*Pflugar v. Pultz*, (N. J.) 128.

3. Plaintiff had leased premises from a landlord by a lease giving him access to a heater through the basement of the building, which was an appurtenance to plaintiff's premises, giving heat to no other part of the building. Subsequently the landlord gave a lease to defendant of the basement, and defendant notified plaintiff that he would not thereafter be permitted to pass through the basement to the heater, to which there were no other means of access. *Held*, that this was such an irreparable injury to a settled legal right in real estate as equity would protect by injunction, on an interlocutory application.—*Hodge v. Giese*, (N. J.) 484.

4. Where an hotel proprietor has granted one telegraph company the exclusive privilege of establishing and operating an office upon his premises, equity will interfere by injunction to prevent a breach of the contract in the form of an extension of the same facilities to another and a rival company; the remedy at law of the party having the first and unquestioned right being inadequate.—*Western Union Tel. Co. v. Rogers*, (N. J.) 18.

5. The fact that complainant's traffic, whose volume does not appear, will be compelled to make a *détour* of some 800 feet in consequence of the proposed construction of the thoroughfare in a vacated portion of a street, does not constitute such irreparable injury as to warrant an injunction in the face of the undeniable benefit to the public which will accrue from the intended alteration.—*Dodge v. Pennsylvania R. Co.*, (N. J.) 751.

6. On motion for preliminary injunction

to restrain defendant from laying its railroad track over lands to which both parties claimed title, and from digging and removing gravel therefrom, the evidence showed that the chief value of the land was the gravel beneath its surface, and that defendant's agents had expressed a determination to remove gravel from, and the defendant had graded a roadway for a railroad across, the land. *Held*, that the acts of defendant would work an irreparable injury to and destroy the inheritance, and a preliminary injunction should issue until the titles are settled.—*Newall v. Staffordville Gravel Co.*, (N. J.) 495.

### **INNKEEPERS.**

#### **Protection of guests.**

Plaintiff and one F. became intoxicated in defendant's saloon, and F. there, in defendant's presence, pinned paper to plaintiff's back, and set it on fire. *Held*, that defendant was liable for the injury.—*Rommel v. Schambacher*, (Pa.) 779.

### **INSANITY.**

#### **As ground for postponement of trial.**

1. No person can be tried for a crime while so mentally deranged as not to be able to conduct his defense. The mode of determining the existence of this mental state may be by an inquiry by the trial court, or by a jury specially impaneled. The trial court should not arrest the course of a trial for the purpose of entering upon such an inquiry upon a mere suggestion of defendant's counsel, without any substantial evidence of the existence of insanity.—*State v. Peacock*, (N. J.) 270.

2. When a defendant upon bail was present at the opening of the trial, but afterwards absented himself, evidence that his absence was the result of mental disorder was relevant; but a ruling of the court that insanity could not be shown, but the acts and conversation of the defendant about the time of his leaving could be proved, was not injuriously erroneous.—*Id.*

### **INSOLVENCY.**

See, also, *Assignment for Benefit of Creditors; Bankruptcy; Corporations*, 9-11; *Poor Debtors*.

#### **Preferences.**

1. A merchant, finding that he was in failing circumstances, proposed to his largest and most pressing creditor that he should take back the goods he had sold him, and apply them at cost price to the payment of his account. He made this proposition, not with the intention of going

into insolvency, but with the view and hope, which he communicated to the creditor, of reducing his stock, and cutting down his expenses, and thus of continuing in business. The creditor, finding that the merchant could not sell the goods as a whole to any one else, and that he was unable to borrow money to meet the bill, took the goods back. A few days later the merchant's store was closed by attachment, and he was forced into insolvency. *Held*, that these facts did not warrant the conclusion that the return of the goods was made "with a view to insolvency," and that the transfer was therefore not invalidated by Gen. St. Conn. p. 878, § 1, providing that preferences made "with a view to insolvency" shall be void. — *Hayden v. Allyn*, (Conn.) 81.\*

### Discharge.

2. A creditor may appeal from the order of discharge for any defects or irregularities in the proceedings, but he cannot petition to vacate it on those grounds. — *Waters v. Mumenthy*, (Md.) 768.

3. An action by the indorsee of a promissory note, made after the enactment of the insolvent law, though in renewal of a note made prior thereto, is barred by the maker's discharge in insolvency. — *Snow v. Foster*, (Me.) 602.

### Procedure—Composition.

4. When an insolvent debtor produces at a meeting of his creditors the affidavits and composition agreement required by Rev. St. c. 70, § 62, and they are duly filed in the insolvency court, a creditor, who is not a party to the agreement of composition, has not the right to examine the debtor upon all matters relating to his insolvency; but the examination must be limited to the questions whether the agreement was signed by the requisite proportion of the creditors, and whether the debtor had paid or secured to his creditors the percentage agreed upon. — *Messer v. Storer*, (Me.) 275.

### Appeal.

5. An appeal in insolvency proceedings, where the questions raised and decided in the court below have not been certified by such court as provided by Rev. Code Md. art. 71, § 6, will be dismissed. — *Waters v. Mumenthy*, (Md.) 768.

## INSURANCE.

### Payment of premium.

1. A policy of insurance, executed and attested as required by the act incorporating the company, and containing no stipulation making an actual payment of the premium a condition precedent, or that default in its payment should constitute a forfeiture, was, without prepayment, deliv-

ered to an agent for the purpose of being delivered to plaintiff. Plaintiff paid the premium to the agent, and the stock insured was destroyed by fire. *Held*, that the company was liable. — *Pennsylvania Ins. Co. v. Carter*, (Pa.) 102.\*

2. Where the usual course of dealing between an insurance company and its agent is for the company to treat the agent as its debtor for the premiums on policies delivered to him, and to render statements or bills for the same periodically, payment of the premium by the insured to the agent is payment to the company. — *Id.*

3. Plaintiff obtained insurance through a broker who received the premium from him, and offered it to the defendant company's agent. The agent, having directed the broker to hold the premium for a time, charged him and credited the company with the amount, and afterwards remitted it to the company. *Held*, that the question of payment of the premium was for the jury, and an instruction to find for defendant was error. — *Pittsburgh Boat-Yard Co. v. Western Assur. Co.*, (Pa.) 801.

### Scope of risk.

4. In an action on a policy of insurance on property contained in a "new two-story frame barn," the fact that the animal was not present in the barn at the moment of death by lightning does not impair the right to recover. *Haws v. Fire Ass'n*, 7 Atl. Rep. 159, followed. — *American Cent. Ins. Co. v. Haws*, (Pa.) 107.

### Insurable interest—Assignment to creditor.

5. A policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt, with interest, and the amount of premiums, with interest thereon, during the expectancy of the life insured, according to the Carlisle tables. — *Cooper v. Shaeffer*, (Pa.) 548.

6. Where the disproportion between the amount of a policy taken out by a creditor on the life of his debtor and the debt thereby secured is very great, as where the insurance is \$3,000, and the debt \$100, it is the duty of the court to declare the transaction a wager as matter of law. — *Id.*

7. Where a debtor assigns a life-policy of \$3,000 to secure a debt of \$100, the transaction is in law a wager, and if the company pays the loss, the assignee cannot retain more than the amount of his debt, with premiums paid and interest. — *Cooper v. Weaver's Adm'r*, (Pa.) 730.

### Breach of conditions of policy.

8. An insurance policy prohibited the keeping of fire-works on the insured premises. The building insured was situated in Exposition grounds, where there was also a stable some 25 or 50 feet distant, in which

fire-works were stored at the time of the fire. *Held*, that the meaning of the word "premises" is confined to the building insured, and the policy was not avoided.—*Allemania Fire Ins. Co. v. Pitts Exposition Soc.*, (Pa.) 572.

9. Where the principal defense of an insurance company, against whom an action on a policy was brought, was that the plaintiff had forfeited the policy by committing acts in violation thereof, but the acts complained of were those which would rather diminish than increase the danger of fire, *held*, that such defense was without merit.—*Allemania Ins. Co. v. White*, (Pa.) 96.

#### Proof of loss.

10. A submission by insurers to appraisers of the amount of a loss is sufficient evidence of waiver of proof of loss to go to the jury.—*Allemania Fire Ins. Co. v. Pitts Exposition Soc.*, (Pa.) 572.

11. In an action on a policy of insurance on stock, the evidence showed that there was but a single subject of loss, and that notice of loss was immediately given. *Held*, that a further detailed proof of loss was not requisite to recovery.—*American Cent. Ins. Co. v. Haws*, (Pa.) 107.

12. Where immediate notice of the loss was given to an agent, but no proof of loss was made within the 80 days, as required by the policy, and plaintiff was permitted to introduce evidence to show that proof was not made within the time on account of the failure of the company to furnish him with blanks, and that no objection was made when the proof was filed, *held*, not prejudicial to defendant, since it was left to the jury to say whether the explanation of the delay was sufficient.—*Id.*

#### Payment of loss—To whom made.

13. In an action on a policy, which provided that "the production \* \* \* of this policy, and a receipt for the sum assured, signed by any person furnishing proof satisfactory to the company that he or she is the beneficiary, or an executor or administrator, husband or wife, or relative by blood, or connection by marriage, of the assured, shall be conclusive evidence that such sum has been paid and received by the person or persons lawfully entitled to the same, and that all claims and demands upon said company under this policy have been fully satisfied," *held*, that payment to the daughter of the insured, who produced the policy and the premium receipt-book, and her receipt, constituted a complete defense against any claim of the beneficiary named in the application.—*State v. Schaffer*, (N. J.) 154.

14. If the beneficiary had a vested interest in the policy, the condition operated as an appointment by the parties to the contract of insurance of various persons, any

of whom were authorized to receive payment of the sum agreed to in case of the death of the insured.—*Id.*

#### Subrogation to lien of mortgage.

15. A vendor who had not sold her property, held a mortgage on a house. She had given a deed to her sons, and had received the mortgage from them, which required the wife of one of the sons to sign, the balance of the purchase money was to be paid, and future interest collateral to the mortgage, was to be paid. The house was burned down on payment of the loss, the mortgage company was not entitled to an assignment of the mortgage.—*Nelson v. Mut. Fire Ins. Co.*, (N. J.) 68.

#### Limitation of action.

16. In an action on an insurance policy which requires the action to be brought within 12 months next after the loss occurred, and the evidence showed that the action was begun in time, but the summons was not served, and that *alias* notices were issued before service was made, *held*, the *alias* and *pluries* were not a continuance of the original action, but the inception of a new one.—*Allemania Ins. Co. v. Haws*, (Pa.) 107.\*

#### Mutual fire insurance—Members.

17. Upon its organization, a mutual fire and fire insurance company, the two departments, marine and fire, should be separate; that there should be no other connection between the two departments than that the expense of the institution should be equitably borne by each. If the institution was made known by circulars, and agents, and for years the company thus conducted its business, even when one of the departments was losing money, *held*, that the charter was intended to create two distinct branches of the business, and that the members who had taken out policies in the fire department, having done so with knowledge that the premium was paid to the fire department, and that the rules of the company required the payment of their losses, were bound to assert any such claim.—*Allemania Mut. Marine & Fire Ins. Co.*, (N. J.) 789.

18. The officers of a mutual fire insurance company, with knowledge of the loss, but before it had been voluntarily canceled the policy by the members, and executed a new policy, held the policy-holder was, nevertheless, liable for all losses and expenses incurred.

19. A policy-holder whose loss occurred after an appointment of a receiver for the insolvent company is not entitled to a share in the distribution of the assets.—*Id.*

#### **Mutual benefit insurance—Assessments.**

20. The by-laws of a mutual benefit society requiring that all assessments should be made by the board of directors, and that the chairman should approve all proofs of death, are satisfied where the secretary and treasurer submits a notice of death to a meeting, which directs that its chairman shall examine the proofs when they arrive, and if found correct the secretary shall issue notices of assessment thereon.—*Passenger Conductors' Life Ins. Co. v. Birnbaum, (Pa.) 378.*

#### **Change of beneficiary.**

21. A benefit certificate was issued by defendant to a woman, payable in the event of her death to her husband, subject to change at her pleasure, on presentation of the certificate with a new application to the supreme secretary. *Held* that, notwithstanding her husband paid the assessments on the certificate, the insured had the right, on presenting the certificate, to effect a change in the beneficiary.—*Fisk v. Equitable Aid Union, (Pa.) 84.\**

22. A new benefit certificate issued to change the beneficiary, upon application made in accordance with the by-laws of the union, and signed by the supreme president and secretary of the union, and sealed with the seal of the supreme union, is not invalid because not signed and sealed by the officers of the subordinate union.—*Id.*

### **INTEREST.**

See, also, *Usury.*

Liability of executors and administrators, see *Executors and Administrators*, 11-18.

On judgment, see *Judgment*, 3.  
yearly balances, see *Master and Servant*, 6.

#### **On purchase money retained as indemnity.**

A., in June, 1880, sold real estate to B., who gave a judgment note for a balance of the purchase money. At the time of the purchase there were certain incumbrances thereon, and it was agreed that B. should retain enough of the purchase money to protect him from such incumbrances. A legal tender of payment of the principal of the judgment was made about March 5, 1884, and a demand for a removal of the incumbrances. On October 10, 1885, the incumbrances having been removed, the principal of the judgment was paid to A. *Held*,

the note for June 1, 1880, to March 3, 1884.—*Bates v. Wynn, (Pa.) 448.*

### **INTERPLEADER.**

#### **When allowable.**

1. In an action on a note, defendant, before plea, admitted his liability, offered to pay the money into court, suggested that it was claimed by a third person, not a party to the suit, and prayed such order as was necessary for his protection. The court directed an interpleader, under St. Pa. March 27, 1848, relating to interpleading in Berks and Schuylkill counties, and extended to all counties of the state by act of February 14, 1857, which provides that the defendant, in any action for the recovery of money, or goods, chattels, or the value thereof in damages, may, before plea, disclaim all interest in the subject-matter of the action, offer to bring the same into court, and suggest that the right thereto is claimed by a third person, and the court may thereupon order an interpleader. *Held*, that these facts show defendant entitled to an interpleader, and the contract relations between him and plaintiff would not affect this right.—*Bechtel v. Sheaffer, (Pa.) 889.*

2. In St. Pa. March 27, 1848, §1, providing for interpleader, the words, "which have lawfully come into the hands or possession of defendant," have reference to goods and chattels, and not to money.—*Id.*

3. A Pennsylvania creditor proceeded against a New York corporation by attachment, and garnished F., a resident of New Jersey then in the state, as the maker of a note to the corporation, payable in New Jersey. The corporation, with knowledge of the garnishment, transferred the note before maturity, and for value, to B., a resident of New York, who took it with notice. B. then sued F. on the note in New Jersey. *Held*, that the *bona fides* of the transfer to B. being at issue, and the question of the attachability of a note payable in its very terms outside of the jurisdiction issuing the writ being an open one in both Pennsylvania and New Jersey, F., the maker and garnishee, could maintain a bill of interpleader.—*Fitch v. Brower, (N. J.) 380.*

### **INTOXICATING LIQUORS.**

High-license election, see *Elections and Voters*, 1-3.

#### **Constitutionality of acts.**

1. Pub. Laws R. I. cc. 538, 634, (forbidding the manufacture or sale of intoxicating liquors,) are not unconstitutional, or in

violation of Const. U. S., art. 1, § 8, relating to their regulation of commerce, because they fail to distinguish between a sale within the state and a sale without the state.—*State v. Fitzpatrick*, (R. I.) 767.

2. Pub. Laws R. I. c. 684, § 15, regarding the sale and forfeiture of liquors unlawfully kept, is not unconstitutional, in giving to district courts power to condemn prohibited liquors, whatever their value may be, because the right of trial by jury is not invaded; the act reserving a right of appeal to the court of common pleas.—*Id.* 778.\*

8. Proceedings in Rhode Island for the seizure of liquors unlawfully kept are not subject to articles 4-7, in amendment of the constitution of the United States, these articles being limited in their operation to the government of the United States.—*Id.*

#### Licenses.

4. It is a proper exercise of the discretionary power of a court of quarter sessions, in the granting of liquor licenses, to refuse such license in a case where but 14 people signed a petition for the license, and over 200 people signed a remonstrance against it, and the applicant had been refused a license the year before for violation of the liquor laws; also in a case where the court knew that the applicant had violated the liquor laws the preceding year.—*Leister's Appeal*, (Pa.) 387.

5. Upon appeal from a decree of the quarter sessions refusing to grant a liquor license, the supreme court will not review the facts of the case.—*Id.*

#### Action on bond.

6. The amendment to the Rhode Island constitution, prohibiting the sale of intoxicating liquors to be used as a beverage, did not take away the right to recover for the breach of the condition of a bond given pursuant to the requirements of a license law in force before and upon the adoption of said amendment.—*Coggeshall v. Groves*, (R. I.) 296.

#### Criminal prosecution.

7. On indictment found April 8, 1887, under the Pennsylvania act April 12, 1875, for unlawfully selling intoxicating liquors without a license, the defendant on the day of trial, June 21, 1887, defended on the ground that the said act had been repealed by the act of May 18, 1887, and that he could not be legally tried and convicted thereunder. *Held*, that the effect of the third section of the latter act is to permit the granting of licenses under former laws up to June 30, 1887, which necessarily keeps in full force all the previous provisions and penalties connected therewith up to the time of the expiration of such licenses.—*Thomas v. Commonwealth*, (Pa.) 68.

8. A complaint founded on Rev. St. c. 27, § 31, which avers that the respondent, at a town named, "did then and there knowingly transport from place to place in the state of Maine intoxicating liquors, with intent that the same shall be sold in violation of law in the county of Kennebec," does not sufficiently state the places from which and to which the liquor was conveyed, and is bad on demurrer.—*State v. Lashus*, (Me.) 604.

9. An allegation in an indictment for liquor nuisance, that the building alleged to be occupied by the respondent is situated "at the corner of Depot square in said Gardiner," is sufficiently certain without stating on which corner.—*State v. Hall*, (Me.) 181.

#### Prior conviction.

10. The record of a prior conviction of the respondent, as a common seller of intoxicating liquors, is admissible in evidence upon a trial for the same offense, although it is not so fully extended as to embrace the indictment at length, and a copy of the indictment does not accompany it.—*State v. Lashus*, (Me.) 180.

11. The identity of the respondent with the person named in the record is a question of fact for the jury, and the mere identity of name is not sufficient to authorize the presiding judge to withdraw the question from the jury, and treat it as one of law.—*Id.*

12. On trial of indictment for liquor nuisance, if the description of the building in the record of a prior conviction is not inconsistent with that in the pending indictment, though less complete, evidence *alibi* may be introduced to show that both descriptions refer to the same building.—*State v. Hall*, (Me.) 181.

13. Such record of prior conviction is evidence of the intention of the use of the building described in the pending indictment as a nuisance, only when it appears that the building is the same in both instances.—*Id.*

#### Search and seizure.

14. Under Pub. Laws R. I. c. 596, § 27, providing for the seizure and forfeiture of liquors unlawfully kept for sale, a complaint which described the liquors as "a certain quantity of rum, being about and not exceeding one hundred gallons; \* \* \* other strong and malt and intoxicating liquors, being about and not exceeding one hundred gallons; \* \* \* contained in barrels, kegs, jugs, jars, bottles, decanters, and other vessels, is sufficient under Const. R. I. art. 1, § 6, which requires that such a complaint shall describe, as nearly as may be, the things to be seized.—*State v. Fitzpatrick* (R. I.) 778.

15. The sale of liquor in Rhode Island, by any person, except a registered pharmacist or his assistant, without a license, being unlawful, such goods cannot be attached.—*Barron v. Arnold*, (R. I.) 298.

16. Pub. St. R. I. c. 87, § 65, provides "no action of any kind shall be had or maintained in any court of this state for the possession or the value of any liquors held, purchased, or sold, contrary to the provisions this chapter." *Held*, that this section applies only to actions where a party seeks to recover the possession or value of liquors, which by some act of his own, or by some act or contract to which he was a party, are held, or have been disposed of, in violation of law, and does not prevent the owner of such liquors from recovering them when seized under attachment.—*Id.*

## Jail and Jailer.

Control of jail, see *Counties*, 2.

## Judge.

Power of vice-chancellor, see *Railroad Companies*, 2.

## JUDGMENT.

Interest on, see *Usury*, 2.

Lien, priority, see *Partnership*, 6-7.

Effect—*Res adjudicata*.

1. Decedent, in his life-time, entered into an agreement to sell certain lands to defendant, and after his death the lands were sold at an administrator's sale, through which plaintiff derives title. After the administrator's sale defendant obtained specific performance of the agreement, and paid the balance of the purchase price into court. Plaintiff appeared before the auditor, and laid claim to the money in court. The auditor awarded it to the administrator of decedent, and plaintiff excepted. The auditor's report was confirmed, and plaintiff did not appeal, but brought this action of ejectment, claiming a verdict for the land, to be released on payment of the balance of the purchase money under the agreement with decedent. *Held*, that the decree for distribution in the suit for specific performance concluded plaintiff from maintaining this action.—*Nelson v. Nelson*, (Pa.) 61.

2. Justices of the peace and surveyors of highways made a determination in writing, relating to encroachments on a road by adjoining land-owners, which determination was partially acted upon, and boundary lines fixed by the land-owners. Afterwards an entirely different determination, as to the place and encroachments on the same

out the first determination being set aside or reversed. *Held*, that the action of this body was a judicial one, and the first determination was a bar to the second, and rendered it invalid.—*State v. Briggs*, (N. J.) 428.

## Lien.

8. A judgment index failed to show that a judgement bore more than 6 per cent. interest. The appearance docket showed that the judgment was to bear 8 per cent. interest. *Held*, that a subsequent creditor cannot object to the allowance of 8 per cent. interest, unless it appears affirmatively that he was misled by the entry in the judgment index.—*Nicholson's Appeal*, (Pa.) 563.

4. Upon a hearing before an auditor appointed to determine the validity of certain claims against an estate, a judgment obtained against the firm of which the deceased was a member was filed. *Held* that, as the record did not show the names of the individual members of the firm, the judgment could not be charged upon the individual property of the deceased.—*Appeal of Fox*, (Pa.) 228.

5. An exemplified copy of a judgment obtained under the mechanic's lien law (Revision N. J. p. 672, §§ 18-25) is conclusive, as to the facts recited therein, in determining the priority of such judgment over another judgment against the same debtor.—*Naylor v. Mettler*, (N. J.) 859.

## Collateral attack.

6. A judgment, regular on its face, taken upon a *scire facias* upon two returns of *nil*, cannot, in the absence of any allegation of fraud or collusion, be attacked collaterally.—*Murray v. Weigle*, (Pa.) 781.\*

7. In ejectment, where defendant's title was found on a judgment on a *scire facias* taken upon two returns of *nil*, proof of the death of the mortgagor at the time the *scire facias* issued is inadmissible.—*Id.*

8. In ejectment, plaintiff claimed under a deed in consideration of the future support of his grantor. Defendant's title was based on a sheriff's sale under a judgment subsequently confessed to him by plaintiff's grantor for a debt for domestic services rendered by defendant while living in his family, and alleged to exist prior to the date of plaintiff's title. On the trial, the plaintiff, in order to rebut defendant's claim for services, and to show that the judgment confessed therefor was fraudulent and void for want of consideration, offered to prove what it was worth to support defendant's two children living with her during the time she kept house for her judgment debtor. *Held* properly refused.—*Curry v. Curry*, (Pa.) 198.

9. Where, on a question of the validity of

a voluntary deed, as against a judgment subsequently confessed by the grantor for a debt which it was claimed existed prior to the conveyance, evidence tending to show that the judgment debtor had declared that the judgment was without consideration, and was given for the purpose of defeating the title of the grantee under the voluntary conveyance, is inadmissible.—Id.

#### Foreign judgments.

10. When by the statute of another state the transcript of the record of a justice of the peace filed in a court of common pleas of said state is directed to be treated as a judgment of said court, said judgment, when transferred to another state as the judgment of said court, is entitled to the same faith and credit as a judgment originally obtained in said court, and where the plaintiff declares on a judgment of the foreign court, the production of such a record does not amount to a variance, and the same is admissible in evidence.—Rowley v. Carron, (Pa.) 435.

#### Assignment.

11. Plaintiff was the assignee of a part of a judgment. The other part, remaining unpaid, was assigned to a third party. Plaintiff sought to obtain a separate judgment for his part of the original judgment by means of a *scil. fa.*, and to obtain an independent right to process for its collection. *Held*, that the undivided judgment could not be so separated into distinct and independent parts.—Hopkins v. Stockdale, (Pa.) 368.

12. J. held a judgment which, through a third party, was assigned to his wife. C. claimed an agreement with J. that the judgment was to be assigned to him for certain considerations which were performed by C., and filed a bill in chancery asking that court to order an account, and Mrs. J. to pay, from the proceeds of the judgment, the amount found to be due said complainant. *Held* that, the proof not sustaining the charge that the judgment was to have been assigned to C., the right of the wife to the judgment is left untouched.—Childs v. Jones, (N. J.) 16.

13. It was contended before an auditor, appointed to determine the validity of claims against an estate, that a certain judgment held by the assignee was invalid, as the assignee was the real debtor, and the deceased the nominal one. The evidence showed a judgment regularly entered against the latter, and assigned to the former; that the property for which the judgment note was a part of the purchase money had been transferred to the assignee by deceased; that the former had paid most of the money on the judgment, and finally took an assignment. A daughter of deceased testified that she had heard him say

the assignee had paid the purchase money for the farm in addition to the judgment, that he was entitled to an assignment. *Held*, that the claim was proper.—Appeal of Fox, (Pa.) 228.

#### Revivor—Presumption

14. Defendant, in 1858, put in a written agreement an interest in a mill, paying part cash, and giving promissory notes for the balance, part in two, and three years. She received them, plaintiff entered judgment upon them. In 1876 plaintiff *scire facias* to revive the judgment. The articles of agreement, if it was indorsed a payment of court instructed the jury that the presumption was that a judgment had been paid, but that, if any payment had been made during that time the presumption would be removed from them to determine whether it was paid upon the judgments. That this question was proper for the jury under the instruction.—Jerdson, (Pa.) 558.

#### JUDICIAL SALE

See, also, *Execution*, 8-8; *Mortgage*.

#### Setting aside—Estoppel.

Complainants sought to set aside a land made under a decree of inadequacy of price. At the time the sale was made, they insisted that the sale should be set aside. The sale was ratified at their request, they received and gave release of the proceeds. *Held*, that the sale could not be set aside.—Presnall, (Md.) 764.\*

#### Jury.

Right to jury trial, see *Constitution*, 11; *Justices of the Peace*, 4.

#### JUSTICES OF THE PEACE

Practice on appeal from, see *Appeal*.

#### Jurisdiction — Amount in controversy.

1. A justice of the peace in F has jurisdiction to the extent of cases of attachment execution. *Warren Sav. Bank*, (Pa.) 440.

#### Title to land.

2. A justice of the peace has jurisdiction of an action for cutting or destroying trees, where the plaintiff has actual possession of the premises. *Stenner*, (N. J.) 181.

3. If the defendant produces evidence that the plaintiff is entitled to temporary possession, and that the

another, a question of title is presented in the case, and therefore the justice must dismiss the suit, because he has not jurisdiction to try it.—*Id.*

#### Practice—Trial by jury.

4. The New Jersey justice's court act, § 38, provides that either party in any action, after the defendant has pleaded, and before the justice has begun to inquire into the merits of the action, may demand a jury. Section 41 provides that, if the jury disagree, other writs of *venire* may issue in the cause until a verdict is obtained. In an action where the jury disagreed, neither party asked for a new jury. The justice proceeded to try the case. *Held*, that the failure to call for a new jury was a waiver of the right to it, and the justice had power to proceed in due course to trial and judgment.—*State v. Hathaway*, (N. J.) 848.\*

#### Laches.

See *Equity*, 10, 11; *Specific Performance*, 1. Estoppel by, see *Estoppel*, 2.

### LANDLORD AND TENANT.

Actions for rent, see *Action*, 2.

Estoppel to deny landlord's title, see *Estoppel*, 4.

Recovery of possession, jurisdiction, see *Appeal*, 1.

#### Liabilities of landlord.

1. In an action by a tenant against the landlord for injuries sustained by reason of the premises being out of repair, and it appeared that the landlord had agreed to keep the premises in repair, the court charged the jury that if the premises were out of repair and insecure, the plaintiffs had made out a *prima facie* right to recover. *Held* error, as the landlord was only bound to use reasonable diligence in finding out what repairs were necessary, and in making such repairs as due inspection would show to be proper.—*Frank v. Conrad*, (N. J.) 480.

2. The owner of a building who divides it into several tenements, which he lets to various tenants, retaining to himself control of the halls and stairways for the common use of the occupants, and those having lawful occasion to be there, is bound to see that reasonable care and skill are exercised to render the halls and stairways reasonably fit for the uses which he thus invites others to make of them; and is responsible for any injury which others, lawfully using them with due care, sustain through his failure to discharge this duty; but he is not answerable for defects which do not render the halls or stairways reasonably unfit for use, or which reasonable

care and skill would not prevent.—*Gilloon v. Reilly*, (N. J.) 481.\*

#### Lease—What constitutes.

8. An agreement giving one the right to occupy so much of certain land as is necessary in prosecuting the work of finding and producing oil and minerals, including the erection of buildings and machinery, and the building of roads, this right, unless abandoned, to continue to the lessees, their heirs, executors, administrators, and assigns, for the term of 20 years, or "as long as said parties of the second part use it for the purpose of producing oil or minerals or gas," is a lease, and the estate of the lessee is subject to the special lien of mechanics and material-men, under the act of assembly of Pennsylvania of April 8, 1868, (P. L. 752).—*McElwaine v. Brown*, (Pa.) 453.

#### —Construction.

4. Where a landlord leases premises to a tenant, giving him a right of access to a heater through the basement of the building, he cannot, by a subsequent lease to another, grant the basement free of the easement, although the first lease is not recorded, the New Jersey registry acts not applying to leases, and the provision (Revision, p. 157, § 19) providing for their record not imposing any penalty for not complying with it.—*Hodge v. Giese*, (N. J.) 484.

5. By the terms of a lease the lessor was to furnish the ground, and the lessee the labor, and pay the lessor "half of all profits from the farm." *Held*, to mean one-half of the products, and not half the net profits.—*Richmond v. Connell*, (Conn.) 868.

#### —Actions on.

6. Defendant was surety for a lessee, who covenanted to build, and not to remove or impair the building, but surrender it to the lessor at the expiration of the lease in as good condition as it was at any time during the lease, ordinary decay and inevitable casualty excepted. Defendant afterwards became the owner of the lease. The house was destroyed by fire. The lessor brought suit at the expiration of the lease on the covenant. At the trial, his counsel asked the judge to charge the jury "that the burden of proof is upon defendant to show that the fire could not have reasonably been prevented. He has failed to do so, and the verdict of the jury must be for the plaintiff." *Held*, properly refused, on the ground that it was for the jury to determine from all the evidence whether the fire could have been reasonably prevented.—*Kelly v. Duffy*, (Pa.) 244.

7. Plaintiff's counsel also asked the judge to charge the jury: "Under all the evidence in the case, the verdict should be for plaintiff for the value of the building

at the time of the expiration of the lease and the rentals unpaid, less the credits." *Held*, that it was properly refused, on the ground that it was for the jury to decide from the evidence whether the plaintiff was entitled to recover, and how much.—*Id.*

8. Defendant's counsel asked the judge to charge the jury: "If the jury are satisfied from the evidence that the building was destroyed by fire, without any negligence or fault on the part of the lessees, and that the usual and ordinary effort was made to save the building, this is all that is required by law of the defendant, and the verdict should be for defendant." The court answered: "This point is affirmed, by the expression, 'that the usual and ordinary effort was made to save the building,' is understood to mean all the efforts which were practicable under the circumstances were made to save the building." *Held*, that the point of defendant was properly answered.—*Id.*

#### **Defendant—Action for.**

9. In an action of debt to recover rent due from a tenant holding over after the termination of his lease, which provided a penalty in default of payment of the rent, *held*, that the lessor was entitled to sue for the amount actually due, whether it be more or less than the penalty.—*Waller v. Bartley*, (Pa.) 228.

## **LARCENY.**

#### **Indictment.**

1. Act Pa. March 31, 1860, § 82, provides that a prosecution for larceny must be brought within two years from the date of the offense, except, if the person against whom the indictment shall be brought shall not have been an inhabitant of the state during the time for which he would be liable, then indictment may be brought against him at any period within a similar space of time, during which he shall be an inhabitant of the state. *Held*, that an indictment which alleged such absence as would take the case out of the operation of the statute, though not incorporated in the count charging the crime, was sufficient.—*Rosenberger v. Commonwealth*, (Pa.) 782.

2. Act Pa. March 31, 1860, § 14, provides that in prosecutions for felony or misdemeanor the indictment may be amended where there is a variance between the statement of the indictment and the evidence in relation to the ownership of the property. *Held*, that where the indictment alleged a joint ownership of property stolen, and the proof was that the property belonged to the alleged owners individually, amendment accordingly was proper.—*Id.*

## **LIBEL AND SLANDER.**

#### **Privileged communications.**

1. The report of a commission appointed to make an investigation upon charge of malfeasance and non-feasance in the management of a prison of the facts elicited by their inquiry would be regarded as a privileged communication, and as such would not be actionable without proof of express or actual malice.—*In re Investigating Commission*, (R. I.) 429.

#### **Justification—Waiver of plea.**

2. In an action for slander, for saying plaintiff embezzled and stole, the parties agreed that evidence should be admitted under a plea of "not guilty," to prove the truth of the alleged slanderous words, the same as if under a plea of justification; and thereafter plaintiff requested the court to charge that "defendant, in order to sustain the plea of justification, must prove the same character and weight of evidence as would convict the plaintiff if criminally indicted for larceny and embezzlement." And the court answered: "Affirmed, with the qualification that this is a correct general statement of the law applicable thereto; but there is no plea of justification filed in this case." *Held* error, as it would naturally lead the jury to believe that while, in other cases, in order to make a successful justification, it was necessary for the jury to be satisfied that the words spoken were true, yet this was a case to which the rule was not applicable, as no plea of justification had been filed.—*Woddrop v. Thacher*, (Pa.) 621.

#### **License.**

Between individuals, prescriptive easement, see *Easements*, 4.

Liquor licenses, see *Intoxicating Liquors*, 4-6.

Of occupations, see *Constitutional Law*, 7; *Municipal Corporations*, 1-3.

#### **Liens.**

See *Attachment*, 2; *Chattel Mortgages*; *Execution*, 1; *Judgment*, 3-5; *Mechanics' Liens*; *Pledge*.

#### **Light and Air.**

See *Easements*, 5-9.

## **LIMITATION OF ACTIONS.**

By assignee in bankruptcy, see *Bankruptcy*.

Criminal cases, see *Larceny*, 1.

Exceptions, ignorance of cause of action, see *Corporations*, 1.

On claims against estates, see *Executors and Administrators*, 5.

On policy of insurance, see *Insurance*, 16.  
To recover back usurious interest, see *Usury*, 4.

### Adverse possession.

1. Under act Pa., April 13, 1859, providing that limitation shall run against the remainder-man unless arrested by the tenant in tail, adverse possession for 20 years will bar both the tenant in tail and the remainder-man.—*Bassett v. Hawk*, (Pa.) 803.

2. In ejectment in which defendant set up limitation, and proved possession for 30 years, claiming under a title by gift, the court charged that "if it is shown \* \* \* that it was an actual, *bona fide*, absolute gift, and he went into possession under that gift, then \* \* \* from the time he entered in pursuance of that gift, and held and continued to hold the premises embraced by the gift by hostile, adverse acts, in a notorious manner, visible, open to all the world, and held that possession in that continued manner for a period of 21 years, and the possession was actually in himself, or by some one under him, directly under him, then we say to you that that would vest in such person good and valid title, under the statute of limitations of 1786." *Held*, that the charge was more favorable than plaintiff could require, as it was only necessary that defendant should have entered under a pretense of gift, and thereafter have claimed the property as his own, for the statute to perfect his title.—*Kennedy v. Wible*, (Pa.) 98.

3. An entry under claim of right by parol gift upon a tract of land, the boundaries of which, though not distinctly marked on the ground, are so designated as to be easily ascertained, is sufficient upon which to base a claim of title to the entire tract under the statute of limitations.—*Craig v. Craig*, (Pa.) 60.

4. Where defendants claimed title against their co-tenants by adverse possession, evidence of a parol gift from the ancestor is properly submitted to the jury as tending to show that such entry was under claim of right and adverse to their co-tenants.—*Id.*

5. The declarations of a party claiming an adverse possession of lands, as well as the understanding of his neighbors, is competent evidence to show the nature of his claim and possession.—*Kennedy v. Wible*, (Pa.) 98.

### Running of the statute.

6. A running account of thirty years, showing cash credits made within six years, is not barred by the statute of limitations.—*Appeal of Fox*, (Pa.) 228.

7. Defendant's machinery had incumbered plaintiff's building for more than six

years after notice to remove it, interfering with the plaintiff's use or rental thereof. *Held*, that the wrong was a continuing one, and that an action for damages was not barred in six years after the refusal to remove.—*Barclay v. Grove*, (Pa.) 838.

8. *Purd. Dig. Pa. § 1063*, provides that an action on a debt shall be brought within six years after cause of action accrues. Section 525 provides that no debts, except mortgage and judgment, shall be a lien on decedent's real estate, unless action be brought and duly prosecuted within five years after his death. More than six years after the cause of action accrued, but within five years after the death of defendant's decedent, suit was brought on a debt. *Held*, that it was barred.—*Miskey v. Miskey*, (Pa.) 881.

9. In Pennsylvania, when a sale of real estate, for the payment of the debts of an intestate, has been confirmed by the orphans' court, the rights of the parties are then determined, and a debt constituting a valid lien at the time of confirmation will not be barred by delay in distributing the proceeds; and interest ceases to run on so much of the debt as the proceeds of the sale, applicable thereto, are sufficient to pay.—*Arndt's Appeal*, (Pa.) 638.

10. A writ was issued within six years from the time the right of action accrued, but returned *n. o. t.* An *alias* was issued and served within six years from the first, though more than six years from the time when the right of action accrued. *Held*, that the statute of limitations is not a good defense.—*Fuller v. Dempster*, (Pa.) 670.\*

### Disabilities and exceptions.

11. In an action of *assumpsit* for money had and received, the cause of action accrued during the infancy of plaintiff, and suit was commenced within six years from the time plaintiff attained her majority. *Held*, the action was not barred by the statute of limitations.—*Pugh v. Powell*, (Pa.) 570.

12. Under *Rev. St. Me. c. 81, § 103*, providing that, where a person is out of the state when a cause of action accrues against him, the action may be commenced within the time therefor after he comes into the state, an action on a promissory note can be maintained where the time the defendant resided outside the state, deducted from the time the note ran, left a balance of less than six years.—*Palmer v. Morse*, (Me.) 601.

13. In an action on a due-bill dated October 15, 1879, it appeared that the maker was absent from the state for two months in 1885, paying rent for his office at the time, but not for room and board. On October 13, 1885, he left home again, and in May, 1886, died in Denver. Action was begun November 23, 1886. *Held*, that during

his absences from home the maker was not a resident of the state within the terms of the statute of limitations, and as to those times the statute did not run.—*Brady v. Potts*, (N. J.) 845.\*

### Acknowledgment.

14. Where plaintiff's evidence was that defendant frequently promised to pay the debt between the time it accrued and the commencement of the suit, and defendant's evidence was that he never denied the debt, but never promised to pay it, an instruction that if defendant, within six years after the debt became due, acknowledged or admitted it, and within six years after the first acknowledgment again acknowledged and admitted the debt, and that the last acknowledgment was within six years before the bringing of the suit, then the debt sued on was never barred; and if there was no uncertainty about the debt and the amount, and the acknowledgments and admissions were clear, distinct, and unequivocal, and consistent with an intention to pay, then they would find for the plaintiffs, is not erroneous.—*Detzel v. Schomaker*, (Pa.) 637.

15. The credit of a certain number of pounds of wool, on a note otherwise barred by the statute of limitations, is sufficient to remove the bar.—*Appeal of Fox*, (Pa.) 228.\*

## LOGS AND LOGGING.

### Driving logs.

A mill-owner, upon a non-tidal floatable stream, must furnish a log-driver with reasonably convenient facilities for running his logs, but is under no legal obligation to furnish locks or sluices through which large and loosely constructed rafts can be run without being broken or the logs displaced.—*Foster v. Searsport Spool & Block Co.*, (Me.) 273.

### Lost Instruments.

Action on, pleading, see *Negotiable Instruments*, 9.

## LOTTERIES.

### Evidence—Policy books.

1. On the trial of an indictment under Rev. Code Md. art. 73, § 163, prohibiting the keeping of any place for the sale of lottery tickets, certain slips of paper, known as "policy books," were, over objections, admitted in evidence as inculpatory defendant. The record on appeal failing to show the circumstances of the admission, held, that the presumption must prevail that the ruling of the trial court was correct.—*Dorbert v. State*, (Md.) 707.

2. Rev. Code Md. art. 73, § 171, provides that the statute in relation to lottery tickets shall be liberally construed, and courts "shall adjudge all tickets, parts of tickets, certificates, or any other device whatsoever by which money or any other thing is to be paid or delivered on the happening of any event or contingency in the nature of a lottery, to be a lottery ticket." Defendant sold a slip of paper, commonly called a "policy," and, in case certain numbers were drawn in a lottery of the same date in another state, the purchaser was to receive \$1.80. Held, that a conviction on such evidence would be sustained.—*Smith v. State*, (Md.) 758.

## MALICIOUS PROSECUTION.

### When lies.

Where defendant caused plaintiff to be indicted for maliciously interfering with his possession of property, and when the case was called for trial had the indictment nollied at his own cost, held, that the *nolle pros.* was a sufficient termination to enable plaintiff to maintain an action for malicious prosecution.—*Murphy v. Moore*, (Pa.) 665.\*

## MANDAMUS.

To municipal officer, see *Municipal Corporations*, 22.

### To compel payment of judgment.

Petitioner was the assignee, before payment, of part of a judgment against the city of Pittsburgh, and, after the whole amount of the judgment had been paid to the judgment creditor or his attorney of record, petitioned for *mandamus* to compel the city treasurer to pay the amount assigned him. His assignment had been duly recorded on the assignment docket. Held, that such *mandamus* was properly refused.—*Schuck v. City of Pittsburgh*, (Pa.) 661.

### Marriage.

See *Divorce; Husband and Wife*.

Evidence of, see *Bastardy*, 1.

## MASTER AND SERVANT.

### Contract of hiring—By the year.

1. In an action against a corporation for damages for wrongful discharge from its service, defendant asked the court to instruct the jury that, notwithstanding they might find that plaintiff did hire himself to defendant in April or May, 1882, for a year, and after its expiration continued in defendant's service without any new contract as to time of service, then their relations, after the first year, was a hiring at will, and

could be terminated by either party at any time. *Held* properly refused, because if plaintiff hired for a year and continued from year to year without a new contract, it would constitute a hiring by the year.—*McCullough Iron Co. v. Carpenter*, (Md.) 178.

2. In an action against a corporation for damages for wrongful discharge from its service, plaintiff claimed to have been hired for a year from April 1, or May 1, 1886. Defendant asked the court to instruct the jury that if they found that the hiring was for an indefinite length of time, and that no subsequent contract fixed a definite time, then they must find for defendant. The court had already instructed the jury that "to enable plaintiff to recover he must satisfy the jury that he entered upon said employment for a year, commencing on the first of April or the first of May, 1886, upon the mutual understanding and agreement of himself and defendant that it should continue for a year." *Held*, that the refusal to give the instruction was not error.—*Id.*

3. In an action against a corporation to recover damages for wrongful discharge from its service, plaintiff claimed that he was hired by the year. The evidence showed that, after plaintiff had been hired, defendant hired another man, and told him they would hire him the same as they did plaintiff, "by the year." Defendant asked the following instruction, which was refused: "That there is no evidence in this case legally sufficient to entitle plaintiff to recover." *Held*, the refusal was not error.—*Id.*

#### Contract of hiring—Estoppel.

4. Complainants, being good practical potters, contracted with defendants to take charge of their pottery, for \$3,000 per year each, and 10 per cent. of the profits, which defendants guaranteed should produce \$2,000 to each annually. With the knowledge of defendants, complainants attempted to manufacture a peculiar ware, the experiments proving failures. The pottery turned out goods of the value of \$200,000 per year besides these failures. Defendants credited complainants with the \$2,000 a year each for two years, and in their advertisements referred to the good workmanship shown by their wares. They paid complainants the \$3,000 salary, but refused to pay the \$2,000 guaranty, alleging heavy losses owing to the unskillful management and neglect of complainants. *Held*, that defendants were liable on their guaranty, the circumstances showing no fraud or deception on the part of complainants, and defendants having encouraged them to continue their experiments with knowledge of their failures, and having, with such knowledge, given them credit for the

amount guaranteed.—*Wood v. Alpaugh*, (N. J.) 469.

#### Compensation—Quantum meruit.

5. Plaintiff worked for defendant about one year without any special contract as to compensation; then the parties entered into a permanent contract as to his past and future earnings, but, by a failure to understand each other, the minds of the parties never met. *Held*, that plaintiff could recover, in *assumpsit*, what his services were reasonably worth.—*Tucker v. Preston*, (Vt.) 726.

6. It is not error, in such case, to allow interest on the yearly balances found to be due plaintiff.—*Id.*

#### Master's liability to third persons.

7. In an action for injuries resulting from the collision of a wagon driven by plaintiff and a carriage belonging to defendant, and driven by a servant in defendant's employ, defendant asked an instruction that if the driver was, at the time, in the employ of the person to whom the carriage was hired, defendant is not liable; and also that if the carriage and driver were, at the time, temporarily engaged in the service of the person hiring the same, and under his direction and control, defendant is not liable for negligence of the driver. *Held*, properly refused.—*Hersberger v. Lynch*, (Pa.) 642.

8. The defendant's employe had, in the course of his employment, deposited timbers upon the sidewalk of a street, and had improperly, against the defendant's instructions, left them there for several days. The plaintiff, while passing along the sidewalk with due care, fell over them and sustained injury. *Held*, that the defendant was responsible for the damages.—*Driscoll v. Carlin*, (N. J.) 482.\*

#### Negligence of master—Reasonable care.

9. Plaintiff was a carpenter in the employ of defendant, and worked upon the roof of a building in process of erection by defendant. The building fell, and plaintiff was injured. *Held*, that the right of plaintiff to recover depended upon the fact whether, under all the circumstances, defendant exercised reasonable care in the erection of the building.—*Diamond State Iron Co. v. Giles*, (Del.) 189.

10. While the illegal erection of a building by a corporation cannot of itself give a person a claim for injuries received while working as the servant of the corporation on such illegal building, it may have a very material influence in determining the liability of the corporation.—*Id.*

11. A servant who goes upon the roof of a building as the employe of his master, to work thereon, has a right to assume, un-

less his attention is called to the contrary, without particular inquiry, that his employer has exercised the due care and caution observed by any ordinarily prudent man in the erection of the building.—Id.

12. In an action by an employee for injuries caused by the fall of a building, defendant alleged that it would have withstood any ordinary storm, but that the one that overthrew it was most extraordinary. The court instructed the jury that the defendant would be liable, unless he showed that it was such an unusual storm as builders do not provide against,—“a phenomenal one.” *Held*, that all the judge said in relation to storms in his charge must be considered together, and that the charge in substance, meant an “extraordinary storm such as builders do not provide against or contemplate, in planning their architecture,” and was correct.—Id.

13. After a charge to the jury, defendant's counsel called the attention of the court to certain prayers for instructions. The court read the instructions prayed for, and declined to give them, because he had already instructed the jury as to the care required in putting up a building “of that kind.” *Held*, that the building alluded to was the one described in the charge, and that the language of the judge was not calculated to mislead the jury.—Id.

#### — Warning to employees.

14. It is the duty of a railroad company to frame and promulgate such rules and schedules for the moving of its trains as will afford reasonable safety to the operatives engaged in moving them; and for a failure to perform this duty, the company is responsible to an employee injured thereby.—*Lewis v. Seifert*, (Pa.) 614.

15. Where a schedule for the moving of trains is departed from, such orders must be issued by the company as will afford reasonable protection to employees engaged in the running of its trains.—Id.

#### — Defective appliances.

16. Certain servants in a hotel were required, when in working costume, to use the freight elevator as a means of transit to and from the various floors. While going up in this elevator, plaintiff, one of the servants, had her foot crushed between the elevator and the wall. *Held* that, as the evidence showed that the elevator was not fitted for the safe transportation of human beings, a judgment for plaintiff in an action for damages was warranted.—*McKinnin v. Kilgallon*, (Pa.) 614.

#### Negligence of vice-principal.

17. Where a master or superior places the entire charge of his business, or a distinct branch of it, in the hands of an agent or subordinate, and exercises no discretion

or oversight of his own, the master is liable for the negligence of such agent or subordinate.—*Lewis v. Seifert*, (Pa.) 514.

18. The master owes to every employee the duty to provide a reasonably safe place in which to work, and reasonably safe instruments, tools, and machinery, and when such duties are delegated to an agent, the latter stands in the place of the principal, who is responsible for his agent's acts.—Id.

19. A train dispatcher, vested with the power and authority of moving trains, of changing the schedule time, or making new schedules, as regards the employees engaged in moving trains is a “vice-principal.”—Id.

#### Negligence of fellow-servants.

20. To constitute fellow-servants, the employees need not be at the same time engaged in the same particular work. It is sufficient that they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purpose. The rule is the same, although the one injured may be inferior in grade, and is subject to the direction and control of the superior, whose act caused the injury, provided they are co-operating to effect a common object.—Id.\*

21. Each person who enters the services of another takes on himself all the ordinary risks of the employment in which he engages, and the negligent acts of his fellow-workmen in the general course of his employment are within the ordinary risks.—Id.

22. When no negligence on the part of defendant is proved, and it appears that the injury, was directly caused by a fellow-workman's negligent disobedience of orders, it is the court's duty to give a specific instruction to him for defendant.—*Allegheny Heating Co. v. Rohan*, (Pa.) 789.\*

#### Risks of employment.

23. A brakeman in the employ of the defendant company, was injured by being crushed between a car, from which he was descending, and the “oil-house,” standing at a distance of about two and one-half feet from the rail, and clearing an ordinary car by about eight or nine inches. *Held*, that the cause of the injury was one which was open, permanent, and visible in its character, and the risk of which plaintiff assumed when he entered defendant's service in the capacity in which he was employed.—*Kelly v. Baltimore & O R. Co.*, (Pa.) 659.

24. A master may conduct his business in his own way, and when a servant takes service with a master who conducts his business in a way which the servant thinks is unsafe, he cannot recover from the mas-

ter damages for any injury happening to him. He should refuse to enter upon the employment, or should leave it on discovery of the master's method of doing business.—*Hawk v. Pennsylvania R. Co.*, (Pa.) 459.\*

## MECHANICS' LIENS.

On interest of lessee, see *Landlord and Tenant*, 8.

### Recording.

1. A house erected by one in possession of land under a contract of purchase, and attached to the land, becomes a part of the realty in the absence of an agreement to the contrary, and, to preserve a laborer's lien upon the same, the lien claim must be filed in the registry of deeds, and not in the office of the town clerk.—*Skillin v. Moore*, (Me.) 603.

### How lost.

2. The right of a material-man to proceed against the owner is lost, by accepting notes which had not matured at the time of giving the notice.—*McPherson v. Walton*, (N. J.) 21.

### Excessive claim.

3. Section 8 of the New Jersey mechanics' lien law, provides that upon refusal of the contractor to pay a material-man on demand, the material-man shall give notice to the owner of the amount due, and the owner shall retain that amount. *Held*, that a notice claiming more than is due at the time of giving the notice, is defective, and the material-man has no right to proceed under the statute against the owner for the amount due him by the contractor.—*Id.*

4. The right of the material-man to proceed against the owner is lost by including in the claim items for flagging the sidewalk in front of the houses.—*Id.*

### Practice—Amendment of claim.

5. Under Act Pa. June 11, 1879, § 2, providing that in mechanics' lien cases amendments in furtherance of justice shall be allowed at any stage of the proceedings, by changing, adding to, or striking out, the names of claimants or owners and contractors, a claim cannot be amended after the statutory six months for filing liens have expired, by opening the judgment striking off the name of the owner and joining his wife as co-defendant.—*Knox v. Hilty*, (Pa.) 792, 794.

## Merger.

Of prior contract, see *Mortgages*, 8.

## Mesne Profits.

Receiver for, see *Ejectment*, 8.

## Mistake.

As ground for new trial, see *New Trial*.  
Reformation of contracts, see *Equity*, 5-7.

## MORTGAGES.

See, also, *Chattel Mortgages*.

Fixtures as between mortgagee and subsequent judgment creditor, see *Fixtures*.  
Payment by third party, see *Subrogation*, 1, 2.

Time of payment, see *Vendor and Vendee*, 1.

### Validity.

1. A husband dealt with his wife's money, and invested it in real property, taking title in his own name, and lived with his wife thereupon, and afterwards mortgaged it to a *bona fide* mortgagee without notice. *Held*, that the title of the purchaser under foreclosure was good, even though the husband had perpetrated a fraud upon his wife.—*Oakley v. Macrum*, (Pa.) 820.

2. W. took a mortgage from his brother for money loaned. After his death, his widow procured another mortgage, to herself, from the mortgagor, alleging that the money loaned was hers, and surrendering the first mortgage. W.'s administrator sued to foreclose the first mortgage. *Held*, that the burden of proof was on the widow to show that it was her money, and not that of her husband, and, having failed to do that, her mortgage must be held null and void.—*Truax v. White*, (N. J.) 735.

### Effect—Merger of prior contract.

3. Where a mortgage reciting a money indebtedness, payable at a definite time, was, in fact, given to secure payment for property purchased under a pre-existing agreement which allowed payment to be made in material, and was silent as to time, and both parties afterwards continued to act under the terms of the agreement, and not under those of the mortgage, *held* that, as between the parties, the mortgage was merely collateral security, and that the agreement was not merged.—*Rees v. Logsdon*, (Md.) 708.

### Sale of mortgaged premises.

4. Premises subject to a mortgage given to A., and assigned to B., were sold to C. by the administrator of the mortgagor, the amount of the mortgage being deducted from the purchase price, and the deed reciting that the conveyance was subject to a mortgage to B. In the administrator's account, which was confirmed, credit was claimed for the amount of the mortgage. The premises were thereafter conveyed to D. by deed containing a like recital. D. conveyed to E. by deed containing no such recital, and took back a mortgage, which

was assigned to F. F. was not shown to have had express notice of the non-payment of the first mortgage, the assignment of which to B. was not then recorded. F. having bought the premises at a sheriff's sale under his mortgage, *held*, that he took the same free from the lien of the first mortgage.—*Brownback v. Ozias*, (Pa.) 801.

5. Where the grantee in a deed containing covenants of warranty assumes and agrees to pay as part of the purchase price mortgages upon the land conveyed, and goes into possession, he becomes, as between his grantor and himself, the principal debtor to the mortgagees; and the grantor may resort to equity to compel him to discharge the amount due on the mortgages, without making the mortgagees parties to the suit.—*Cubberly v. Yager*, (N. J.) 118.

#### Payment and discharge.

6. The purchase of the equity of redemption in land, by the mortgagee, at a sale by the mortgagor's assignee in insolvency, does not amount in law to a payment of the mortgage debt; nor is the mortgagee estopped to sue for the balance of the debt.—*Clark v. Jackson*, (N. H.) 59.

7. N., as trustee of the United States surplus funds for the town of Woodbury, procured a mortgage from W. securing a note previously given by W. to the town, and also securing two other notes held by N. in his own right. Subsequently N. purchased the land upon which said mortgage was given, and without payment of the notes of the town discharged the mortgage and sold the land to B., who had full knowledge of such discharge, and of the fact that the note was unpaid. *Held*, that the discharge was a gross fraud, and that the town was not estopped from asserting its rights under the mortgage, and that as between the town and B. the town had the superior equity.—*Town of Woodbury v. Bruce*, (Vt.) 52.

#### Rights of mortgagor after foreclosure.

8. A mortgagor of land, who simply continues in possession after his right of redemption under foreclosure proceedings has expired, has no right to cut and sell the hay therefrom.—*Perley v. Chase*, (Me.) 418.

#### Foreclosure.

9. Plaintiff had a mortgage on the property of the defendant in several states, including New York and Connecticut. It sued defendant in New York, and foreclosed the mortgage. A referee was appointed, who sold defendant's real estate in Connecticut, and gave a deed thereof to the purchaser. Plaintiff then brought this suit to foreclose the mortgage according to the laws of Connecticut. B., an attaching

creditor, set up as a defense the sale in New York. *Held*, that the deed of the referee conveyed no title to the land in Connecticut, and the rights of the parties were unaffected by the proceedings in New York.—*Farmers' Loan & Trust Co. v. Postal Tel. Co.*, (Conn.) 184.

10. The fact that one of three tenants in common joined in the mortgage of the joint property merely to secure money which her co-tenant borrowed for his own use, and that the assignee of the mortgage knew that such was the fact when he took the assignment, is no defense to a suit by such assignee to foreclose. That fact, however, entitles her to a postponement of the sale of her interest until the interest of the principal debtor has first been exhausted.—*Lorey v. Overton*, (N. J.) 15.

### MUNICIPAL CORPORATIONS.

See, also, *Counties; Highways; Poor and Poor Laws; Schools and School-Districts; Towns.*

Building ordinance, see *Constitutional Law*, 8.

Officer and agents, see *Mortgages*, 7.

Enforcement of judgment against, see *Mandamus*.

#### Ordinances—Licenses.

1. Where an act of assembly incorporating a borough gives to the council of such borough express authority to enact such by-laws, and make such rules, regulations, and ordinances as shall be determined by a majority to be necessary to promote the peace, good order, benefit, and advantage of said borough, particularly providing for the regulation of the markets, streets, alleys, highways, etc., therein, said council has power to pass an ordinance requiring book canvassers to take out a license, and imposing a penalty for failure to do so.—*Borough of Warren v. Geer*, (Pa.) 415.

2. The provisions of the general borough act of April 8, 1851, § 8, (P. L. 820.) vests in boroughs power to make all needful regulations respecting markets and market-days, the hawking and peddling of market produce and other articles in the boroughs, etc. *Held*, that the court could not say, on demurrer to a declaration, that such provisions were not broad enough to authorize the passage of an ordinance as to book canvassers as above.—*Id.*

3. A borough ordinance requiring persons canvassing from house to house, for the purpose of selling or soliciting orders for books, to take out a license for that purpose, and to pay certain fees therefor, thus putting such persons on the same footing as others holding a mercantile license within the borough, is not unreasonable, as

opposed to common right, and is not in conflict with the constitution of the United States or of Pennsylvania.—*Id.*

#### Ordinances—Buildings.

4. Const. Pa. art. 10, § 7, prohibits the legislature from passing any local or special law regulating the affairs of towns or boroughs. Brightly, *Purd. Dig.* 164, provides for the incorporation of boroughs, their powers and duties, including regulating the erection of frame buildings. The council of a borough prohibited the erection of wooden buildings within a certain prescribed district and provided that persons violating the ordinance should remove the building, or pay the costs of removal. *Held*, that an ordinance of a borough was not a law within the meaning of the constitution, and the council had the power to pass the ordinance in question.—*Klinger v. Bicket*, (Pa.) 555.

5. Plaintiff, in violation of an ordinance prohibiting the erection of a frame building, being warned by the council of a borough not to put it up, began to do so, and the high constable and defendants pulled it down, under the order of the council. *Held*, that the act of defendants was lawful, and no action lies against them.—*Id.*

6. A section of the building ordinance of a city provided that the outside walls of a building having a trussed roof, such as churches, public halls, and the like, if more than 16 feet, and less than 25 feet, high, should average at least 17 inches in thickness. *Held*, that a rolling-mill, with a trussed roof, with walls 21 feet high, came under the provisions of that section.—*Diamond State Iron Co. v. Giles*, (Del.) 189.

#### — Police power.

7. A town purchased of plaintiff and his father certain land in which to construct a reservoir, and the officers of the town, after getting a deed, gave an agreement back allowing plaintiff and his father to use the reservoir for fishing and sailing. The town, acting under legislative authority, in order to prevent the pollution of the water of the reservoir, passed an ordinance prohibiting its use for those purposes. *Held*, that it was a valid exercise of the police power of the state, and, whether valid or not, it was not error to deny an injunction prohibiting its enforcement, as, if it was invalid, the plaintiff's remedy was at law.—*Dunham v. City of New Britain*, (Conn.) 854.

#### — Duties of officers.

8. Ordinances of a city council imposing upon the city solicitor the duties which are required by statute to be performed by the receiver of taxes, are so far unauthorized and illegal.—*State v. City of Camden*, (N. J.) 137.

#### Officers—Elections.

9. When an assessor has been elected by ballot by a municipal body, and his election has been declared and entered of record, it cannot be reconsidered at an adjourned meeting on a subsequent day, and a new election had.—*State v. Phillips*, (Me.) 274.

10. The common council of Newark, being the sole judges of the election of its members, may, upon a contest respecting the election of one of its members, appoint a committee to take testimony, and to report the facts and the evidence to the council.—*State v. Haynes*, (N. J.) 151.

11. It may also authorize the committee to employ a stenographer for the purpose of taking such testimony; and if the committee employ the stenographer before the resolution giving such authority becomes effective, the common council may subsequently ratify such employment.—*Id.*

#### — Compensation.

12. In an action brought by a city attorney to recover for services performed for the city, *held*, that the preparation of a digest or a codification of the laws applicable to such city is within the line of his duty as laid down by the city charter, which provides that he "shall do all and every professional act incident to the office which may be required of him" by the officers of said city.—*Hays v. City of Oil City*, (Pa.) 63.

#### Defective drains and sewers.

13. In a suit against a municipal corporation for the overflow of plaintiffs' cellar from a sewer insufficient to carry off the water flowing to it from gutters, defendant offered evidence to show that the overflow was due to the deepening of plaintiffs' cellar, and the court instructed the jury that plaintiffs could not recover, notwithstanding that the grade of the streets, and the insufficient size of the sewer, caused the overflow. *Held* error, in the face of evidence that the overflow would not have occurred but for those causes.—*Hitchins v. Town of Frostburg*, (Md.) 826.

14. An instruction upon the law of the case, abstractly correct so far as it went, but omitting any reference to evidence that defendant had for years had notice of the defective condition of the sewer, or as to the deepening of the cellar, *held*, properly refused.—*Id.*

15. The court instructed the jury that plaintiffs could not recover, notwithstanding the negligent or defective construction of the culvert, "provided the construction of the culvert did not place or leave the property in a worse condition than if no culvert had been made at all." *Held*, error.—*Id.*

**Public improvements—Paving.**

16. When the owner of a footwalk on a public street within the city of Pittsburgh, on notice of the street commissioner, neglects or refuses to pave the same, he is bound to submit to have such paving done for him by the contract of that officer.—*Indley v. City of Pittsburgh*, (Pa.) 678.

17. On the neglect or refusal of the owner of a footwalk within the city of Pittsburgh to pave the same, the street commissioner, in the absence of any law or ordinance to the contrary, is warranted in having the work done without advertising for bids.—*Id.*

18. The only defenses that can be interposed by the owner of a footwalk within the city of Pittsburgh to the contract of the street commissioner for paying the same are the price and quality of the work.—*Id.*

**—Opening streets.**

19. The Pennsylvania act of May 14, 1874, relating to the assessment of damages for the opening of streets by the sewers, does not apply to cases in which streets in Philadelphia have been already located.—*In re Magnolia Ave.*, (Pa.) 406; *in re Widening of New Street*, *Id.* 410.

20. A street marked out or laid down upon a confirmed plan is to be regarded as established or located; and a jury appointed to report upon the necessity of opening such established or located street can only report upon that question, and are without power to assess damages.—*Id.*; *Id.*

**—Negligence.**

21. A municipal corporation authorized to open, grade, and pave streets, and construct gutters and sewers, although not compellable to exercise its powers, must, if it undertakes to do so, adopt reasonable plans, and is liable for any negligence or unskillfulness whereby private property is injured.—*Hitchins v. Town of Frostburg*, (Md.) 836.\*

**Fiscal management.**

22. The common council of Newark passed, over the veto of the mayor, a resolution appropriating money to pay a stenographer employed by a committee to take testimony. *Held*, it being the duty of the mayor to counteract the warrant drawn or such appropriation, a refusal to perform it would be enforced by *mandamus*. *State v. Haynes*, (N. J.) 151.

**—Taxation.**

23. Under the provisions of the city charter of Camden, the receiver of taxes must collect all taxes which are not made by the sale of lands. He has no authority to sell lands for taxes, and no duty to perform with respect to assessments for street and sewer improvements.—*State v. City of Camden*, (N. J.) 137.

24. The seventeenth section of the charter of the city of Camden applies to taxes and assessments, and authorizes the city council to pass the resolution directing the city solicitor to proceed against the lands to enforce payment of an assessment which may be a lien.—*Id.*

25. Under the fourth section of the New Jersey Martin act, (Laws 1893, 1) the city treasurer is the officer who is to collect the readjusted tax assessments, and water rents, to sell the non-payment thereof, and a writ of mandamus must be brought to compel him if necessary.—*Id.*

26. In the case specified by section 4 of the New Jersey Martin act, the city council may elect to proceed under the provisions of the charter, and in that event the provisions of the city charter must regulate the proceedings.—*Id.*

**NEGLIGENCE.**

Contributory, *see, also, Bridges*;

12.

Defective Bridges, *see Bridges*.

—highways, *see Highways*, 10

Injuries to passengers, *see Carriers*

—servants, *see Master and Servant*

In making public improvements, *see Municipal Corporations*, 18-15, 21.

Of landlord in making repairs, *see Landlord and Tenant*, 1, 2.

**Proximate and remote cause.**

1. Even though two causes of an accident exist, without both of which the accident would not have occurred, one is due to negligence, one party's negligence cannot render the other liable to plaintiff for the injury caused thereby because a third party was also in fault.—*Township of Burr v. Burr*, (Pa.) 619.\*

2. Where a horse was frightened by an engine standing in a road, and the occupants of the wagon to which the horse was attached over a steep bank not guarded with a protecting rail, the injury to the horse was no question of proximate or remote cause.—*Id.*

3. Plaintiff's wife was jolted off the seat of a car into the street by the whipping up of the car horses. She was struck and injured by a runaway car. In a suit for damages against the car company, there being no negligence on the part of the driver, it was not the proximate cause of the injury. The court refused, saying

was a question for the jury under the evidence. *Held* error.—*South-Side Passenger Ry. Co. v. Trich*, (Pa.) 627.

### Burden of proof.

4. In an action for damages for injuries resulting from an accident caused by negligence of the driver of a carriage, the burden is on the plaintiff to establish, to the satisfaction of the jury, that the driver was guilty of negligence.—*Hersahberger v. Lynch*, (Pa.) 642.

### Contributory negligence.

5. In an action by a husband and wife for personal injuries to the wife, caused by being knocked off a bridge by a wagon driven by defendant's employe, the evidence was conflicting. The defendant asked the court to instruct the jury "that, under the evidence, the plaintiff was guilty of contributory negligence," and also "that the verdict of the jury should be for the defendant." *Held* properly refused.—*Chautauqua Lake Ice Co. v. McLuckey*, (Pa.) 616.

6. In an action for damages for personal injuries, the court charged that the plaintiff must show, not only that the defendant was negligent, but that the injury was not caused, in whole or in part, by her own negligence. A further instruction was given "that contributory negligence, to be a defense, must have contributed to produce the injury, and even then the defendant must have been in the exercise of ordinary care." *Held*, that the latter instruction, though not proper as an abstract statement, was proper in the connection in which it was given, and could not have operated to mislead the jury.—*Knowles v. Crampton*, (Conn.) 598.

## NEGOTIABLE INSTRUMENTS.

Check of firm, see *Partnership*, 2.  
Reformation, see *Equity*, 5.

### Execution.

1. In a controversy as to the execution of a note with a seal to one of the signatures, but with no seal to defendant's name, the court charged the jury that, "if you find that the defendant signed this note, it is his obligation, on which he would be liable, in this proceeding, for any balance that might be due upon it;" and "if he did so write his name to this note, and you find so from the evidence, your verdict should be for plaintiffs, although he may not have made the seal to the note, or adopted as his the seal that is above his name on the note." *Held*, that the question as to the execution of the note was fairly submitted to the jury.—*McKinney v. McCain*, (Pa.) 111.

2. In a suit brought on two notes, signed by a mark, the maker, the payee, and the two attesting witnesses being dead, a witness testified that he had gone with the payee to the maker 19 years before, as the payee said, to collect some notes; that they looked like those in suit, but witness did not see the signatures. *Held*, that the notes were not sufficiently identified to go to the jury.—*Wolf v. Mackrell*, (Pa.) 320.

### Consideration.

8. Where notes were given by a father to his son, who was also his trustee under an assignment for benefit of creditors, *held*, that the evidence disclosed such a confidential relation between the parties as threw the burden of proving the consideration for such notes upon the son.—*Huffman v. Iams*, (Pa.) 444.

### Accommodation paper.

4. In an action on a promissory note against one as first indorser, the evidence tended to show that the note was the last of several renewal notes, whereon plaintiff and defendant were accommodation indorsers; that, in the usual course of the dealing, the notes had been filled in with plaintiff as payee; and that, at the time of defendant's indorsement of the note in suit, there were no other indorsements on it, and the body of the note was blank. In this note defendant was made payee. The jury were instructed that, if it was one of the renewal notes, they might infer that the parties intended it to be filled and indorsed like the former notes, and that, by mistake, it was not so done. *Held*, that such inference was not warranted by the evidence.—*Ahlborn v. Wolff*, (Pa.) 799.

### Sureties.

5. One who, at the request of the principal in a promissory note, signs as surety, upon condition that another shall also sign as surety, cannot, in an action upon the note, set up as a defense the failure of the condition in the absence of proof of the payee's knowledge thereof.—*Grossman's Appeal*, (Pa.) 725.\*

### Checks.

6. An attachment execution was served on A., a bank, as garnishee, on October 28, 1886, at which time there was a sum of money on deposit with A. to the credit of the defendant. On October 29, 1886, a check was presented, given by defendant on October 23, 1886. *Held*, that the holder of the check had no claim or lien on the fund in the hands of A.—*Kuhn v. Warren Sav. Bank*, (Pa.) 440.

7. A holder of a bank check has no right of action on the check against the bank, although there are funds of the drawer in the hands of the bank sufficient to pay the check, unless the bank has accepted the

check in the hands of the holder.—*First Nat. Bank of Tamaqua v. Shoemaker, (Pa.) 04.\**

8. Where a check is drawn by A. to the order of B., A. has no right of action upon the same; his remedy against the bank is in action for damages for dishonoring his check, or he can bring *assumpsit* for the amount of his deposit; his rights of action being different, therefore, from that of B.. It is error in an action by B. against the bank, where there has been no acceptance by the latter, to allow an amendment substituting A. as the legal plaintiff, particularly when A.'s rights are subject to the bar of the statute of limitations.—*Id.*

#### Lost notes.

9. The loser of a negotiable instrument can recover in an action at law against the maker's administrator, upon proof that defendant can pay it without the hazard of being required to pay it a second time, and in averment of the loss of the note is not necessary.—*Adams v. Baker, (R. I.) 168.*

### NEW TRIAL.

#### Mistake.

A new trial will not be granted on motion of the plaintiff for an alleged error in a surveyor's report in a real action, when the surveyor was a witness for the plaintiff at the trial, and testified to the same fact, and the proposed correction is inconsistent with the declaration in the plaintiff's writ.—*Littlehale v. Littlefield, (Me.) 120.*

### Nolle Prosequi.

As evidence of malicious prosecution, see *Malicious Prosecution.*

### NOTICE.

#### To attorney.

Notice to an attorney of a claim of title under an unrecorded deed is notice to his client; and as against that client, claiming relief as a *bona fide* creditor of the grantee without notice, the uncontradicted testimony of a single unimpeached witness that the attorney had such notice is sufficient to impute notice to the client, although the client in his answer under oath denies all notice.—*Dickerson v. Bowers, (N. J.) 142.*

### NUISANCE.

Diversion of water-course, see *Waters and Water-Courses, 1.*

Obstruction of highways, see *Highways, 15-18.*

— surface water, see *Surface Water, 1-5.*

### Private and mixed nuisances.

1. In an action for maintaining a common nuisance, by carrying on lead-works, with a claim of special damages from noxious gases, plaintiff must show a real and substantial injury, and not merely a trifling one, necessarily resulting from the business.—*Price v. Grantz, (Pa.) 794.\**

2. Where plaintiff declared for a public nuisance, with averment of special damage, an instruction that, under the pleadings, plaintiff must show that, in opening the manufactory complained of, defendants were guilty of maintaining a common nuisance, was improperly refused.—*Id.*

3. In a suit for maintaining a common nuisance, with averment of special damage, an instruction that under the evidence plaintiff has not shown that the manufactory complained of was a common nuisance was properly denied, as the question of nuisance was for the jury.—*Id.*

4. In an action for maintaining a nuisance by erecting lead-works and a shot-tower, from which gases mixed with lead and arsenical poisons were alleged to escape, the court, in its charge, referred to a decision that a smelting company was a nuisance, and that, as both it and the defendants used lead and arsenic in their business, in its opinion it was a nuisance to erect works producing like effects, though the business were different. *Held*, that it was error, to overlook the difference in degree; defendants alleging that the quantity of noxious gas thrown off was too small to affect the comfort of the neighborhood.—*Id.*

#### — Peculiar susceptibility.

5. An undertaking establishment in a populous city is not a nuisance *per se*, and the burden of showing such an establishment to be a nuisance is on the complainant. That a single person of a most sensitive taste on the subject is seriously disturbed thereby, and no others are called who have been annoyed, is not enough to justify the interference of the court.—*Westcott v. Middleton, (N. J.) 490.*

6. In an action for damages for a common nuisance in permitting noxious gases to escape from lead-works, an instruction that "the effect of a peculiar and very exceptional idiosyncrasy or susceptibility on the part of a person by which he or she may be affected by a slight trace of arsenic or lead, which would not in any degree affect other persons, would not be such an injury as would of itself condemn the source of such effect as a nuisance," was improperly refused, when there was testimony from which the jury might infer such susceptibility in plaintiff's wife.—*Price v. Grantz, (Pa.) 794.\**

**Injunction.**

7. Plaintiffs, residents and owners of property in a thickly-populated neighborhood, filed a bill asking that defendants should be enjoined from erecting buildings for a bone-boiling establishment. *Held*, that an injunction restraining the use of the buildings as a bone-boiling establishment was properly issued, but that the erection of the buildings was not a nuisance, and the portion of an injunction restraining that must be dissolved.—Appeal of Czarniecki, (Pa.) 680.

**ORDERS.****Acceptance.**

In an action by the owner of a building against the creditors and mechanic's lien claimants of the contractor, to settle to whom the balance due under the contract was to be paid, defendant claimed under an order given on the owner by the contractor, which was general in its terms. Upon presentment the owner made no formal acceptance, but said there was now no money due the contractor, but he would pay the order out of the first money due him, and retained the order. *Held*, a sufficient acceptance.—McPherson v. Walton, (N. J.) 21.

**Parent and Child.**

Note from father to son, consideration, see *Negotiable Instruments*, 3.  
Oral gift of land, see *Gifts*, 2.  
Power of parent to bind child as apprentice, see *Apprentice*.

**PARTIES.**

Capacity, see *Wills*, 6.  
In actions against executors, etc., see *Executors and Administrators*, 26, 27.  
equity, see *Creditors' Bill*, 2; *Equity*, 20; *Specific Performance*, 2; *Trusts*, 7.  
Substitution, see *Abatement and Revival*, 2, 3; *Negotiable Instruments*, 3.

**Joinder.**

A life-tenant and remainder-man may join in an action for an injury to land which affects both the possession and the fee-simple.—McIntire v. Westmoreland Coal Co., (Pa.) 808.

**PARTITION.****Personal property.**

1. Where there is inadequacy or absence of a legal remedy, as for a partition of personal property owned by co-tenants, equity has jurisdiction, and, if a partition is impracticable, will order a sale and an ac-

counting between the co-tenants.—Spaulding v. Warner, (Vt.) 186.

**Equal justice impossible.**

2. In a suit for partition of lands, where it appeared that there were valuable mineral deposits beneath the surface, but their exact locality, extent, or value was uncertain, rendering it impossible to do equal justice between the parties, *held*, that under act N. J. April 20, 1885, providing that a division or partition is not to be made if it will work great prejudice to the owners, the court would not decree a partition.—Kemble v. Kemble, (N. J.) 783.

**Decree.**

3. A tract of land was partitioned by order and decree of court in 1881. A motion was made by a purchaser of a purpart sold under the decree, praying that the plaintiff in the partition suit should show cause why an order directing certain interest to be paid to plaintiff under the decree, as tenant by curtesy, should not be rescinded and set aside. *Held*, that the order was consistent with the judgment, and while that stands the order would stand, and the motion was properly overruled.—Appeal of Clemans, (Pa.) 659.

**PARTNERSHIP.**

Dissolution, see *Pledge*, 8.

Judgment against, see *Judgment*, 4.

**Construction of articles.**

1. Where articles of partnership provided that the profits should be divided into tenths, of which the first party to receive six, the second three, and the third one, a provision in the articles that the first party guaranties profits to the second party equal to 20 per cent. on his investment is merely a personal agreement, and will not operate to increase the second party's share beyond said three-tenths as regards the firm.—Appeal of McIntire, (Pa.) 784; \* Appeal of Nellis, (Pa.) 786.

**Power of partners to bind firm.**

2. One partner has authority to assign and dispose of a patent-right belonging to the firm of which he is a member, and of this authority he cannot be deprived by any action on the part of his copartners.—Christ v. Firestone, (Pa.) 895.

**Payment of private debt.**

3. One of the defendants gave a firm check of the firm in payment of his individual note. The other defendant, his copartner, hearing of it, stopped payment of the check. *Held*, that as the transaction was a fraud on him he could not be held on the check.—Graham v. Taggart, (Pa.) 652.

4. Plaintiff, trustee of a savings bank took from one of the defendants, in pay-

ment of his individual note, a check of the firm of which he was a partner, knowing that the signature and writing in the check were in the handwriting of the maker of the note. *Held*, that these facts were notice to plaintiff that defendant was applying the firm assets to his private use, and they took the risk of the assent of the other partner.—*Id.*

#### Accounting between partners.

5. Upon an accounting between S., W., and B., the only matter in dispute was a sum of money which S. claimed he had paid to B. in the course of the firm's business, and for which he had not been allowed credit. The evidence was uncontradicted that the money had been paid to S. for the firm, and the testimony as to his having turned it over to B. was conflicting. *Held*, that the burden of proof to establish payment to B. was upon S., and that he had failed to make out his case.—*Silverthorn v. Brands*, (N. J.) 828.

#### Firm and private creditors.

6. A constable levied executions, issued against the individual members of a firm, upon the firm property. Before sale the sheriff levied an execution on the firm property, issued on a judgment against the firm. *Held*, that the sale under the constable's writ only passed the interest of the individuals in the firm, and the sale under the sheriff's writ passed the firm property; and the vendees under the constable's sale would only be entitled to relief after the satisfaction of the execution levied by the sheriff.—*Richards v. Allen*, (Pa.) 552.\*

7. Labor claims upon which judgments have been rendered against a firm after the transfer of the interest of one member, and an assignment by another, are invalid as against the individual estate of the latter, to the exclusion of individual creditors.—*Appeal of Fox*, (Pa.) 228.

#### Actions against.

8. A summons was issued against two partners, both of whom were served. One of them neither appeared nor pleaded, and no interlocutory judgment was entered against him. The jury were sworn generally as to both defendants, under objection, but without exception; and a verdict was taken and judgment entered against both. *Held*, such judgment was invalid against defendants, either individually or as partners.—*Corcoran v. Trich*, (Pa.) 677.

9. One of two defendants, sued as partners, filed an affidavit of defense, denying the partnership, and any indebtedness to plaintiff, either individually or as partner. The court admitted in evidence plaintiff's affidavit of claim as an admission by both defendants of the amount due. *Held error*. The affidavit of defense being a sufficient

denial of the partnership and the amount due, the affidavit of claim was inadmissible as an admission by the defendant appearing, though an admission of the partnership, and the amount due by the defendant who did not appear.—*Id.*

### Patents for Inventions.

Assignment, see *Partnership*, 2.

#### Payment.

Of insurance premium, see *Insurance*, 1-8.  
On policy of insurance, see *Insurance*, 18-15.  
Presumption from lapse of time, see *Judgment*, 14.

#### Penalty.

See *Damages*, 2-4.  
Enforcement in equity, see *Sale*, 7.

### PLEADING.

See *Equity*, 12-19.  
Answer in divorce, see *Divorce*, 6-9.  
Estoppel by, see *Estoppel*, 1.  
Pleading and proof, variance, see *Appeal*, 11; *Highways*, 18.  
Plea in abatement, see *Bastardy*, 5; *Bonds*, 1, 2.

#### Demurrer.

1. A general demurrer to an entire declaration, containing a special count on a policy of life insurance, a count on account settled or stated, and the common counts, is bad, if any count is sufficient.—*Langley v. Metropolitan Life Ins. Co.*, (R. I.) 174.

#### Motion to dismiss.

2. Defendant was sued as the "B. & L. R. Co., a company duly organized under the laws of this state." The service of the writ was as required by statute by leaving a copy with the clerk. A motion was filed to dismiss on ground that the service was illegal; but not specifying any error, or the method of correcting it. *Held*, that it is presumed that defendant is a corporation organized under the general law; and that the motion is faulty in not pointing out both the defect and its correction.—*Nye v. Burlington & L. R. Co.*, (Vt.) 689.

#### Variance.

3. In an action of covenant on a contract, which stipulated that no claim for extra work should be allowed, unless such work was done upon a written order signed by the engineer and approved by the examiners, plaintiff alleged in one count of his declaration that such extra work was done according to contract, and offered evidence to show that such work was done

without such written orders, but with the consent of defendants, and upon their express promise to pay for the same. *Held*, that the evidence was not responsive to the pleadings, and was properly excluded.—*O'Brien v. Fowler*, (Md.) 174.

## PLEDGE.

### Sale by pledgee.

1. Complainant borrowed money on certain notes, pledging stock as collateral security. The note authorized the holder, upon non-payment, to sell the stock at private or public sale without demand of payment or further notice. *Held*, that a sale by the pledgees, after maturity of the note, without notice, was valid, and divested the title of the pledgeor.—*Appeal of Jeanes*, (Pa.) 862; *Appeals of Elbert*, Id. 866.

2. The maker of a note pledged, as collateral security, certain shares of railway stock, the note containing power of sale of the securities on non-payment. Part of the stock proved to be a fraudulent over-issue by the officers of the company, which was compelled by the court to issue *bona fide* certificates therefor to the pledgees, who, upon non-payment of the note, afterwards sold them, without notice to the maker. *Held*, that the power of sale in the note applied to the substituted certificates.—*Id.*

3. A partnership discounted a note, taking certificates of stock as collateral. The note contained power of sale of the collateral on non-payment without notice. The partnership was dissolved, and, the note being unpaid, the collateral was distributed among the partners, who sold it separately at private sale, without notice. *Held*, that the power to sell was properly exercised.—*Id.*

## POOR AND POOR LAWS.

### Settlement of paupers.

1. The evidence showed that, at the time of pauper's birth, her parents had their legal settlement in D. township, where they resided for 14 or 15 years; that the father then abandoned the family, and never took any further care of them, but removed into another township, and bought land, and lived with another woman; that the mother (but at what time did not appear) sold the place, and removed into A. township, and afterwards married, and went to live with her second husband in S. township. The pauper lived with her mother both in A. and S. townships, but the evidence did not show that the mother acquired any settlement in S. during the minority of the pauper, or that the pauper acquired any settlement after her majori-

ty. *Held*, that D. township was the last place of legal settlement of the pauper.—*Overseers of Donegal Tp. v. Overseers of Sugar Creek Tp.*, (Pa.) 213.

### Maintenance—Medical services.

2. A physician attended a boy who had been injured by a railroad train. The boy was unable to pay, and the railroad company refused to pay the physician's bill. The bill was approved as correct by two justices of the peace, and the physician sued the poor district. *Held*, that the physician was entitled to recover from the district compensation for his services.—*Poor District of Summit Tp. v. Byers*, (Pa.) 242.

### Proceedings for removal.

3. In proceedings under act Pa. June 13, 1836, § 18, providing for the removal of those who are likely to become chargeable upon the town, to the place of their legal settlement, notice of the hearing before the magistrate must be given to the person to be removed, and an adjudication had upon the question; otherwise the proceedings are void.—*Overseers of Gilpin Tp. v. Overseers of Park Tp.*, (Pa.) 791.

4. Where a pauper, having a settlement in D. township, came into S. township, but before acquiring a settlement became insane, and was sent to the lunatic asylum, *held*, that this was not a case within act Pa. June 13, 1836, § 23, relating to relief of paupers who become sick or die before acquiring a settlement, and providing for notice to the township of their settlement and proceedings, by complaint before the quarter sessions; but that the overseers could proceed under sections 16 and 18 of that act, providing for proceedings for removal, by information before magistrate, and the removal need not be actual, but a transfer by delivery of the order of removal is sufficient.—*Overseers of Donegal Tp. v. Overseers of Sugar Creek Tp.*, (Pa.) 213.

## POOR DEBTORS.

### Application for discharge.

Petitioner claimed the benefit of the insolvent law, alleging that he had surrendered himself into the custody of the sheriff, and that he was then in such custody. The uncontradicted evidence showed that, at the time of presenting his petition, he was not in custody nor restrained of his liberty. *Held*, that as one of the essential allegations of his petition was untrue, an exception to his discharge should have been sustained.—*Eshenbaugh v. Bricker*, (Pa.) 818.

### Powers.

Execution, see *Pledge*, 1-3.

## Practice in Civil Cases.

See *Action; Appeal; Certiorari; Costs; Equity; Error, Writ of; Interpleader; Judgment; New Trial; Parties; Pleading; Reference; Set-Off and Counter-Claim; Trial; Witness.*

## PRINCIPAL AND AGENT.

**Estoppel** to assert agency, see *Replevin*.

### Authority of agent.

1. In an action for personal services against a railroad company, it appeared that plaintiff authorized an ex-president of the road, by letter, in relation to his vouchers for such services, which had been left with the ex-president for settlement prior to his resignation as follows: "I hereby authorize you to make the best settlement you may be able to do for me." *Held*, that the ex-president by virtue of this letter was authorized as plaintiff's agent, not only to determine upon the amount he should receive, but to collect and receipt for the money coming to him under the settlement.—*New York, P. & N. Ry. Co. v. Bates*, (Md.) 705.

2. In an action on a contract, defendant testified that at the time of signing it was read to him at his request by the party who had been commissioned by plaintiff to bring it to him; and that said party had read it as if it included a stipulation contained in the original agreement as to the matter, which stipulation was in reality not in the written contract. *Held*, that the burden of proof was on defendant to show that the party reading the contract had authority from plaintiff to represent that such a stipulation was inserted therein, and that, in the absence of such proof, plaintiff was not bound by any such representations, as said party, in reading the contract, must be taken to have been the agent of defendant.—*Sylvius v. Kosek*, (Pa.) 892.

## PRINCIPAL AND SURETY.

**Conditional contract**, see *Negotiable Instruments*, 5.

**Rights of sureties**, see *Subrogation*, 8.

### Release and discharge.

1. The recital in the note of a director given to a bank as collateral to a note of his company, that the company's receipts for a certain month are pledged to the payment of the principal note, does not bind the bank to appropriate such receipts as deposited to the payment of the note; and having notice at the time the note is discounted, of an appropriation of the receipts to another purpose, it may pay them

out for such purpose by order of the company; and on default in payment of the principal note the liability of the maker of a collateral note becomes absolute; following *Street v. Old Town Bank*, 10 Atl. Rep. 819.—*Wilson v. Old Town Bank*, (Md.) 759.

2. Plaintiff sued defendants as sureties on her guardian's bond, alleging a decree against him on final accounting in July, 1886, which had never been paid nor appealed from. Defendants, in an affidavit of defense, alleged a receipt in full, duly executed by plaintiff at the June term, 1886, in the orphans' court, whereby she released her guardian in full of all moneys coming to her; that a writ of attachment was issued against him by the orphans' court; that, after arrest, he was released by plaintiff and her counsel from all liability under the decree; that it was her duty to attempt to collect the amount from the guardian, and her failure to do so, and her release of him, released the sureties. There was no averment of payment of the decree; and the affidavit was made "to the best of the information and knowledge of affiants," but did not state their belief in the information. *Held*, that the affidavit constituted no defense.—*Cook v. Commonwealth*, (Pa.) 574.

3. A petition to compel the administratrix of a surety on a deceased guardian's bond to sell real estate, to pay a judgment recovered on the bond, was resisted on the ground that the surety had been released by the negligence of a subsequent guardian in not enforcing the claim against the principal, and that the judgment against him on which the judgment against the surety was founded, was obtained after the latter's release, and without notice to his administratrix. *Held*, that the mere forbearance of the subsequent guardian to avail himself of the means of satisfaction of the claim would not release the surety.—*Appeal of Neel*, (Pa.) 636.\*

### Contribution between sureties.

4. One of two sureties on the bond of an insolvent guardian voluntarily paid half the amount found due the ward by the orphans' court. Judgment went against him for the balance in a suit subsequently brought against him by the ward, and he paid that. *Held*, that he might proceed against his co-surety for contribution without first reducing his claim to a judgment, and that, as incidental to such relief, he might compel discovery as to an alleged fraudulent transfer of property by the co-surety, since the liability on the bond accrued, and be relieved upon proof of such fraud.—*Neilson v. Williams*, (N. J.) 257.

5. Plaintiff and the defendants were sureties for different amounts on separate appeal-bonds, given by one B. To indem-

nify them. B. gave them one bond, to secure to each, *pro rata*, the amount he might have to pay on the appeal-bond signed by him. Plaintiff and defendants were compelled to pay the bonds signed by them, and entered up judgment against B. on the indemnifying bond. The defendants assigned their interest in this judgment to the wife of B., she paying to each, from her own money, the amount he had paid on the bond on which he was liable. Plaintiff sued the defendants for a *pro rata* distribution of the money received by them. *Held*, that defendants were not liable to their co-surety for contribution for the money received by them from the purchaser of their interest in the judgment against their principal, when the money so received was not that of the principal debtor.—*Hutchinson v. Roberts*, (Del.) 48.

## PUBLIC LANDS.

### Titles under state laws—Maryland proclamation warrants.

In an action of trespass *quare clausum fregit* title was claimed by both parties under special proclamation warrants, dated, plaintiffs' March 21, 1794, and defendant's October 4, 1793. *Held*, that defendant's title was superior to plaintiffs', as the title to land relates back to the date of the warrant, which was equivalent to a designation of the location by actual survey.—*Koch v. Maryland Coal Co.*, (Md.) 700.

## Qui Tam and Penal Actions.

See *Fisheries*, 2; *Highways*, 18.

## RAILROAD COMPANIES.

See, also, *Carriers*; *Eminent Domain*.

Negligence, injuries to servants, see *Master and Servant*, 14, 15, 19, 23.

### State regulation—Passenger traffic.

1. Cape May is not a sea-side resort within the meaning of act N. J. March 8, 1880, providing that a railroad, at any sea-side resort less than four miles in length, built merely for summer travelers and tourists, shall be excepted from Rev. N. J. p. 943, § 160, providing that if any railroad fail to run daily trains on any part of its road, on petition of any citizen, a receiver may be appointed; affirming ante, 261.—In re Delaware Bay & C. M. R. Co., (N. J.) 737.

2. Rev. N. J. p. 943, § 160, provides that on petition and proof that a railroad has failed to run daily trains for ten days "the chancellor of this state" shall appoint a receiver. Rev. N. J. p. 126, c. 116, provides that the chancellor may refer to the vice-chancellor any pending cause or matter to

hear for him, and report and advise. *Held*, that the vice-chancellor has jurisdiction to hear the petition.—*Id.*

### Construction of road.

3. Whenever it is necessary to erect a railroad embankment, a proper outlet, of ample capacity to carry off all water, must be provided, to prevent damage to contiguous property; but this rule does not contemplate excessive rain-falls of infrequent occurrence and beyond ordinary foresight.—*Philadelphia, W. & B. R. Co. v. Davis*, (Md.) 822.

4. A railroad company, incorporated under the Pennsylvania general railroad act of April 4, 1868, (P. L. 62,) has full power to carry its tracks across the streets of a borough, and in so doing it is not a trespasser, nor are its acts unlawful.—*Appeal of Borough of South Waverly*, (Pa.) 245.

5. The manner of crossing the streets of a borough, incorporated under the Pennsylvania general borough act, rests within the discretion of the railroad company, when so incorporated, and after the road is built and in operation nothing less than a gross abuse of that discretion will justify the interference of a chancellor.—*Id.*

6. A railroad, incorporated under the general railroad law, carried its tracks across streets of a borough, incorporated under the general borough act. After the road was built and in operation, the borough filed a bill in equity, averring that the streets crossed were not properly bridged, that the crossings were now dangerous to the public, and detrimental to the business interests of the community, and praying relief in the premises. A master was appointed, who reported (1) that, at two crossings, the company had built wagon-bridges; that at both there was much travel both on foot and in teams; that horses were frequently frightened by the noise of moving trains, rendering the bridge unsafe for foot passengers; (2) that at another crossing, used necessarily by nearly all the inhabitants and many school children, the company had numerous tracks; that there the noise of moving trains was almost constant; that this crossing was dangerous; and that parties were frequently delayed here waiting for the tracks to be cleared, as there was no bridge; and also that the common council of the borough had passed a resolution requiring a bridge at these three crossings, the provisions of which had been accepted by the railroad company. *Held*, (1) that the company had the right to construct its road over the streets in question; (2) that the facts of the case did not show such a gross abuse of that right as would authorize the interference of a court of chancery; and (3) if the borough had the right to make the contract

with the railroad company, their only remedy for a breach thereof was an action at law for damages.—*Id.*

### Taxation.

7. The West Shore & Ontario Terminal Company is a railroad corporation, and liable to be taxed under the N. J. "Act for taxation of railroad and canal property," approved April 10, 1884.—*State v. Bettie*, (N. J.) 17.

8. Under N. J. act of April 10, 1884, relating to the taxation of railroads, debts cannot be deducted from the valuation of the property by the state board of assessors unless applied for under the twenty-first section of said act.—*Id.*

9. In the absence of proof, the court will not interfere with the valuation of the franchise of a railroad by the state board of assessors, made at the taxing date.—*Id.*

10. Where property has been returned to the state board as used for railroad purposes, and has escaped local taxation, it is too late to claim exemption from the valuation by such board.—*Id.*

11. The state board of assessors, in the valuation of railroad property, must give its true value, and is not necessarily governed by the valuation of the local assessors, and it is no objection, within the meaning of the N. J. act of April 10, 1884, that its valuation is higher than that of the local assessors, in the absence of other proof that the value is assessed too high.—*Id.*

12. Where the railroads claim and establish the right of deduction under N. J. act of 1884, section 12, relating to the taxation of railroad property, such deduction must be made from the local tax, and not from the state tax of one-half of 1 per cent. By the act of 1884, the legislature did not intend, in any event, to diminish the revenue of the state, by reducing the tax of one-half of 1 per cent.—*Id.*

### Receivers.

Appointment, see *Railroad Companies*, 1, 2.

Contracts, see *Chattel Mortgages*, 2.

For mesne profits, see *Ejectment*, 8.

### REFERENCE.

#### Auditor's findings of fact.

1. An auditor's finding of fact must be accepted, unless error clearly appears.—*Appeal of Atkinson*, (Pa.) 289.

2. An auditor found the fact that a decedent gave his son money to pay for a farm on condition that the son was to pay interest on the money during the father's life, and that the son was not required to repay any part of the principal. *Held*, that the conclusion of the auditor was a finding of fact, and not a mere inference from a fact found.—*Appeal of Ames*, (Pa.) 282.

### REPLEV

#### When lies.

A principal, whose as a license granted to the sends himself to be the estopped from maintain replevin for the proper attached as the proper *Barron v. Arnold*, (R. I.

### Resciss

Of contracts, see *Contract* 8; *Sale*, 2-4.

### RIPARIAN I

#### Overflow of lands.

1. Plaintiff was ripa stream on which defend leges, and sued him fo land through neglect in embankment. The coufendant guilty of the neg extreme northern point i duty of defendant to mai ment could not be exac between the points P an tained in the record, an broke through between t that the finding was suff maintain the judgment.— *Parker Co.*, (Conn.) 188.

2. Defendant moved th to recommit the finding damages for failing to with directions to locate which he could maintai plaintiff's right to judgm ages was absolute, and even if admissible, was t

### SALE.

Fraud of buyer, see *Decei*

— rights of subsequer

chaser, see *Auction* and

Judicial sales, see *Judicia*

Of realty, see *Vendor* and

Tax sales, see *Taxation*, 1

Warranty, contract of inf

What constitutes, see *Bar*

#### Action for price.

1. Plaintiff purchased which there was an appli ent. Defendant claimed th the manufacturer to pa Plaintiff claimed the pri manufacturer, and that h inventor when the paten The defendant asked the the jury "that the questio patent of the coke-crushe in this case, and that, if

that the agreed price of the machine was \$500, a failure to obtain a patent afterwards would not affect the contract." *Held*, that the refusal to give such instruction was not error.—*McKnight v. Mathews*, (Pa.) 876.

### Rescission—Fraud.

2. On the trial of a cause, the issue being whether the vendee had purchased certain goods fraudulently, the evidence showed that he began a jobbing business in a basement room about June 15, 1885, and on August 21st bought the goods in question, worth \$6,000, to be paid for October 10th; that, before July, he began sending goods to an auctioneer for sale, and so continued till September 5th, when he had left a stock worth \$400 or \$500, though he had the week before a stock worth \$15,000; that the auction sales realized over \$6,400; that on September 7th he withdrew nearly all of his bank deposit; and that, after September, the business was conducted in his wife's name. *Held*, that the evidence tended to show that the purchase was fraudulent.—*Higgins v. Lodge*, (Md.) 846.

3. Upon the trial of an action for goods sold and delivered, defendants alleged that they were induced to enter into the contract by the false representation of plaintiff's agent that they had 14 orders for the goods in defendants' district, which orders they would transfer to defendants. Some of the orders were forged, and others conditional, but the evidence did not cover all the 14. *Held* that, nevertheless, having proved a fraudulent misrepresentation as to a material fact, defendants were entitled to a verdict.—*Henkel v. Trubee*, (Conn.) 722.\*

4. Suit was brought to compel a reconveyance of property alleged to have been obtained through false representations of defendant as to the solvency and success of a corporation of which he was a director, and a number of shares of whose stock had been the consideration of the conveyance. The evidence showed that the stock never had any market value, and but little had ever been sold for an actual money consideration. Most of it had been transferred to employes in payment for alleged services, or to others gratuitously. Defendant owned more than half of the stock, for which he had paid nothing, and the institution had done scarcely any business. Nor was it at the time of the conveyance the owner of the machinery it was represented to own, though some time afterwards there was a pretended purchase thereof from another corporation of which defendant was director or manager. *Held* sufficient evidence of fraud upon which to decree a reconveyance.—*Gray v. Robbins*, (N. J.) 860.\*

### Sales on condition.

5. A contract for the sale of certain goods stipulated the title should not pass until payment, in installments, was made in full. The vendee mortgaged the goods to various persons, only one of whom had notice of the contract. The property passed into the hands of receivers, and the vendors asserted title, and asked the delivery or value of the goods. *Held*, the vendor could not recover, except as to the mortgagee having notice of the contract; and not as against him in this case, as the prayer of the petition was for the whole property, and directed against all the mortgagees.—*Lincoln v. Quynn*, (Md.) 848.

6. Where a contract of sale stipulates for payment by installments, to be secured by promissory notes, which notes the buyer after delivery of the goods refuses to give, the seller may either treat the contract as broken, and sue for damages, or regard it as subsisting, and sue for each installment as it falls due.—*Clarke v. Dill*, (Pa.) 82.

7. Where it was stipulated in a contract for the sale of goods, payable in installments, that, if default was made in any of the credit payments, the vendor might reclaim and take them, and that all payments made at that time should be forfeited, *held*, such forfeiture would not be enforced by a court of equity.—*Lincoln v. Quynn*, (Md.) 848.

## SCHOOLS AND SCHOOL-DISTRICTS.

### School taxes.

School taxes upon unseated lands are to be collected by the counties as trustees for the several school-districts, and the treasurer is entitled to receive for his services on behalf of the county "a certain amount per cent. on all moneys received and paid out by him."—*County of Cameron v. Shippen Tp. School-Dist.*, (Pa.) 534.

### Scire Facias.

See *Judgment*, 14.

## SET-OFF AND COUNTERCLAIM.

### When allowable.

1. Defendant, in an action of *scire facias* to revive a judgment, offered certain claims against the plaintiff, being unsettled partnership accounts, as a set-off, and the court instructed the jury that they were not available as a ground of recovery against the plaintiff in this proceeding. *Held*, that the instruction was proper.—*Jenkins v. Anderson*, (Pa.) 558.

2. After a sale by the sheriff of certain property, the original owner was permitted by the purchaser to remain on the land for a certain time, on consideration of a note to the purchaser, and other valuable consideration. In an action on the note, one of the defendants offered to testify that he paid certain taxes, while the tenant of the plaintiff, under and by plaintiff's direction, but his offer did not specify that they were taxes which plaintiff was legally bound to pay, and nothing appeared to show that they were. *Held*, that the evidence was properly rejected as irrelevant. — *Hill v. Truby*, (Pa.) 89.

### Sewers.

See *Municipal Corporations*, 18-15.

## SHERIFFS AND CONSTABLES.

Liability for false imprisonment, see *False Imprisonment*, 1.

### Refusal to pay over money.

Where a sheriff refused to pay into court money raised upon an execution on a judgment at law, upon due notice in behalf of the equitable assignees of a definite part of such moneys, the court, in order to protect the rights of the assignees, may compel him to do so. — *Brown v. Dunn*, (N. J.) 149.

## SPECIFIC PERFORMANCE.

Decree, bar to ejectment, see *Judgment*, 1.

### Laches.

1. Defendant, being a part owner, sold an undivided and undetermined one-tenth interest in certain coal land, to one who paid one-half the purchase money, but refused to pay the balance, and did nothing for eight years, when his assignee in bankruptcy sued for specific performance. A railroad had been built, and coal mines opened on some of the lands, which had greatly enhanced in value. *Held*, that neither the circumstances of the case, nor the conduct of the purchaser, was such as to entitle plaintiff to relief in equity. — *Ruff's Appeal* (Pa.) 558.

### Parties.

2. M. entered into a contract for the purchase of land of A. B. paid A. the consideration money: it being agreed between the parties that, when A. conveyed to M., B. should receive a mortgage on the property for the money advanced. In a bill by the heirs of M. for specific performance, *held*, that B. was a necessary party. — *Appeal of Alexander*, (Pa.) 83.

### Decree.

3. A building contract provided that upon final settlement the contractor was to take in payment two houses at a fixed value; and the contractor, before completing the contract, and with the knowledge of the owner, but without his assent to the price, agreed to convey one of the houses to a third person; and, by reason of the contractor's failure to complete the contract, the balance due was not equivalent to the value put upon the houses in the contract. In an action by the owner against mechanics' lien claimants, to settle to whom the balance should be paid, *held*, that a conveyance of the house will be decreed in accordance with the agreement, conditioned that such third person pay the difference between the amount paid by him to the contractor under the agreement to purchase and the value of the house as fixed by the building contract. — *McPherson v. Walton*, (N. J.) 21.

4. A. contracted to sell certain lands to M., reserving to himself certain mining privileges. After the death of M., and before the conveyance of the land, A. wrote to M.'s heirs offering \$100 "in lieu of my omission to reserve the coal in the bottom lands." A. finally tendered a deed in substantial compliance with the terms of the original contract. *Held*, that what was said in the letter was merely an expression of opinion, and could not control the meaning of the language of the contract; and that the conveyance should be made in accordance with the intent of the contract. — *Appeal of Alexander*, (Pa.) 83.

## STATES AND STATE OFFICERS.

Condemnation of land by state, see *Eminent Domain*, 1.

### Governor—Power to appoint investigating commission.

The governor of the state of Rhode Island has power to appoint or employ others to make inquiry for him, and report the facts, upon charges made of malfeasance and non-feasance in the management of the state prison, etc., but they would not be "officers," within the meaning of Pub. St. R. I. c. 23, § 5. They could not administer oaths or summon witnesses, and compel them to testify, or punish them for contempt. — *In re Investigating Commission*, (R. I.) 429.

## STATUTES.

Repeal by constitution, see *Constitutional Law*, 5.

### Amendment.

It is not necessary in legislation amending statutes, to set forth the amended statute, and also the statute as it was before amendment. The mischief to be remedied by the constitutional amendment does not require it, nor does the language of the constitution. It is sufficient to set forth the amended act in full.—*State v. American Forcite Powder Manuf'g Co.*, (N. J.) 127.

### SUBROGATION.

Of insurer to lien of mortgage, see *Insurance*, 15.

#### Payment by third party.

1. A married woman gave her debtor his note for \$366, which she owned, on condition that he pay her note of \$125 at a bank, and a note of her husband for \$1,000, which he had indorsed. The debtor had a mortgage given by the husband as security for the indorsement, which had been conveyed to trustees for the benefit of creditors. *Held* that, in absence of an agreement, she was not subrogated to the interest of her debtor in the mortgage.—*Troxall v. Silverthorne*, (N. J.) 684.\*

2. One S. gave to her debtor his note, which she owned, for \$66, on condition that he pay her note for \$125, and her husband's note for \$1,000, which he had indorsed. A mortgage made by her husband, as security for the indorsement, had been assigned to trustees under an agreement that from the proceeds of foreclosure they should, after paying a small note, pay the balance to the indorser, if he paid the note. *Held*, that any balance he received, after repaying any money he paid out on the two notes, belonged to S.—*Id.*

#### Rights of sureties.

3. The sureties upon a note given by a married woman for money borrowed for repairs to her separate estate, which is not binding upon her, having paid the same, are merely subrogated to the rights of the holder, and are not, therefore, entitled to recover from the married woman.—*Sellers v. Heinbaugh*, (Pa.) 550.

#### Voluntary payment.

4. In an action to enforce a claim against the estate of a decedent, the evidence showed that plaintiff voluntarily paid the undertaker's bill for the burial of the decedent, and took no assignment or anything to show that the payment was intended otherwise than as an absolute discharge of the debt. Afterwards he asked to be subrogated to the rights of the undertaker. *Held*, that having voluntarily paid the debt of another, he was not entitled to the relief asked.—*Fay v. Fay*, (N. J.) 122.\*

### SURFACE WATER.

Duty to provide for, see *Railroad Companies*, 3.

#### Obstruction.

1. Defendants erected a tight board fence between their lot and plaintiffs', whereby the surface water from plaintiffs' lot was stopped from flowing on theirs. The fence was built in part on a portion of the division line which was to have been fenced by plaintiffs. *Held*, that defendants had a right to erect a perfect barrier to the surface water, and it was not modified by the agreement as to the portion of the fence to be built by plaintiffs.—*Chadeayne v. Robinson*, (Conn.) 592.

2. If a railroad company closes a usual outlet for surface water, raising the bed of a street, and constructs another outlet of insufficient capacity to carry the water likely to be in it, it is liable for damages to contiguous property occasioned thereby.—*Philadelphia, W. & B. R. Co. v. Davis*, (Md.) 822.

3. In an action for damages to plaintiff's house by defendant having obstructed or altered the outlet for surface water, an instruction that, "if the jury find the construction or alterations of plaintiff's house were sufficient to cause the injury, plaintiff is not entitled to recover," assumes that such construction or alterations actually did cause the injury, and was properly modified by adding, in effect, "unless the jury find that the injuries were caused by acts of the defendant."—*Id.*

4. In an action for damages for the overflow of water caused by defendant's neglect to construct a proper drain, the evidence showed that the surface water was obstructed by defendant's plank-road so that it flowed through a culvert upon plaintiff's premises; that when plaintiff bought the premises she had filled up an old quarry where the water formerly flowed, and had constructed a road that changed somewhat the flow of the surface water. Defendant asked the court to instruct the jury that plaintiff had herself obstructed the flow of the water and caused the injury for which the action was brought. *Held* properly refused.—*Plank-Road Co. v. McCloy*, (Pa.) 819.

5. The evidence tended to show that, after plaintiff bought the premises, the culvert under defendant's plank-road was made larger or the drainage above changed so that more water than usual flowed over plaintiff's land. The court charged the jury: "The question of fact then is, is there an increase in that culvert or change in the drainage above, by which a larger quantity of water is thrown on her lot than formerly?" *Held* not error.—*Id.*

## TAXATION.

Constitutional power, see *Constitutional Law*, 5-7.

Municipal, see *Municipal Corporations*, 28-26.

Of railroads, see *Railroad Companies*, 7-12.

School taxes, see *Schools and School-Districts*.

### Exemption.

1. The relator's charter provides "that the premises \* \* \* and fixtures of said cemetery shall not be subject to any assessments \* \* \* unless \* \* \* ordered by the \* \* \* freeholders of the county of Essex." *Held*, not to be a contract with the state, but a delegation by the legislature to a subordinate public body of the power to tax the cemetery, and repealable.—*State v. City of Newark*, (N. J.) 147.

2. The New Jersey act of April 4, 1878, p. 629, providing "that \* \* \* land \* \* \* in the city of Newark, owned, \* \* \* or which may hereafter be owned \* \* \* or vested in, any society \* \* \* now existing in said city, under whatever charter or act, \* \* \* shall \* \* \* be subject to and liable for \* \* \* assessments for street openings, and all \* \* \* local improvements in said city, \* \* \* the same and as fully as property owned by individuals, \* \* \* any exemption or provision \* \* \* in the charter, \* \* \* or in any supplement thereto, to the contrary notwithstanding," operates as a repeal of any exemption which might exist.—*Id.*

3. The defendant, Mercantile Library Association of Pittsburgh, owned stores which the act of April 18, 1864, exempted from taxation. The constitution of 1874, art. 9, § 1, provided that " \* \* \* the general assembly may, by general laws, exempt from taxation public property held for public purposes, \* \* \* and institutions of purely public charity. \* \* \* All laws exempting property from taxation other than the property enumerated shall be void." *Held*, that the statute exempting its property was rendered void by the adoption of the constitution.—*Mercantile Library Hall Co. v. City of Pittsburgh*, (Pa.) 667.

4. A supplement to the act of incorporation of the Wagner Free Institute of Science provided "that the cabinet collection and lot of ground on which it is erected, belonging to the said institution, with any gifts, bequests, or endowments, shall be exempt from taxation." The corporation was also authorized to accept a deed for certain real estate conveyed to it, and "to hold the premises and property therein mentioned, including all endowments at any time to be made to the said corporation," subject to the conditions therein mentioned. Subse-

quently other real estate was conveyed to the corporation as a gift, the rents from which were used for its purposes under the original charter. *Held*, that such real estate was not a gift, bequest, or endowment which was exempt from taxation within the terms of said act.—*Appeal of Wagner Free Institute of Science*, (Pa.) 402.

### Assessment.

5. The evidence on a claim of overvaluation of lands for taxation was that they were worth from \$10,500, the lowest estimate, to \$22,000, the highest estimate. The assessor valued them at \$14,000. *Held*, that the evidence was not sufficient to overthrow the presumption in favor of the correctness of the assessor's valuation.—*State v. Hawkins*, (N. J.) 265.

6. Revision N. J. p. 1149, § 56, provides that if any person shall be assessed at too low a rate, the commissioners of appeals in cases of taxation may, on complaint and after notice to the parties, and a due examination of the matter, increase the assessment. *Held*, that payment of the tax as levied by the assessor before the time appointed for the commissioners to meet, does not take from the commissioners the right to increase the valuation, but the money thus paid should be credited on the taxes as increased.—*State v. Jersey City*, (N. J.) 848.

7. When a bridge owned by a corporation was duly declared a county bridge, the surplus of the damages assessed over the amount of capital stock, which was divided among the stockholders, was in the nature of profits, and a proper measure of the tax upon the capital stock.—*Matson's Ford Bridge Co. v. Commonwealth*, (Pa.) 818.

8. Where an assessment was made upon land of a cemetery company fronting on a highway, and it appeared that a greater part of the same had been conveyed in fee before the assessment, *held*, that the cemetery company having no beneficial interest in the part conveyed, the assessment was erroneous and would be corrected under the New Jersey act of March 23, 1881.—*State v. City of Newark*, (N. J.) 147.

### Collection.

9. Pennsylvania act June, 1885, provides for a general system of levying and collecting taxes throughout the state, but not to apply to any taxes collected by a local law. Act April 21, 1869, (P. L. 67.) provides a method of collecting taxes in certain parts of the state. *Held*, that it was not repealed by the act of 1885.—*Evans v. Phillipi*, (Pa.) 680.

10. A tax-warrant was regularly and legally issued, and commanded the collector to make the taxes by a sale of the goods and chattels of the delinquents. Under the warrant the collector advertised for sale the lands of the delinquents. *Held*

that, though this proceeding was unwarranted on the part of the collector, and might have been entirely disregarded by the delinquents, it did not render the tax-warrant void. — *State v. Hawkins*, (N. J.) 265.

11. Where the description of lands in the assessor's duplicate is correct, a tax upon such lands will be maintained, although the warrant is to make the taxes by a sale of personal property, and contains no description of the lands whatever. — *Id.*

## TENANCY IN COMMON AND JOINT TENANTS.

See, also, *Partition*.

Rights and remedies *inter se*, see, also, *Mortgages*, 10.

Rights and remedies *inter se*.

1. Defendant let a farm on shares to plaintiff, who agreed not to sell any part of the crops, and to manage the same to the best interests of both parties, and at a given date and at stated times thereafter to pay defendant one-half the profits realized to such date. *Held*, they were tenants in common, and plaintiff could not recover the proceeds of an undivided moiety of the crop, taken and sold by defendant without consent. — *Connell v. Richmond*, (Conn.) 852.\*

2. By the terms of a lease the lessee was to pay the lessor, "one-half the amount of all sales from the farm." *Held*, that the tenancy in common would not prevent the lessor from recovering money for crops sold; and an ordinary suit for the recovery of money was the proper remedy, and not an action of account. — *Richmond v. Connell*, (Conn.) 853.

Conveyance by tenant in common.

8. The owner of a fractional part of the reversionary interest in a life-estate conveyed the whole of the estate, by metes and bounds, to another, in fee under a general warranty. The grantee and his successors had remained in exclusive possession for more than 20 years when the joint owner of the reversionary estate sought to recover his interest of them. *Held*, that the possession of defendants under the deed of the whole estate in fee was adverse to the title and possession of the co-tenant, and amounted to a disseizin. — *Rutter v. Small*, (Md.) 693.

## Tender.

Effect, see *Costs*.

## TOWNS.

See, also, *Highways*; *Poor and Poor Laws*; *Schools and School-Districts*.

Settlement of supervisors' accounts, see *Appeal*, 4.

Liabilities for torts of agent.

The plaintiffs brought action to recover damages caused by the overflow of water produced by a bridge put up by defendants under the direction of their supervisor. *Held*, that a municipal corporation is not liable for damages caused by an honest mistake of judgment made by a public officer in the discharge of his duty. — *Shieb v. Township of Collier*, (Pa.) 866.

## TRADE-MARKS.

Abandonment—Alteration.

1. Where by an amicable arrangement, the children, at the death of the father, had, prior to any one else, appropriated to their use a symbol or device used by the father as a trade-mark for stamping butter, *held*, that its use by the several members of the family did not destroy its distinctive features, and leave it open to public use. — *Appeal of Pratt*, (Pa.) 873.

2. A trade-mark, the use of which began in 1810, was relinquished by the owner in 1881, to his son. At the son's death, in 1882, an arrangement was made among his four children by which each should use the trade-mark, by placing their individual names thereon, in place of their grandfather's, as previously used. *Held*, an injunction to restrain the similar use of it by a stranger would be sustained. — *Id.*

## TRESPASS.

By animals, see *Animals*.

Evidence.

1. Plaintiff in an action of trespass *q. c.* introduced an agreement of sale running to him and another, who did not execute it, and who disclaimed any interest under it. *Held*, it was admissible to show an equitable title to the land in him sufficient to sustain the action. — *Arnold v. Pfoutz*, (Pa.) 871.

2. In an action of trespass *quare clausum fregit*, plaintiff has the right to rebut the testimony offered by defendants as to the location of the land. — *Id.*

8. In an action of trespass *quare clausum fregit*, plaintiff introduced testimony to establish a certain boundary line. *Held*, that defendants must introduce all their testimony to establish another line in chief, and not reserve a portion of it for rebuttal. — *Id.*

4. In an action before a justice of the peace to recover damages for the destruction of growing trees, the plaintiff, upon proof of his possession of the premises, is entitled to be regarded *prima facie* as the

wner and to show the value of the trees destroyed.—*State v. Stenner*, (N. J.) 181.

## TRIAL.

ee, also, *New Trial*.

a criminal cases, see *Criminal Law*, 2-6.  
Verdict, construction, see *Costs*.

### Conduct of trial.

1. To allow the jury to take the pleadings to the jury-room is in the discretion of the court, and a refusal to permit them to do so is not subject to review.—*Hitchins v. Town of Frostburg*, (Md.) 836.

2. After the rulings upon the instructions asked, counsel proposed to read the declaration to the jury, for the purpose of calling their attention to the testimony, or supporting the allegations, and that plaintiffs were therefore entitled to recover. *Held* that, as such a step would constitute an appeal from the court to the jury, the court properly refused to permit it.—*Id.*

### Reception of evidence.

3. An offer of evidence must of itself disclose all the facts which are necessary to establish its admissibility.—*Hill v. Truby*, (Pa.) 89.

### Instructions.

4. On the trial of an action for trespass for, for mining coal on plaintiffs' location, the latter, after admitting the correctness of certain plats in evidence, proved that the places of the alleged trespass were "also within the lines of defendant's tract," and where the two said tracts lie foul of each other as located on the plats." *Held*, that an instruction assuming that state of facts, given on defendant's request, was not erroneous.—*Koch v. Maryland Coal Co.*, (Md.) 700.

5. Where a party presents certain hypothetical facts to the court which there is evidence to sustain, and requests the instruction of the court upon the effect of those facts if believed by the jury, it is error for the court to charge simply that the question is one of fact for the jury, and that its weight is entirely for them. The party is clearly entitled to an affirmation or denial of the propositions of law submitted by him.—*Kraft v. Smith*, (Pa.) 870.

6. The court instructed the jury that he gave them, with some regret, the law as laid down by the supreme court, that, in a suit for breach of promise, the birth of a child might not be proved, to aggravate the damages. He further told them they might consider all the circumstances; the disgrace, the feelings of misery, apart from the child being born; and made many similar comments. *Held*, that a judge should not tell the jury that he regrets the state of the law, or practically take away

all its effect by observations which inflame the jury into disregarding it.—*McFadden v. Reynolds*, (Pa.) 888.

7. It is not error for the court, when instructing a jury, to speak of the testimony of one party to the action as uncorroborated.—*Lillibridge v. Barber*, (Conn.) 860.

8. Where it was objected that the court erred in answers to plaintiff's points, and it appeared that the points were based upon an assumption of facts, the truth or falsity of which was for the jury, and were relevant, and disclosed fully the facts assumed, and the law was stated as upon a finding of these facts by the jury: *held* not error, as the opinion of the court could have no weight with the jurors, unless the facts assumed were in their judgment established by the proofs.—*Bretz v. Dishle*, (Pa.) 898.

9. Where there are disputed facts, or facts from which others may or may not be inferred, the court should submit them all to the jury without instruction as to what inferences they should accept or reject; but, when no reasonable construction would entitle defendant to a verdict, the court may give binding instructions for plaintiff.—*Maynard v. Lumberman's Nat. Bank*, (Pa.) 526.

10. The court, in charging the jury, made an arithmetical calculation of the amount due one of the parties, but expressly charged: "I only give these suggestions, and I do not intend to indicate to you that you should take them, but they are only suggestions of the way you may look at it; not the way you must look at it. That is exclusively for you." *Held*, no error.—*Curry v. Curry*, (Pa.) 198.

11. Upon the audit of the accounts of A. and B., road commissioners, A. was entitled to certain credits, for which B. obtained credit in his account upon his promise to repay the same to A. A. afterwards brought suit against B. to recover the amount of these credits, B. having failed to repay him. Upon the trial, A. testified as above, and B. contradicted his testimony entirely. *Held*, that the question was one of fact for the jury, and was properly submitted to them.—*Hoop v. Anderson*, (Pa.) 544.

### Verdict.

12. In a suit to recover money won at "casino," the judge charged the jury to disregard a "poker" game previously had between the parties. The verdict showed that the jury disregarded the instruction. The court refused to receive the verdict. *Held* correct.—*Newell v. Wilgus*, (Pa.) 885.

13. In an action brought by a city attorney to recover for services performed for the city outside of his duties as such officer, the court instructed the jury to render

a verdict for the plaintiff, subject to three questions of law reserved, without a finding of facts or an agreement of the parties. *Held* that, since the questions were reserved upon the whole evidence, there was no error in not requiring a finding of facts. —Hays v. City of Oil City, (Pa.) 68.

## TROVER AND CONVERSION.

Estoppel to claim ownership, see *Estoppel*, 1.

Property taken by officer from person arrested, see *Arrest*.

### When lies.

Trover will lie against a defendant, alleging himself to be one of two joint owners of certain personal property, by the vendee of the other joint owner, when defendant is estopped from claiming his ownership. —Garber v. Doersom, (Pa.) 777.

## TRUSTS.

In fraud of creditors, who may attack, see *Execution*, 8.

Misappropriation of trust funds in bank, liability of bank, see *Banks and Banking*.

Rights of beneficiaries, see *Mortgages*, 7.

Trustee as a witness to transactions with a deceased *cestui que trust*, see *Witness*, 8.

### Resulting trusts.

1. A husband bought land, paying for it in part with his wife's money. This land he sold, and bought other land, his wife joining with him in the sale. *Held*, that there was no resulting trust giving the wife a claim on the land last purchased. —Jennings v. Longdon, (Pa.) 212.\*

2. An oral agreement to purchase for another at a *bona fide* sheriff's sale will not of itself raise a trust. Fraud at the time of the sale, or the payment of the purchase money is necessary, and a bill in equity which seeks to establish a trust in a person who has purchased at a sheriff's sale, but does not state facts bringing the complainant within those rules, is not sufficient. —Appeal of McCall, (Pa.) 206.\*

3. A parol agreement by a purchaser of real estate at a sheriff's sale to hold the same, and to convey it to defendant in execution, whenever he shall repay to the purchaser his advances, does not raise a resulting trust enforceable within the proviso of the Pennsylvania act of April 22, 1856, § 4, (P. L. 538,) unless fraud is clearly shown to have been perpetrated upon the defendant in the execution at the time of the sale. In such case only, can a trust *ex maleficio* arise, the evidence to establish which must be clear, explicit, and unequivocal. —Kraft v. Smith, (Pa.) 870.

4. After a wife has joined her husband in an assignment for the benefit of creditors, and the property so assigned has been sold, and the creditors paid from the proceeds, it is too late for the wife to assert a claim on the property so assigned for a resulting trust for money of hers given in payment for the property. —Jennings v. Longdon, (Pa.) 212.

### Establishment.

5. Parol evidence is not admissible, under the statute of frauds, to prove a trust by a grantee to reconvey the property to the grantor. Particularly is this true where the elements of fraud or illegality are present in the agreement. —Slocum v. Wooley, (N. J.) 264.

### Enforcement.

6. Certain heirs, for the purpose of realizing a profit from land left by their ancestor, purchased the same from the executors, giving a mortgage for the purchase price, formed a corporation, and chose defendants as trustees to carry out the object of the corporation, which was to parcel the land, and sell it in residence lots. After a certain number of lots had been sold, and about one-fourth of the mortgage paid off, the trustees ceased active efforts to sell the land, and the sales stopped, in consequence of which the interest on the mortgage fell due, and was not paid. The executors of the estate foreclosed the mortgage, and defendant trustees were purchasers at the foreclosure sale. *Held*, that the *bona fide* of the trustees was sufficiently questionable to justify the court in continuing the injunction which had been granted staying the sale of the land by the trustees, and appointing a receiver of the property. —Raileigh v. Fitzpatrick, (N. J.) 1.

7. In the action to set aside the transfer of title to the trustees, the executors who foreclosed the mortgage were not necessary parties. —Id.

8. Complainant, one of the heirs, should not be required, as a condition precedent to granting him relief, to repay defendants the amount expended by them at the foreclosure sale, when it appeared that he did not possess the financial ability to do so. —Id.

9. Nor should complainant be required to give bond to indemnify defendants against loss, by reason of any subsequent failure of the parties to realize the amount of money invested by defendants in the property. —Id.

10. The proper relief was not to declare the trust as it existed before the foreclosure sale, and thus give the trustees the power of sale and disposition of the lands. Their former management of the property afforded the court a reason for taking con-

trol of it, and the same reason called for a continuance of such control.—Id.

11. Complainant was not bound, in law or equity, to accept the offer of defendants, either to buy his interest in the property, or to sell their own to him.—Id.

12. The fact that the fraudulent acts charged against defendants were fully answered by them, and their answers were not contradicted in any way, except by the testimony of complainant, did not call for a dissolution of the injunction, as the court might feel itself bound to retain the property under its control for the purpose of effecting the design of the parties who declared the trust.—Id.

13. Complainant was not estopped from disputing the validity of the foreclosure sale by allowing it to be made without objection, and afterwards accepting from the executors a payment of a portion of this money, as income due him under the will of his father.—Id.

### Trustees.

14. A trustee paid with trust money a debt which he owed in another capacity. *Held*, that the creditor receiving such payment is liable to the trust-estate for the amount thereof, and it is immaterial whether or not he had notice that the trustee was thus misappropriating the trust funds.—*Swift v. Williams*, (Md.) 835.

15. Where two trustees have been guilty of a breach of trust, the court may determine the order in which they shall stand answerable for the loss, by making one primarily liable, and the other secondarily.—*McCartin v. Administrator of Traphagen*, (N. J.) 156.

16. One in embarrassed circumstances conveyed real estate, in trust to pay his debts, and to apply the income to the support and maintenance of the grantor and wife, and, in case the income should prove insufficient for the support of the grantor and wife, giving the trustee power to sell or mortgage the same for that purpose; and upon further trust, after the grantor's death, intestate to convey the premises, excepting his widow's dower, to his heirs. The trustee accepted the trust, and mortgaged the premises for as large a loan as he could obtain, which he employed to pay the grantor's debts. The income proving insufficient to support the grantor and his family, the trustee leased to him a store and a farm at a fair rental. The grantor occupied the store, and afterwards lived on the farm. The trustee advanced to the grantor a sum to buy farm implements, and divers other sums, for which the grantor gave his notes. It did not appear what use was made of all said advancements, but it was in evidence that part was used to stock the store, and part to pur-

chase an interest in a vessel to be used to chase a loss. After the grantor's death, the trustee continued to years without objection; and children, paying the support of herself and then filed an account claiming the rent of the store and all his advances of money also for all payments made for the support of the grantor's death. *Held* that, under the trust deed, the trustee was not liable to credit for the sum expended for the store, and the income paid over by the grantor's death; but that he was liable to credit for the sum used to stock the store, and interest in the vessel, nor for the appropriation of which did not appear by competent evidence.—*Taylor's Appeal*, (Pa.) 807.

### Undue Influence.

See *Equity*, 8; *Wills*, 2.

### USURY.

#### What constitutes.

1. A contract to pay more than the rate of interest when the price reaches \$1.15 a barrel is not usury, if the payment depends upon a contingency.—*Truby v. Mosgrove*, (Pa.) 80.

#### Rights of creditors.

2. A judgment bore 8 per cent. On the distribution of the proceeds of the sale of the debtor's property, a creditor objected to the payment of more than 6 per cent. on the ground of usury. Creditors cannot interfere to prevent payment of more than 6 per cent. unless it appears that there was collusion between the debtor and the creditor to defraud the other creditors.—*Nichols v. Peal*, (Pa.) 562.

#### Actions to recover back.

3. The Md. act of 1876, (Cod. 6,) provides that usurious interest may be recovered back after the debt is paid, unless it has been by part or whole, of the original defendant, being the owner of the defendant company, borrowed money from it, and with his money mortgaged as security for \$1,000, paying at least one-half of this sum in retired two shares of stock and a mortgage for \$520. Defendant gave a check for that amount, which he placed to it, and it was placed to its money coming to complainant, interest and dues until he had

more than \$1,040, with interest. He demanded a release of the mortgage, but defendant refused; claiming he still owed the company. *Held*, that the second mortgage was a part of the old original debt, and complainants were entitled to a rebate for the usurious interest paid on the first mortgage.—*Border State Perpetual Building Ass'n v. Hilleary*, (Md.) 505.

4. The limitation of two years within which suit may be brought against a national bank to recover back usurious interest, as provided for by act of congress, does not begin to run from the time of the agreement for such interest, but from the time of the receipt of the money by the bank.—*Carpenter v. National Bank*, (N. J.) 478.

### As a defense.

5. A defense of usury against one obligation cannot be set up against an action upon an entirely distinct and independent obligation, even if it be between the same parties; much less can it be done where the parties are not the same.—*Taylor v. Breisch*, (Pa.) 888.

6. In an action for foreclosure of a mortgage, the grantee of the mortgaged premises sought to have credited on the principal debt the payments of interest made by the mortgagor in excess of the legal rate. *Held*, that the defense of usury is a personal right of the one who pays it, and cannot be transferred.—*Bonnell's Appeal*, (Pa.) 211.

## VENDOR AND VENDEE.

*Bona fide purchaser*, see *Gifts*, 1.

Contract, see *Frauds, Statute of*, 1, 2.

— abandonment, see *Estoppel*, 4.

Interest on deferred payments, see *Interest*.  
Rights and remedies, see *Effectment*, 5.

### Rights and remedies inter se.

1. As between the parties, the time expressed in a mortgage given as collateral to secure payment for property purchased under a pre-existing agreement, silent as to time, does not run against or impair the privileges of the purchaser under such agreement, who has committed no default, when prevented by the vendor's wrong from fulfilling the terms of that contract.—*Rees v. Logsdon*, (Md.) 708.

### Bona fide purchasers.

2. Defendant conveyed land to S. by deed duly recorded, and afterwards, by an unrecorded writing, it was agreed between them that part of the land was not intended to be conveyed. Plaintiff purchased the land without notice of the agreement. *Held*, that plaintiff was not affected by the unrecorded agreement, and that defendant's possession of the part in controversy

did not put him on inquiry.—*Stiffer v. Retzlaff*, (Pa.) 876.\*

3. When one is in possession under a parcel contract of sale, and also under a lease, a purchaser from the holder of the legal title, without knowledge of the lease, is chargeable with notice of any equities the one in possession may have.—*Brinsler v. Anderson*, (Pa.) 800.

4. Plaintiff, claiming under a parcel contract, with one of several heirs, must show the authority of the heir to act for the others.—*Id.*

5. The purchaser of lands took a conveyance in his wife's name, and a writ of attachment was subsequently issued against him, and his interest in the land levied on at the suit of one of the complainants. After the levy, the lands were conveyed by the purchaser and his wife to one of the defendants, in consideration of a debt due him. On a bill filed to set aside this conveyance as fraudulent, *held*, that the relief must be granted, as said defendant took it with knowledge of the attachment, and was not a *bona fide* purchaser.—*Leathwhite v. Bennet*, (N. J.) 29.

## WATER COMPANIES.

Liability for deficiency of water supply, see *Contracts*, 4, 8.

## WATERS AND WATER-COURSES.

See, also, *Riparian Rights*; *Surface Water*.  
Rights of log drivers, see *Logs and Logging*.

### Diversion—Damages.

1. In an action for the unlawful diversion of water from a natural water-course, plaintiff's damages are limited to those sustained prior to the date of the writ.—*Williams v. Camden & Rockland Water Co.*, (Me.) 600.

### Grant of water-right.

2. A deed to plaintiff's grantors gave them the right to construct a ditch, across the lands of grantee to their own, for the purpose of carrying the water from a river to run mills and water-works, and also the privilege of constructing another ditch to carry the water back again. From the upper to the lower ditch there was a fall of 14 feet 4 inches in the river. Mills were erected, and all the fall in the river had been used from the time of the deed in 1807 to the present time. *Held* that, as there was no limitation or reservation of the right conveyed, it must have been the intention of the parties to convey the entire fall from the upper to the lower end of the tract.—*Brigham v. Ross*, (Conn.) 294.

**WILLS.**

See, also, *Executors and Administrators*.

Devise in lieu of dower, see *Dower*, 2, 8.

**Testamentary capacity.**

1. The evidence showed that the testator originally possessed a strong mental organization, which had become weakened by a sun-stroke and the use of liquor, but the evidence was insufficient to show that the testator did not possess, at the time of the execution of his will, sufficient mind and memory to appreciate and understand the nature of the act by which he was to direct the disposition of his estate. *Held*, an issue to try the validity of the will was properly refused.—*McPherson's Appeal* (Pa.) 205.

**Undue influence.**

2. Undue influence may be exercised secretly as well as openly, especially where a confidential relation exists between the principal devisee and testator and they dwell together in the same house. In such case it is not easy to make out an allegation of undue influence by proof which is direct or positive, nor is it necessary to do so. The effects of its exertion may be very visible; but as these may also be consistent with a perfectly free will, much caution must be exercised by the jury in considering such an aspect of the case. Rash conclusions must not be drawn simply because of a large disproportion of the estate being given to one to the exclusion of others, and the evidence of the exertion of undue influence must be of a satisfactory and convincing character, whether it be direct or circumstantial.—*Herster v. Herster*, (Pa.) 410.\*

**Revocation.**

3. A husband executed a declaration of trust in favor of his wife of certain funds, which she accepted, and the trustee received the funds. Afterwards the wife, by a last will, bequeathed the proceeds of the trust funds to complainant, her second husband. The trustee invested the trust fund in a house and lot, and took title in the name of the wife, who occupied the same at the time of her death. Defendants claimed that this investment was a revocation of the testamentary gift. *Held*, that the will could not be revoked by the trustees, and, in the absence of a formal revocation by the testatrix, the bequest to complainant is valid.—*Horner v. Clements*, (N. J.) 465.

**Probate and contest.**

4. In an application for an issue *devise vel non*, if the testimony is such that after a fair and impartial trial, resulting in a verdict against the proponents of the al-

leged will, the trial judge, after a careful review of all the testimony, would feel constrained to set aside the verdict as contrary to the manifest weight of the evidence, it cannot be said that a dispute has arisen. On the other hand, if the state of the evidence is such that the judge would not feel constrained to set aside the verdict, the dispute should be considered substantial and an issue to determine it should be directed.—*Herster v. Herster*, (Pa.) 410.

5. Testimony going to show that real estate devised by a will in contest to the testator's sister was in part acquired by the earnings of the testator's wife, and her daughters by a former husband, although it stood in the testator's name, is admissible; the will being contested on the ground that the testator, through mental weakness and disorder, was incapable of making it, and also that the will was obtained by undue influence.—*Beattie v. Thomason*, (R. I.) 172.

**Actions to construe.**

6. A bill in equity for the construction of a will, under which a question arose as to its validity as a disposition of real estate, made as parties the legatees and devisees thereunder. *Held*, the rule being that a party must be presented to the court in the precise capacity in which he is sought to be charged, that the bill was demurrable, even though it did not appear but that the legatees and devisees under the will were the only heirs at law of the testator.—*Lomerson v. Vroom*, (N. J.) 13.

**Construction.**

7. A legacy to the widow of "an income in cash of \$1,200 a year during her life" is payable annually, and not at periods during the current years at the discretion of the executors.—*Anthony v. Anthony*, (Conn.) 46.

8. A testator in his will declared, "As to such worldly estate wherewith I hath pleased God to intrust me I dispose of the same as follows;" and, "If there is anything omitted relative to my worldly affairs or estate, I leave it to be conducted by and at the discretion of my executors." *Held*, that such clauses reinforce the presumption that the testator did not wish to die intestate of any part of his property, and antagonize a construction that would give the legatees a life-estate with the remainder in fee undisposed of.—*Reynolds v. Crispin*, (Pa.) 286.

9. Where the will provides that the testator's minor daughter is to receive her education and support, but fixes no limit as to the extent of either, the estate is liable for her support until she becomes of age, and for such an education as her circumstances and condition in life would reasonably afford.—*In re Simons' Will*, (Conn.) 36.

10. The use and income of the entire estate was left to the widow for life, or until marriage, and the "said property"—not the income merely—"was placed in her possession for the family, and for the education and support," of the testator's minor daughter. Power was given the widow to "exchange or dispose of the real estate, if it is found for her comfort and convenience." The estate was small. *Held*, that the widow was not limited to the income of the estate for the support and education of the daughter and the support of herself, but might encroach upon the principal for that purpose, upon giving bond and rendering annual accounts to the court of probate.—*Id.*

11. A wife, by a last will, bequeathed a trust fund in her favor to complainant, her husband. Prior to her death the trustee invested the trust fund in a house and lot, and took the title in the name of the wife. *Held*, that the identity of the fund being clear, the taking of the title by the trustee in the name of the *cestui que trust* did not defeat complainant's right to recover the fund.—*Horner v. Clements*, (N. J.) 465.

12. A testator devised by will his farm to his three daughters, with the further provision that at the decease of any of them their portion should go to the survivors or survivor during their lives or life. Two of them died. *Held*, that the survivor, and her heirs under her will, were entitled, as owners in fee, to an undivided one-third interest in the farm, and (there being four other heirs at law of the deceased sisters) one-fifth of the other two-thirds.—*Reynolds v. Crispin*, (Pa.) 286.

13. The testator, who held land in fee simple to secure the payment of money, directed by his will that if the money should be paid to him in his life-time, or to his executors after his death, his executors should pay to his wife during her life-time the interest on \$5,000; and gave directions regarding the application of the principal after her death. The land in question was reconveyed by the testator in his life-time, part of the money due being paid in cash, and the balance secured by mortgage. *Held*, that the condition upon which the appropriation of the \$5,000 depended had been performed.—*Barnet v. Barnet*, (N. J.) 119.

14. A person, after making certain provisions under his will, left the residue of his real and personal property in trust for certain purposes, among others, "to hold one-third part of all the rest and residue of my estate, \* \* \* together with the income thereof," for the use of his wife, during her life, "one-third part for the use of my son," and "one-third part for the use of my daughter." The will also provided that, upon the death of his wife, the

property held in trust for her should be held in trust for the use of the son and daughter in equal shares. *Held*, that it was the intention of the testator that the trust-estate should be held in one entire fund, and the income divided equally between his widow, son, and daughter.—*Bell v. Towner*, (Conn.) 185.

15. Testatrix, in her will, provided as follows: "And the other half or share I give and bequeath to the said A. in trust for the use of my said daughter B., who is not capable to act for herself, and put the same at interest, or use the same himself at five per cent. interest as he may see fit, and keep, maintain the said B. during her life, or until she becomes, in the judgment of the said trustee, capable to act for herself, then, and in that case, the trustee may pay to her the said interest and of the principal; and provided, further, that in case the said B. should marry and have lawful children born of her, immediately upon the birth of such child or children the said trustee shall pay all such trust money remaining in his hands at the time unto my said daughter B., her heirs and assigns, and not otherwise, and in default of such lawful children born of my said daughter B., then, upon her death, the balance of said trust money I give to my son, A., his heirs and assigns." "The said trustee shall keep, support, and maintain out of said trust fund, my said daughter B. until marriage and a lawful child born to her, or her death, as hereinbefore directed." *Held*, that in carrying out the provisions of the trust it was necessary that the trustee should have the custody and control not only of the *corpus* but also of the interest or income arising from the trust property; that to require him to pay the latter to the committee of B. would deprive him of the only means he had of performing the active duties of the trust as contemplated by testatrix; and that in the absence of evidence of mismanagement of the trust property, or of the refusal of the trustee to apply the income in the manner directed by the will, the committee had no just reason to complain.—*Rudy's Appeal*, (Pa.) 398.

#### Construction—Conversion.

16. A provision in a will that land be sold after seven years from the date of the death of the testator is a conversion of the realty from the time of the death of the testator, and hence the provision of the Pennsylvania act of February 24, 1834, as to the lien of decedents' debts, does not apply.—*McWilliams' Appeal*, (Pa.) 383.

#### —Description of devisees and legatees.

17. A testator gave to each of his sons four-fifths of his share devised absolutely, the income and interest of the one-fifth to

be paid each during life, and upon the death of a son the share "shall be distributed or go to his personal representatives, who would be entitled to his personal estate according to law." One of the sons died, leaving a widow but no issue. He bequeathed all his estate to her. *Held*, that the "personal representatives" of the son were his next of kin. — *Davies v. Davies*, (Conn.) 500.

18. The testator left a wife, a daughter 14 years old, and a son of 30, who was capable of supporting himself. The widow was given the entire income for life, or until marriage, and the entire property was placed in her possession, with power to sell or exchange it "for the family, and for the education and support of" the daughter, and in trust for the son. Upon the death or marriage of the widow, the estate was to be equally divided between the daughter and the son's trustee, the successor of the mother. *Held*, that the word "family" included the wife and daughter, but excluded the son, who took nothing until the death or marriage of his mother. — *In re Simons' Will*, (Conn.) 36.

19. A clause in testator's will was as follows: "This is my will: That my brother, Robert Kingan, shall have and hold for his own special benefit all my property, real and personal, for and during his life; and at his (my brother Robert's) death, the real estate to be divided among my legal heirs, share and share alike." *Held*, that testator's heirs would take *per stirpes*, and not *per capita*. — *Appeal of Alston*, (Pa.) 366.

20. The income of the residuary estate was left to trustees for the benefit of the testator's two sons, "and their families," during the lives of the sons. Upon the death of either leaving "no heirs," \$3,000 was to be paid to the widow, (who had already been liberally provided for,) if living. *Held*, that "heirs" meant children, and that, upon the death of one of the sons without children, the widow then living took the \$3,000; its payment not to impair the income already payable to her under the will. — *Anthony v. Anthony*, (Conn.) 45.

#### — Shelley's case.

21. In a devise to D. "as long as he shall live, and to his legal heirs, if he have any at his death; and if D. do not have any legal heirs at his death, then," etc., "heirs" is a word of limitation, and the devisee takes a fee-tail according to the rule in *Shelley's Case*. — *Bassett v. Hawk*, (Pa.) 802.

22. The devising clause of the will was: "And to each of them [plaintiffs] I devise the income of one undivided half of all my real estate for her life only, and on the decease of either of my daughters her share in my estate to go to her children in fee-

simple." *Held*, that the word, "children" is a word of purchase, and not of limitation, and plaintiffs take only a life-estate. — *Foster v. McKenna*, (Pa.) 874.

23. A gift or devise to a man during his life, and after his death to his heirs, which is the ordinary instance of the rule in *Shelley's Case*, contains evidence of testamentary intent of only a life-estate in the first taker; yet the rule applies, nevertheless. — *Little's Appeal*, (Pa.) 520.

24. The word "heirs," when uncontrolled by the expressed intention of the will, has the effect to vest a legacy which would otherwise be contingent. It is to be taken as a word of limitation, limiting the bequest in case of the death of the legatee before the time fixed for payment, to his or her representatives. — *Id.*

25. The strong presumption arising from the use of technical words of limitation is not easily overcome. It may be rebutted only by affirmative evidence of a contrary intention, so clear as to leave no reasonable doubt. — *Id.*

26. In a devise to A., "and at her death to her child, children, or other lineal descendants," the words "other lineal descendants" so qualify the previous words "child or children" as to make them words of limitation, and not of purchase. — *Mason v. Ammon*, (Pa.) 449.

#### — Nature of estate.

27. A person, by will, left certain real estate and personal property to his wife, to have it, "both real and personal, during her natural life, to use as she may think best. My will further is that at her death, the house and lot, and all the personal property that may remain unused or undisposed of by her, shall go to" the testator's grandchildren. *Held*, that the wife had the right of disposition of the personal property, but no unqualified title in it. — *Logue v. Bateman*, (N. J.) 259.

28. After devising land to his daughters in fee, the testator proceeded as follows: "At the decease of any of my daughters, their portion of the mansion farm is to belong to the surviving sisters or sister during their lives or life." "If \* \* \* any of my children should become destitute of house or home, they are to have the privilege of making the mansion house and farm their home and residence with those there upon good behavior. It is intended by me as a home or asylum for my wife, sons, and daughters, and not to belong or go into the possession of any other person or persons while any of them live, and necessity require it, without the consent of those living." *Held*, that he did not intend to limit the estate or interest of his daughters in the land before devised to them in fee, but to restrain them from alienating

the place while any of his children might by necessity become homeless, and that it did not prevent the survivor of the three daughters from disposing of her interest in the farm, by will or otherwise.—*Reynolds v. Crispin*, (Pa.) 236.

#### Construction—Life-estates.

29. A testator had devised a parcel of land to one of his sons, in fee-simple, but the son having died in the life-time of the father, a codicil was added devising the same parcel to the widow of such son, "while she remains the widow of said John McGuire, deceased, in fee-simple." *Held*, that she took only a life-estate terminable on her marriage.—*Appeal of McGuire*, (Pa.) 72.

30. A testator devised his estate to his three children. His will contained a proviso that his daughter should "keep her share in her sole and separate right, or until her children shall marry or become of age; and should she die without living issue, her portion is to revert to her brothers," etc. *Held*, that the intention was that, in case the daughter should die before the testator, her share should go to her brothers, otherwise she to enjoy it as her sole and separate property.—*Phelps v. Phelps*, (Conn.) 596.

31. A will contained a proviso that, in case of the death of one of the legatees before his youngest child became of age, certain property was to be held in trust for the widow and children, and, "in case of the decease of said children and their father before they are twenty-one years of age, leaving no issue, their portion shall revert to" the other two children of testator. *Held*, that this clause contemplates the death of the legatee in the testator's life-time, and, if the legatee survives, the widow and children take nothing.—*Id.*

32. Testator gave one-half of his residuary estate to his executors in trust, first to pay his aunt a life annuity, the remainder of the income to be divided among her children and their heirs. After the aunt's death, the whole income was to be divided among her children. After the death of any cousin, his or her share was to go to his or her children absolutely, or, in default of children, to a certain asylum. A cousin, M., had two children, appellant and L. L. died before M. *Held*, that M. was entitled to a life-estate only, and that on her death appellant took the whole share which she would represent.—*Bailey v. Love*, (Md.) 280.

33. Testator bequeathed to his wife one-half the net income from his lands for her life, and, when the land was converted into money, then one-half the interest arising from the proceeds of such lands. He also empowered the executors to sell lands

for the purpose of paying debts and legacies. *Held*, that the widow took, not a life-estate in half the realty, but only one-half the income or interest on the proceeds remaining after the debts and legacies were paid.—*Appeal of Kline*, (Pa.) 866.

34. A testator divided his estate between his three children, with a proviso that, "in the event of the decease of either of them without having issue at his or her decease, the portion of said deceased is to be shared equally by the survivors or their issue." *Held*, that the words, "in the event of the decease," meant the decease of either of the legatees before the decease of the testator, and were not words limiting the estate devised to the life of the legatees.—*Phelps v. Phelps*, (Conn.) 596.

#### — Vested or contingent interest.

35. The testator left \$4,000 "to be divided equally" among the widow's "legal heirs" after her death. *Held*, the will containing no words importing a present gift or bequest, that the legacy could not vest until the death of the widow, and it was therefore void, as contrary to the Connecticut statute of perpetuities.—*Anthony v. Anthony*, (Conn.) 45.

36. A testator directed his executors to divide a certain fund into nine equal parts, and to invest the whole and pay over annually one-ninth part of the interest to each of his grandchildren, or if any of them died leaving heirs, then to such heirs, and at the expiration of 12 years from his decease to pay over the principal in like manner; and that neither principal nor interest should be liable to attachment. *Held*, that the grandchildren took vested interests.—*Appeal of Reed*, (Pa.) 737.\*

37. Where the enjoyment of the gift over is postponed to accommodate the estate, or for the payment of debts, or to meet any other burden first imposed, and not chiefly on account of the character of the donee, it is a decisive circumstance in favor of immediate vesting.—*Little's Appeal*, (Pa.) 520.

38. A testator directed the residue of his estate to be converted into cash, and applied first to the payment of debts. After all debts paid, he directed his executors "to make semi-annual distributions of whatever money may remain in their hands on the tenth day of May and the tenth day of November in each year; the said money to be divided into twenty parts, and to be distributed as follows, viz.: To A., five parts; to B., five parts; to the heirs of my brother C., five parts; to D. and his heirs, four parts,—that is, the four parts are to be paid to D. during his life-time, and after his death the same to be paid to his heirs." He further provided that the distributees should claim their shares within two years,

and that the acceptance of the share was to be in full satisfaction of all claims by them against his estate. *Held*, that the bequest to D. was vested.—*Id.*

39. A will provided that one-fifth of the share of each son should be invested by the executor, and the income paid to each son during his life, and that on his death the principal "shall be distributed or go to his personal representatives." *Held*, that the title to the one-fifth share did not vest in the son, and he could not convey it by will. *CARPENTER and GRANGER, JJ.*, dissenting.—*Davies v. Davies*. (Conn.) 500.

40. A testator left to his wife his real estate and personal property, "to manage and dispose of in her discretion for her own use, and in trust for my children, during her life or during the period she may remain my widow." He provided, in case of her death or marriage, for payments to be made to his son during his minority, and for payment of \$500 to each of his children on the coming of age of one of his sons. The fifth paragraph was "that all my property be equally divided among all my children." During the life-time of the widow one of the sons died, disposing of all his real estate and personal property by will. *Held*, that the deceased obtained a vested title immediately upon the death of his father, subject to the execution of the power of disposition by the widow under the will.—*Rhodes v. Shaw*. (N. J.) 116.

41. Upon the death of the testator's son leaving "heirs," the trustee of the residuary estate was directed to pay over the income, as before the death, to his family, until the youngest child should reach the age of 21 years, "at which time the property may be divided equally among the heirs, if the trustee and the judge of probate shall think it safe to do so; it being my desire to place the estate so that it cannot be squandered by the action of my sons." This last clause contained the only final disposition of the residuary estate, and when the son died his only child was the sole heir at law of the testator. *Held* that, intestacy having the effect of defeating the spendthrift trust of the testator, it would not be presumed as against his grandson, although the provision for distribution was merely permissive, and that the trust was valid, the grandchild taking the fee at and from the testator's death.—*Anthony v. Anthony*, (Conn.) 45.

#### — Charges on realty.

42. Testator, in his will, provided as follows: "And to my son C. I give and bequeath all the balance of my estate, real and personal, with all accounts and moneys due, life insurance policy, and all manner and kind of property whatsoever; for

which bequest I order that he, the said C., pay all my just debts, funeral expenses, and the charges of settling up my estate." *Held*, that the debts of testator were a charge upon the estate devised to C.—*Appeals of Thompson*. (Pa.) 455.

43. A testator devised his land to his children, but gave his wife an annuity upon one-third of it. Part of the land was allotted to one of the heirs, and the court decreed that he should pay the other heirs their proportionable parts of the two-thirds of the appraised value of the tract allotted; the legal interest on the remaining one-third to be annually paid to the widow during her natural life, and upon her death the principal to be paid to the persons then thereto entitled. The heir not complying with the decree, the tract was sold under *fi. fa.* *Held*, the annuity of the widow, by virtue of the previous decree of the court, was made a fixed charge upon the land during her life, and the sale under that decree could not divest that charge.—*Truby's Appeal*, (Pa.) 567.

44. A. owned real estate devised him subject to a legacy to his sister, which he never paid. The will of his sister gave to him for life the legacy, with remainder to his children. After the sister's death the real estate was sold by the sheriff on an execution against A., realizing a sum insufficient to pay the liens. *Held*, that the sale discharged the lien of the legacy; that the legal effect of the sale was to pay the legacy, with the accrued interest; that, under his sister's will, A. has a life-interest only in both the principal and accrued interest of the legacy; and that this life-interest did not merge in his estate in the land, and did not pass by the sheriff's sale.—*Woods' Appeal*, (Pa.) 312.

#### Rights of devisees and legatees.

45. The land of a devisee under the will of his wife was sold under execution against him. Three years later it was sold by a decree of the orphans' court to satisfy a debt of his wife. The devisee, being executor of his wife's estate, had full notice of the proceeding to establish the debt, and the purchaser at the execution sale against the devisee was notified at the sale. *Held*, that the sheriff's sale on the execution against the devisee did not divest the lien of the testatrix's debts, and the purchaser at the sheriff's sale took only the interest of the devisee.—*Smith v. Seaton*. (Pa.) 661.

46. A husband succeeded to certain real estate under the will of his wife. *Held*, that he took it subject to its obligation to be applied to the payment of her debts.—*Id.*

47. A testator, by a codicil to his will, left to his wife a house and lot, "she to

have the use and occupation; and to receive the rents and profits for and during her life," and directing the sale thereof by his executors upon the death of the wife, the proceeds to be equally divided between his three sons. The widow and devisees agreed to make sale, and convey title to the property, but the effort to sell was ineffectual, and no further attempt to sell was made. One of the son's mortgaged his interest, and it was sold under assignment, he having become bankrupt. *Held*, that the agreement between the widow and devisees did not constitute an election to take the land instead of the proceeds, and that the mortgage and sale of the son's share did not affect the right of the executor under the will on the death of the widow to sell the place, and distribute the proceeds in accordance with the will.—*Baldwin v. Vreeland*, (N. J.) 341.

43. The testator's farm was left to his grandson, in trust, for the use and support of the trustee's mother, and his sister, "and to her and her heirs after her." Upon the death of the sister, under 21, and without issue, "the devise in trust was to be equally divided between the surviving children" of the trustee. The trustee was also appointed one of the two executors whose judgment was to determine when, if at all, the farm was to be sold. *Held*, (1) that upon the maturity of the sister, with children living, she took the whole estate in the land subject to the life trust in favor of the mother; and (2) that, while the mother remained alive, both could elect to take the farm instead of the proceeds from its sale, and could enjoin the executor from making such sale. — *Howell v. Tomkins*, (N. J.) 833.

## WITNESS.

See, also, *Deposition; Evidence*.

### Competency—Privilege of witness.

1. In an action for breach of promise, a witness was asked whether plaintiff was a chaste woman. *Held*, a proper question, which he could answer categorically without criminating himself. — *McFadden v. Reynolds*, (Pa.) 688.

2. A witness was asked in a breach of promise case whether or not he had connection with plaintiff on a certain day more than two years previous. *Held* that though, to a prosecution for the crime, he could plead the bar of the statute, he could not be compelled to answer.—*Id*.

### —Privileged communications.

3. A husband and wife joined in an action for damages suffered by the wife; the husband being merely a nominal party. *Held*, he was not such a party to the action

as to give the opposite party a right to compel him to testify to matters against the interest of his wife.—*Township of Burrell v. Uncapher*, (Pa.) 619.

### —Transactions with decedents.

4. After the death of plaintiff in ejectment, the suit was prosecuted by the administrator for *meane profits*. *Held*, that defendant could not testify in such action.—*Hart v. McGrew*, (Pa.) 617.

5. Under the Pennsylvania act of 1878, a defendant, one of two joint makers of a promissory note, is competent, after the death of his co-obligor, to testify as to matters occurring between himself and strangers, although pertaining to the questions at issue between the payee and makers of the note, and occurring prior to the death of the co-obligor.—*Hill v. Truby*, (Pa.) 89.

6. Under the New Jersey act of 1880, which prevents a claimant against the estate of a decedent from testifying as to anything the deceased may have said or done tending to show that the claim is valid, a complainant has a right to call a defendant, who is in fact an adverse party to him, as his witness.—*McCartin v. Administrator of Traphagen*, (N. J.) 156.

7. In a suit in equity against the legal representative of a decedent, a defendant, whose rights and interests are the same as those of the complainant, and who is a complainant in fact, though not in form, is not competent as a witness to give testimony as to transactions with the decedent, or statements made by him, under the New Jersey act of 1880.—*Id*.

8. A trustee is not a competent witness as to matters between himself and a deceased *cestui que trust*, but is a competent witness as to matters between himself and living *cestui que trust*.—*Taylor's Appeal*, (Pa.) 307.

### Credibility—Animosity of witness.

9. In an action against county commissioners to recover damages for personal injuries caused by a defective highway, defendant, for the purpose of showing the bias of a witness who had testified to the bad condition of the highway, asked him, on cross-examination, whether he was on "good terms" with the road supervisor in whose district the injuries alleged occurred, and whether there had not been a bitter controversy between him and the friends of the supervisor over the latter's appointment, and whether he did not entertain feelings of animosity towards the commissioners on account of such appointment. The question was excluded on the ground that the supervisor was not a party to the action. *Held*, that the question was proper

to show animosity towards the commissioners, and as the commissioners could recover from the supervisor the amount recovered by plaintiff, the relation of the supervisor to the suit was such as made the whole question proper.—County of Somerset v. Minderlein, (Md.) 57.

### Writs.

See *Arrest; Attachment; Certiorari; Error, Writ of; Execution; Garnishment; Injunction; Mandamus; Replevin.*  
Admission of service, estoppel to contest, see *Corporations*, 8.

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